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186 Cal. 604

SOUTHERN CALIFORNIA IRON & STEEL CO. v. AMALGAMATED ASS'N OF IRON, STEEL & TIN WORKERS, GOLDEN STATE LODGE, LOCAL NO. 3, et al. (L. A. 6049.)

(Supreme Court of California. Aug. 4, 1921.)

1. Master and servant ⇨8(1)—Workman has right to quit employment.

In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services.

2. Conspiracy ⇨3—Striking employee peaceably may persuade fellow employee to leave position.

It is lawful for an employee who has quit peaceably to persuade a fellow employee to leave his position, and, if there are a number of employees who had left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees who continue to work to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal.

3. Injunction ⇨101(3) — May be granted where employees are intimidated by strikers.

Where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals are unlawful, and may be enjoined, and it is not necessary to the enjoining of such acts that it be shown there was actual force or expressed threats of physical violence used.

4. Appeal and error ⇨994(3), 1012(1) — Weight of evidence and credibility of witness for trial court.

It is not the province of an appellate court to weigh the evidence nor to determine the credibility of the witnesses, but only to decide whether the evidence as matter of law supports the findings.

5. Injunction ⇨128 — Evidence held to show intimidation of employees of complainant.

In suit to enjoin union and its members, who were striking employees of complainant, evi-

dence held sufficient to sustain findings that the union and its members entered into a conspiracy to intimidate other employees of complainant by picketing and other means, and to harass complainant in its business.

6. Injunction ⇨190—Judgment against union and striking employees held too broad in its terms.

In suit to enjoin union and its members, who were striking employees of complainant, from intimidating by picketing and other means other employees, and harassing complainant in its business, judgment held too broad in its terms, in that it prohibited acts which may or may not be unlawful according to the purpose for which they are done, and not clearly coupling the acts with the unlawful purpose.

7. Injunction ⇨101(1)—Legal picketing may not be enjoined.

In suit for injunction against union and its members, who were striking employees of complainant, placing of pickets near respondent's place of business for a purpose not at all connected with the business, and not for purpose of intimidating employees of complainant, so as to coerce them to quit, nor for the purpose of intimidating persons intending to become employees so as to prevent them from doing so, could not be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business.

8. Costs ⇨234 — Appellants not entitled to costs on immaterial modification of decree.

Where obvious purpose of appeal in injunction suit was to obtain a positive reversal appellants were not entitled to costs of appeal because the decree was modified, but no substantial features of the decree were changed.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Suit for injunction by the Southern California Iron & Steel Company against the Amalgamated Association of Iron, Steel & Tin Workers, Golden State Lodge, Local No. 3, and others. Decree for complainant, and defendants appeal. Modified, with directions to enter stated judgment.

Paul W. Schenck, James S. Roche, and Richard Kittrelle, all of Los Angeles, for appellants.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

200 P.—1

Cal.Rep. 200-202 P.—1

Barnhill & Pratt and William A. Barnhill, all of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendants, Amalgamated Association of Iron, Steel & Tin Workers, Golden State Lodge, Local No. 3, et al. (hereinafter referred to as "the union"), and the 102 individual members thereof (hereinafter referred to as "the strikers"), from a judgment in favor of the plaintiff, Southern California Iron & Steel Company, a corporation, in an action to enjoin the defendants from "picketing" plaintiff's place of business, from molesting plaintiff's employees, and from otherwise interfering with plaintiff's business.

Respondent conducts a steel rolling mill at the corner of Fourth and Mateo streets in the city of Los Angeles. The union is an unincorporated association, organized in 1907. Respondent employed a varying number of the members of the union. All of the strikers were employees of respondent up to November 1, 1917. On that day a meeting of the union was called, and it was voted to quit respondent's employment. Accordingly, all of the individual appellants, who, however, did not constitute all of respondent's employees, immediately went on strike. Their places were taken by other men, not members of the union, and to these we shall hereafter refer as "the employees."

Respondent continued to operate its plant under these conditions until the commencement of this action, on or about March 1, 1918. It was alleged that on various occasions after the strike was called the strikers have been seen on the street in front and in the immediate vicinity of respondent's mill, singly, and in groups of varying size, and that on those occasions they have engaged in conversation with certain of respondent's employees. At all times, respondent, in effect, alleges, the strikers were instructed by the union thus to visit the neighborhood of the mill in order, by intimidation, threats, and, in certain instances, actual physical violence, to induce respondent's employees to leave their employment; that, in carrying out these instructions, the strikers did threaten, menace, molest, and intimidate certain of the employees, so that a number of them were induced, through fear of personal violence at the hands of the strikers, to quit respondent's employ; and that, by reason of such acts on the part of both union and strikers, respondent has been greatly hindered and damaged in the conduct of its business.

The court made findings of fact and conclusions of law. The judgment is a permanent injunction restraining both the union and the strikers from interfering with the use by respondent of its property; hindering in the manner set forth, the respondent's business; molesting, intimidating, or harass-

ing, using any force against, or applying vile names or language of ridicule or contempt toward any employee of respondent or person seeking to enter its employ; placing pickets near respondent's place of business to induce persons to quit respondent's employ or refrain from entering it, or for any other purpose; and from going to the homes of any employees of respondent to intimidate or threaten them, or to intimidate any member of their families for the purpose of inducing them to persuade the employees to quit respondent's employ.

Appellants contend "that the evidence in this case is insufficient to sustain any of the material findings as found by the trial court." Respondent insists "That the findings have ample evidence to sustain a conspiracy and the acts done in furtherance thereof."

We shall first consider the law on this general subject as laid down in numerous authorities. The leading case in the United States is *United States v. Kane* (C. C.) 23 Fed. 748. There the defendants had quit the employ of the Denver & Rio Grande Railroad, and the road was suing to enjoin them from interfering with the operation of its line. Mr. Justice Brewer, in that case, said:

"I think a few preliminary considerations, in reference to the common rights which we all have as free men in this country, may not be amiss. Every man has a right to work for whom he pleases, and to go where he pleases, and to do what he pleases, providing, in so doing, he does not trespass on the rights of others. And every man who seeks another to work for him has a right to contract with that man, to make such an agreement with him as will be mutually satisfactory; and unless he has made a contract binding him to a stipulated time, he may rightfully say to such employee at any time, 'I have no further need of your services.' * * *

"Supposing Mr. Wheeler had two men employed. * * * But supposing * * * one is discharged and the other wants to stay, is satisfied with the employment, and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them—as I suggested yesterday, a party with revolvers and muskets—and the one that leaves comes to the one that wants to stay and says to him: 'Now, my friends are here; you had better leave; I request you to leave;' the man looks at the party that is standing there; there is nothing but a simple request—that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration of force, a demonstration intended to intimidate, calculated to intimidate, and the man says: 'Well, I would like to stay; I am willing to work here; yet there are too many men here, there is too much of a demonstration; I am afraid to stay.' Now, the common sense of every man tells him that that is not a mere request—tells him that, while the language used may be very polite and be merely in the form of a request, yet it is accompanied with that backing of force intended

as a demonstration and calculated to make an impression, and that the man leave, really because he is intimidated. * * *

"That is really the question here: Whether these parties went there simply, as persons have a right to do, to request engineers and trainmen to desist from further labor, or whether they went there, under the circumstances, with such a demonstration of force, with such an attitude and an air, that although nothing but a request was expressed, it was a request which men did not dare decline to comply with. The fact that half a dozen men went there and asked an engineer, or a brakeman, or a trainman, to quit—that is all right, if it was simply a mere matter of request, a mere matter of giving views and reasons. That is a part of the common right of us all. We all can express our opinions. We can go to any friend and urge him to do this or do that; that is a part of the common liberties of every man in this country; and the question is not whether these gentlemen went there in a pleasant way and stated reasons, or urged their friends to quit work, but, Did they go with such an intended demonstration of power, and in such an attitude, that though, as they have stated here, they simply requested these engineers and employees to quit, they did it under such circumstances, that the engineers and the trainmen were intimidated, and quit because they felt compelled to? * * *

"Then there is another proposition that comes in—a familiar rule of law—that where a party of men combine, with the intent to do an unlawful thing, and in the prosecution of that unlawful intent one of the party goes a step beyond the balance of the party, and does acts which the balance do not themselves perform, all are responsible for what the one does. In order to make that rule of law applicable, there must be a concert of action; an agreement to do some unlawful thing. If there is no such agreement, no such preconcert of action, why then each individual is responsible simply for what he does. Thus, for instance, if there should happen to gather here on the street 50 or 100 or 200 men, with no preconcert of purpose, accidentally meeting here, and a street fight should develop in their midst, all of that crowd are not responsible for it; that would be unjust; that would be unfair; because they did not go there, they did not meet together, with a preconcerted purpose to do anything unlawful; and, although something unlawful may be done in that crowd, yet only they are at fault who do the unlawful thing. But if they all met, as I said, for the purpose of doing some unlawful act, having formed beforehand the purpose to do it, and are present there to carry that purpose into effect, then every man, by virtue of uniting in that preconceived purpose to do the unlawful thing, makes himself responsible for what any one does."

The liability of coconspirators is thus defined in 12 Corpus Juris, 610:

"Where two or more persons enter into a conspiracy, any act done by either in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. This is true even though the results were not

specifically intended or the means specifically agreed on."

See, also, *People v. Schmidt*, 33 Cal. App. 426, 445, 165 Pac. 555.

In *Jordahl v. Hayda*, 1 Cal. App. 696, 82 Pac. 1079, the injunction enjoined the establishment of a picket for purposes of an unlawful boycott. The court said:

"Appellants contend that the words used in the findings such as 'threats,' 'acts of intimidation,' 'interfered with,' 'driven away,' or 'prevented,' as applied to the conduct of the defendants, * * * imply force, and that 'the evidence does not warrant a finding that implies that force was used.' We do not think these words * * * imply that it was necessary to show physical force on the part of defendants toward any one. * * * While the right of free speech is guaranteed to all citizens by the Constitution, there is also guaranteed to them by the same Constitution the right of 'acquiring, possessing, and protecting property; and possessing and obtaining safety and happiness' (article 1, § 1); and it is a maxim of jurisprudence prescribed by the statute law of this state that 'one must so use his rights as not to infringe upon the rights of another' (Civ. Code, § 3514). These guarantees are equally important to and equally necessary for the protection of all classes of citizens. The difficulty in most cases is to apply the principle governing these correlated rights in particular cases as they arise."

Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, was a case of a strike, a threatened boycott of the employer, and of intimidation and threatened boycott of the nonstriking employees. The late Chief Justice Beatty, delivering the opinion of the court, said:

"There was no force, violence, threat, or intimidation used toward the nonunion men. * * * There was not at any time any picketing of the plaintiff's premises or interference with its customers. * * * There was * * * some evidence that in three instances individual members of some of the unions had warned some of the strikers that they would incur some danger of personal violence if they returned to work while the plaintiff remained unfair, but these threats were not authorized or countenanced by the council or any of the unions, and not a single act of violence was proved against any one who did return to work. * * *

"A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means, and to support the conclusion that these defendants were guilty of a conspiracy it must be held that their purpose was at least unlawful, if not criminal, or, their purpose being lawful, that they proposed to attain it by the employment of some unlawful means.

"Limiting our consideration for the present to this question of conspiracy, it is clear that the avowed object of these organizations—the several unions of workmen, and the council in which they were combined—was in no sense unlawful, and the discussion may be confined to

the question whether the means proposed for its attainment were unlawful. * * *

The judgment was reversed on the ground it was not shown that the strikers had used force, violence, threats, or intimidation.

In *Pierce v. Stablemen's Union*, 156 Cal. 70, at page 78, 103 Pac. 324, 328, which was a case of striking employees boycotting their former employer by means of threats and intimidation, it was declared:

"It is the absolute, unqualified right of every employee, as well as of every other person, to go about his legal business unmolested and unobstructed and free from intimidation, force, or duress. The right of a labor association to strike is no higher than the right of a nonunion workman to take employment in place of the strikers. Under the assurance and shield of the Constitution and of the laws, the nonunion laborer may go to and from his labor and remain at his place of labor in absolute security from unlawful molestations, and wherever such protection is not fully accorded, not the laws themselves, but their execution, is to be blamed. In this country a man's constitutional liberty means far more than his mere personal freedom. It means that, among other rights, his is the right to freely labor and to own the fruits of his toil. *Ex parte Jentzsch*, 112 Cal. 468, 4 Pac. 803. Any act of boycotting, therefore, which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful."

See, also, *Goldberg, etc., v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; *Berger v. Superior Court*, 175 Cal. 719, 167 Pac. 143; *Rosenberg v. Retail Clerks' Association*, 39 Cal. App. 67, 177 Pac. 864; *Moore v. Cooks', etc., Union*, 39 Cal. App. 538, 179 Pac. 417; *American Steel & Wire Co. Wire Drawers', etc., Unions* (C. C.) 90 Fed. 608; *Union Pacific R. R. Co. v. Reuf* (C. C.) 120 Fed. 102; *Atchison, Topeka & S. F. Ry. Co. v. Gee* (C. C.) 139 Fed. 582; *Kolley v. Robinson*, 187 Fed. 415, 109 C. C. A. 247; *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 302, note.

We quote from *Martin on Labor Unions*, p. 229:

"The use of force and violence is not necessary to make picketing unlawful. Intimidation is not limited to threats of violence or to physical injury to person or property. It has a broader signification, and there may also be a moral intimidation which is illegal. In the guise of picketing, strikers may obstruct and annoy others, and by insult and menacing attitude intimidate them as effectually as by physical assault."

[1-3] From the foregoing authorities these principles may be deduced: In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow employee to remain in the employment, or of another workman to take the

place vacated by the one who has quit, or the right of the employer to dispense with an employee's services. Furthermore, it is lawful for the employee who has quit to peaceably persuade a fellow employee to leave his position. Moreover, if there are a number of employees who had left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal. But where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals, are unlawful, and may be enjoined. However, it is not necessary to the enjoining of such acts, that it be shown there was actual force or expressed threats of physical violence used. It was said in *Allis-Chalmers Co. v. Iron Molders Union* (C. C.) 150 Fed. 155, 173, that—

"Intimidation * * * includes persuasion by or on behalf of a combination of persons, * * * resulting in coercion of the will from the mere force of numbers."

The same rule is thus stated in *Martin on Labor Unions*, supra:

"Even a simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose."

It was found in substance that between the middle of November, 1917, and the date of the commencement of this action, the union and the strikers entered into a conspiracy with the object of compelling respondent to unionize its plant, and to grant certain other of appellants' demands; that, in furtherance of this conspiracy, appellants entered upon "a course of harassing conduct" toward respondent and respondent's employees; that appellants have stationed pickets in the vicinity of respondent's plant "for the purpose not only of inducing but intimidating the employees of plaintiff's plant to quit the plaintiff's service;" that the pickets were stationed "singly and in bunches and groups of from two to eight, and on several occasions in several different groups;" that the strikers "on several occasions used force and violence toward certain employees of the plaintiff corporation, and on numerous occasions since that time have followed various employees of said plaintiff corporation as the said employees were going to and returning from their work for the plaintiff in an endeavor to get the said employees to quit working for the said plaintiff, and in some instances have threatened said employ-

(200 P.)

ees in an angry and threatening manner, and used threats and intimidation against the said employees, and have * * * gone to the homes of several of the employees of plaintiff corporation and intimidated and frightened the wives of certain employees, * * * and tried to get the said wives to induce their respective husbands to quit working, * * * and have * * * carried on a course of conduct which has made the plaintiff feel that injury would come to the lives and limbs of its employees at said plant;" that, in order for respondent to fulfill its obligations under "a number of contracts entered into between itself and other persons," it has been necessary "that plaintiff's plant should be run at full capacity;" that a high degree of technical skill was required of respondent's employees; that, because of the scarcity of skilled labor due to the war, it was difficult for respondent to secure and keep a sufficient number of competent employees to keep its plant running at full capacity; that ever since the middle of December, 1917, respondent has had a sufficient number of skilled employees; that appellants "threaten to continue the commission of the acts hereinafter set forth to the great and irreparable injury of the plaintiff;" and that respondent had no adequate remedy at law.

We turn now to a discussion of the evidence. C. C. Peterson, secretary of the union, testified that some time prior to the strike the union "adopted a scale of wages the same as prevailed in other coast mills, and then we endeavored to have a meeting with Mr. Stephens, the plaintiff's superintendent, * * * but he wouldn't listen;" that subsequently the union and its members agreed to continue to work until certain improvements had been installed in the mill; that on Monday, October 29, 1917, two men, Wilcox and Harris, both recently initiated members of the union, were discharged; that on the same day Stephens told appellant Dave McMills to go home, because he was drunk; that forthwith a committee from the union visited Stephens and remonstrated with him for discharging McMills, but that Stephens refused to reinstate him; that on October 31 appellant Ed Hefferline was discharged; that the union committee, headed by the witness, immediately called on Stephens and demanded that Hefferline be reinstated in his job, which, it seems, was that of foreman of the "continuous furnace," but that Stephens refused so to do, and discharged the witness; that on the next day, November 1, a meeting of the union was held, at which "a 100 per cent. vote" was taken in favor of a strike, and that the individual appellants immediately quit work; that at this meeting a motion was made and carried to the effect that any striker "caught loitering about the mill would be fined \$5;" that at no time were any instructions given by the

union to the strikers regarding the conduct of the strike, "except that at nearly every meeting the president admonished the men to behave themselves; * * * he never did tell them to go down and stand on the street corner;" that about two weeks after the strike began appellants discovered respondent had been "misrepresenting things" as to the cause and purpose of the strike and the amount of "government work" on hand in the mill; that at that time the rule that loiterers should be liable to a \$5 fine was repealed; "some of our members were requested by us to go down to the plant * * * and see the employees * * * and tell them our side of the story," and a motion was made "withholding strike benefits from any man who did not come four times a week" to interview employees at the mill; that he himself was frequently in the vicinity of the plant from that time on; that it was understood among the strikers that no "rough stuff" was to be used—"under no circumstances were we to be anything but gentlemen;" that he could not remember all of the strikers he had seen in the vicinity of respondent's plant, but did name 33 of them; that the strikers "were told not to bunch or anything like that;" that "there was nothing said at any meeting * * * with reference to trying to get any employee * * * to quit; we simply told them our side of the story, and if they were men they would quit;" that he always approached any employee in this manner: "Beg pardon, brother, can I speak to you?" that of those employees to whom he had spoken at the mill, about 12 quit; that after November 15th the strikers used to visit the homes of various employees in order to present "the union's side of the controversy"; and that he himself, with appellants Reeves, Moses, William Kilpatrick, and several others, with that object in view, had visited the home of A. C. Nolte, an employee, in order to talk to the latter's wife; and that the only ones who quit work on November 1 were the members of the union.

On cross-examination the witness stated the strikers "always made it a point to keep separated and stand in different places;" and that his purpose in talking to respondent's employees "was to have the members of the union get back their jobs on the same terms prevailing in the other coast mills."

Peterson's testimony was corroborated by appellant Carl D. Steele, corresponding secretary of the union, who further testified that on various occasions he had reported to the union that he had talked with employees; that he never saw more than 6 strikers in the vicinity of the mill; and that, while he had "no intention or desire to injure or damage" respondent, he "thought that if I talked to plaintiff's employees * * * they would quit under those conditions."

It was stipulated that Peterson's testimony "should stand as a criterion" of the testimony of each of the 33 strikers whom he testified he had seen in the neighborhood of the mill talking to employees.

Abram C. Denman, respondent's president and general manager, testified that respondent supplied iron and steel materials to the Allies and to various domestic firms; that between November 1 and December 1 the plant could not be run at more than "a 50 per cent. capacity" because he was "unable to acquire a full crew of laborers to take the place of the strikers;" that since November 1 it would have been necessary to "keep our plant running at full capacity in order to fill all of our contracts;" that since November 1 it had been very difficult to secure skilled labor; that he had seen some of the strikers every day since the strike began, near the gate of the plant, gathering in bunches and talking to employees; that he had seen certain of the strikers—whose names he did not know—shaking their fingers at employees, and, in one instance, pulling an employee by his overcoat; that, outside of the last-mentioned case, he had not seen and did not "know of a single, solitary act of violence;" that "the delay in installing new improvements is partly the cause for the delay in getting out some of our work—some of the delay was caused by some of our men who were not as skilled or as familiar with our plant as our old employees;" and that the only orders in which respondent was "behind" were those of one domestic firm.

L. H. Bristol, "efficiency man" for respondent, testified that every day since November 1 he had seen strikers "in and around the plant—never less than eight of them;" that he frequently saw them stop employees, detain them, holding them by the coat, surround them, talking to them "with loud voices and in an angry manner and with gestures;" that on one occasion he saw appellant Ray Hill and three Armenians surround Ogonesoff, an employee, "catch hold of his overcoat," and shake their fists at him, and that "the times when I have seen the strikers gesticulating, menacing, and threatening employees of the plaintiff have been so numerous I haven't kept track of any of the dates, other than as I have testified; it occurred practically every day since I was watching the strike."

G. B. Stephens, the superintendent, and W. G. Stidson, respondent's timekeeper, corroborated Bristol's testimony. Stidson also named 14 employees who, he said, had told him they were afraid of the strikers and quit. James F. Holvey testified that when the strike began he was not a member of the union, and continued at work, but that since that time he had quit and joined the union. An affidavit given by him on January 7, 1918, before he joined the union, was read to him, in which affidavit he had stated that

while he was at work the strikers' attitude toward him was threatening, and that they had told him to quit. The affidavit of A. C. Nolte was to the effect that he had had a similar experience with the strikers; that on two evenings after the strike began three of the strikers had visited his home in an automobile; that on each of those occasions they had told him they would give him just one week to quit, and that if he did not quit they would force him to do so; that on each occasion their attitude and manner were threatening, and that "by reason of these things affiant has been in fear that they would annoy and harm affiant and his wife."

Thomas W. Collins, a colored employee, testified that he had frequently seen groups of strikers in the vicinity of respondent's plant; that he had been frequently approached by various strikers and asked to "come on out and join us;" that on each of these occasions the striker was "not very pleasant about it"; that about 4 o'clock one morning 4 strikers called at his home in an automobile and had tried to persuade him to quit; that he had been "afraid they would give me a beating up and would take me some time and whale me good," but that "there never has been a particle of violence offered to me or to any one else that I know of by any of the defendants."

B. H. Duzan, an employee, testified that on one occasion appellant Peterson had approached him as he was leaving the mill and had asked him in a tone which the witness "couldn't call a friendly manner" if he didn't think "the fellow who takes another man's job is a scab." John M. Nasian, an employee, testified that on January 4, 1918, one Manoogoff, a striker, had threatened to kill him, and had only been prevented from hitting him by two other strikers. Charles Ybarra testified that he had gone to respondent's mill to apply for a job, but had not made any application because Paul Gehrke, one of the strikers, had told him to stay away, and he was afraid of him. Setrak Arekeloff, an employee, testified that on two occasions a group of strikers had visited his home in the evening and had told him that if he continues in respondent's employ "we will lick you." Hambak Kevorkoff, an employee, testified that Sam Miskinoff, a striker, had struck him in the face on one occasion when they had met in the vicinity of respondent's mill. John Sarkisoff, an employee, testified that appellant Ray Hill had threatened to cut his throat. Yervant Nalbantian, an employee, testified that on one occasion, in the Armenian Café, Manoogoff, one of the strikers, had hit him and knocked him down, and that at another time the same man had told him that if he went to work the strikers would harm him. L. Kolesnikoff, an employee, testified that Mike Avakoff, one of the strikers, had told him, "If you come to work, I kill you." George H.

Pettingill, respondent's assistant superintendent, testified that "two or three times" he had seen groups of 7 strikers standing on the street in the vicinity of respondent's mill. H. S. Debinden, Charles W. Ryder, John Anderson, Garfield Parsons, L. L. Willfong, and F. V. Marquez, all employees, testified that the strikers had not threatened them, although Marquez stated that two other employees had quit, telling him that their reason was they were afraid of the strikers. A. H. Swennerton, an employee, testified that appellant C. C. Johnson had told him he (the witness) would be branded as a "scab" and "blacklisted" if he did not quit. Ross S. Mitchell, an employee, stated that toward him the strikers' attitude was "not very friendly."

Mrs. A. H. Swennerton and Mrs. Nolte testified that "since the middle of November" groups of strikers had twice called at each of their homes and told their husbands to quit work, and that they were greatly frightened when the strikers called their husbands "scabs."

All of the above testimony was admitted on behalf of the respondent and is fairly representative of all its evidence. On behalf of the appellants, 13 of the strikers denied that any of them had ever threatened, intimidated, or committed any acts of violence toward respondent's employees. Each of them stated he had never asked any employee to quit—"it was up to them to quit." Thirteen policemen, each of whom at various times since the strike had been stationed in the vicinity of the mill, testified that, while they had seen groups of strikers accosting employees, they had never seen, as one of them put it, "anything unseemly or any wrong act on the part of any one."

[4, 5] It is not our province to weigh the evidence nor to determine the credibility of the witnesses, but only to decide whether the evidence, as matter of law, supports the findings. We think it clear from the foregoing summary of the evidence that the trial court could have found that the union and its members entered into a "combination, confederation, and conspiracy" with the design and for the purposes alleged and found. It is uncontroverted that the strike itself was the result of "a 100 per cent. vote" of the union. As to whether the union authorized the strikers to visit the neighborhood of respondent's mill, Peterson stated that a number of them were "requested" by the union to "go down to the plant and see the employees," and that a motion was made to withhold strike benefits from any man who failed to comply with this "request." Steele and each of the other strikers stated that they had been instructed by the union to frequent the vicinity of the plant and approach the employees, and that they thought that by talking to them they would quit respondent's employment; but, even if it is as-

sumed that this was the true object, there was an abundance of evidence that in carrying out the plan the strikers used unlawful means, and this evidence amply supports the findings of threats and intimidation. As to the responsibility of the union and all its members for the acts of individual strikers, it has been shown that the strike itself was authorized and directed by the vote of the union, and at a subsequent meeting it was voted to direct the strikers to visit the vicinity of the plant in order to persuade the employees to quit. If the acts of the strikers in congregating around the respondent's mill were unlawful, under the rule governing the liability of coconspirators, each of the strikers, "by virtue of uniting in that preconceived purpose, * * * makes himself responsible for what any one does." U. S. v. Kane, supra.

It is true that the strikers stated that they did not intend to threaten or intimidate the employees, and Peterson testified that they had been cautioned not to gather in groups or act otherwise than "in a gentlemanly manner." It appears, however, from the testimony of Denman, Stephens, and Bristol that they had seen various strikers standing in groups in the vicinity of the mill acting in a threatening manner, and using opprobrious language. Moreover, there is the testimony of Stidson that 14 employees had stated to him that they would not continue in respondent's employ because they were afraid of the strikers. In addition to the happenings around the mill, there is the evidence of acts of intimidation away from the works—going to the homes of the employees, the assault on Yervant Nalbantian, and the threat to harm him if he went to work. As was said in U. S. v. Kane, supra, even conceding that strikers used no language and committed no acts calculated to coerce or intimidate the employees, nevertheless if, at the time the employees were being "politely" requested to leave respondent's service, there were strikers present in numbers sufficient reasonably to inspire a feeling of fear in the employees, then the acts of the strikers in so doing were unlawful.

Appellants make numerous specifications of insufficiency of evidence, but, in view of what we have already said concerning the proof, it is not necessary to discuss them. And for the same reason appellants' motion for nonsuit must be held to have been properly denied.

[6-8] The judgment as entered, however, is too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business, and not for the purpose of intimidating employees

of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business. The judgment is not clearly expressed in other respects, and it is therefore liable to be misunderstood in the enforcement thereof if it should be violated. Consequently it should be modified in these particulars. This can be done by a direction of this court to the court below to enter a new judgment in a prescribed form. But as the purpose of the appeal obviously was to obtain a positive reversal, and the modifications to be directed do not substantially change the important features of the judgment, the appellants should not recover costs of appeal.

It is ordered that the judgment of the court below be set aside, and that on the going down of the remittitur that court shall enter a new judgment as follows:

It is therefore ordered, adjudged, and decreed that the defendants Amalgamated Association of Iron, Steel & Tin Workers, Golden State Lodge, Local No. 3, Lester Moses, Charles Boniver, R. Bugundo, George Colvin, A. C. Cole, Gus Phillips, John Phillips, Caspar Russ, E. J. Redden, C. E. Tracy, Ed Hefferline, O. Hayes, Tom Huling, Willard Harn, Wm. Kilpatrick, Jack Masson, Walter Moss, John Donley, Wm. Farr, D. T. Davis, Wm. Davis, Wm. Cumming, O. W. Blom, C. Svensk, John Davis, Geo. B. Willson, Paul Gehreke, Frank Lundberg, Sam Abbott, A. Pilz, C. C. Peterson, Chas. Steele, Ray Hill, Chas. Moss, Riley Delaney, Pete Pogasoff, Sam Soagoff, Anan Kazzerooff, Karo Alekoff, Mike Avokoff, Joe Alekoff, John Manogoff, and each of them be and they are hereby perpetually enjoined and commanded to desist and refrain from directly or indirectly, or by any means or method doing, or attempting to do, any of the following described acts, with the intent or purpose of intimidating the employees of the plaintiff, so as to prevent them from continuing in said employment, or with the intent or purpose of intimidating persons intending to or about to enter such employment, so as to prevent them from becoming such employees, to wit: stationing or placing, or causing to be stationed or placed, on the street or elsewhere, at or near the plaintiff's place of business, any picket or pickets; or applying vile names, words of ridicule or contempt, or words calculated to excite fear, to any employee of plaintiff or to any person

who may seek to enter such employment; or going singly or collectively to any home of any employee for the purpose of intimidating, molesting or threatening such employee or any member of his household, or of frightening such members so as to induce them to persuade or try to persuade any employee of plaintiff to quit such employment.

The aforesaid defendants are also enjoined from and commanded to desist and refrain from interfering or attempting to interfere in any manner with the free use, occupation and enjoyment by the plaintiff, its agents, officers, servants, and employees of any of its property and premises of any kind or nature, or hindering or obstructing or attempting to hinder or obstruct, in any manner, the plaintiff's business or any part thereof; or molesting or interfering with or intimidating or harassing any employee of plaintiff or person who seeks to enter the employment of plaintiff or using any force or violence of any kind or nature or threatening or attempting to use such force or violence against any employee of plaintiff or any person who seeks such employment, with a design to intimidate or coerce them so as to prevent them from remaining or becoming such employee.

The place of business of the plaintiff referred to consists of the establishment of plaintiff at Fourth and Mateo streets, in the city of Los Angeles, county of Los Angeles, state of California, and all buildings, structures, equipment, and property of any and every kind thereunto appertaining or belonging, including all automobiles and other personal property used in connection therewith, either at said place of business or in carrying on said business at said place; and the business of the plaintiff referred to in this decree consists of the maintenance and operation of the said establishment and conducting of the business of a steel rolling mill at said establishment and making and supplying to the trade and to the general market products of iron and steel such as the plaintiff is and has been manufacturing, handling, making, or selling at said establishment.

It is further ordered by the court that the plaintiff recover from the defendants aforesaid its costs in the sum of \$475.25.

It is further ordered by this court on appeal that the appellants shall not recover their costs of appeal.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; SHURTLIFF, J.

186 Cal. 599

NORTHWESTERN PACIFIC R. CO. v. HUMBOLDT MILLING CO. (S. F. 9113.)

(Supreme Court of California. Aug. 3, 1921.)

1. Easements ⇨ 12(2)—Words of inheritance or succession not necessary to grant assignable fee.

The grantee of an easement by a conveyance containing words of grant without words of succession or inheritance is entitled to transfer to another the estate conveyed to him, in view of Civ. Code, §§ 1072, 1092, 1105.

2. Railroads ⇨ 72(5)—Grant of easement held to include successors.

In a grant of easement for railroad purposes, the provision, "so long as the said company [grantee] shall actually maintain, use, and operate its road upon the premises aforesaid, but not longer," held to mean so long as the said company, its successors and assigns, shall operate its road upon the premises.

In Bank.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by the Northwestern Pacific Railroad Company against the Humboldt Milling Company. From judgment for defendant, plaintiff appeals. Reversed.

Gillett & Cutler, of San Francisco, and De los A. Mace, of Eureka, for appellant.

J. F. Coonan, of Eureka, for respondent.

WILBUR, J. On July 10, 1884, the Eel River & Eureka Railroad Company purchased from G. F. Gushaw for \$600 an easement for railroad purposes over certain property described by metes and bounds. It constructed thereon its main railroad track and certain switches, all being a part of its general railway system extending from Eureka to Burnell station. From that time forward said land has been used continuously for railway purposes. G. F. Gushaw died April 22, 1894. His estate was distributed to his widow June 5, 1895. The decree of distribution contained a general distribution to the widow of all property not now known or discovered. In 1896 the defendant began occupying a portion of the right of way not needed for switches or tracks and erected a building thereon. In October, 1902, the Eel River & Eureka Railroad Company transferred all its property, including its rights in the premises deeded to it by Gushaw, to the San Francisco & Northwestern Railroad Company, which thereafter operated said railroad. On December 28, 1918, that railroad transferred its rights to the Northwestern Pacific Railroad Company, which company operates a railroad from Trinidad, in Humboldt county, to San Francisco, a distance of 330 miles, occupying and using the tracks on the property transferred by Gushaw. On May 20, 1913, Rachel

T. Gushaw, widow of G. F. Gushaw, executed a deed to the Humboldt Milling Company covering that portion of the land occupied by the defendant's building. On February 23, 1915, the plaintiff brought this action to recover possession of that portion of the property deeded to it by Gushaw, occupied by the defendant's building, and to quiet title thereto. The defendant's answer consisted of a denial that either the Eel River & Eureka Railroad Company, the San Francisco & Northwestern Railroad Company or the Northwestern Pacific Railroad Company, either entered upon or occupied the land sought to be recovered by the plaintiff. The answer denies that plaintiff is entitled to the possession of any part of the property described in Gushaw's deed, and denies that the defendant ousted or ejected plaintiff from the lands sought to be recovered, and denies "that the said entry and possession of defendant was or is without right or title." The answer affirmatively alleges that through mesne conveyances the defendant has acquired all of the right, title, and interest in the land and premises described in the Gushaw deed, and is the owner and entitled to possession thereof, and—

"That the said Eel River & Eureka Railroad Company has not since the 3d day of October, 1902, actually maintained and used and operated its railroad upon the premises mentioned in the said agreement."

Defendant's claim is based upon the following provision in the deed from Gushaw to the Eel River & Eureka Railroad Company: "So long as the said Company shall actually maintain, use, and operate its road upon the premises aforesaid, but not longer"—its contention being that immediately upon the conveyance made by the grantee to the San Francisco & Northwestern Railroad Company, the condition subsequent contained in the deed was breached, for the reason that thereafter the grantee no longer operated the railroad, but that its grantee thereafter operated the same. The deed upon which this controversy turns, omitting the description of the land conveyed by metes and bounds, is as follows:

"G. F. Gushaw to the E. R. & E. R. R. Co. "Know all men by these presents that I, G. F. Gushaw, of the county of Humboldt, state of California, in consideration of the sum of six hundred (600) dollars gold coin of the United States to me in hand paid by the Eel River and Eureka Railroad Company, the receipt whereof is hereby acknowledged do hereby grant to the said Eel River and Eureka Railroad Company the right, privilege and easement of constructing and maintaining, exclusive of any other person or persons, its track and road switches, turnouts and turntables, and of passing and repassing with its cars and rolling stock, freight and passengers, without let or hinder-

ance, over and upon that certain strip or parcel of land in the county of Humboldt, state of California, bounded and described as follows, to wit: [Here follows description of 2.35 acres of land.] And being the land upon which I reside and upon the line as near as practicable surveyed by R. E. Finley in 1884 and adopted by said company as the line of its road so long as the said company shall actually maintain, use and operate its road upon the premises aforesaid but not longer.

"In witness whereof I have hereunto set my hand and seal this 10th day of July, 1884. G. F. Gushaw."

[1, 2] The trial court held that the transfer by the grantee to its successor was a breach of the condition subsequent, and gave judgment for the defendant. Plaintiff appealed. We think this was an erroneous construction of the deed. Under our system it is only essential that a conveyance should use the word "grant" to convey an estate in fee simple absolute. Civ. Code, §§ 1072, 1092. Section 1092 provides statutory forms of grant, requiring only the declaration that—

"I, A, B, grant to C. D. all that real property—[describing it]. Witness my hand this [insert day] day of [insert month], 18—." Signed, "A. B."

Section 1072, Civil Code, provides as follows:

"Words of inheritance or succession are not requisite to transfer a fee in real property."

This applies as well to the grant of an easement. Section 1105, Civil Code, provides:

"*When Fee-Simple Title is Presumed to Pass.*—A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."

"These provisions of the Code were intended to change the common-law rule not only with respect to a transfer of the fee, but of all other estates in real property." *Painter v. Pasadena L. & W. Co.*, 91 Cal. 74, 81, 27 Pac. 539, 541.

Section 1044, Civil Code, provides:

"*What May be Transferred.*—Property of any kind may be transferred, except as otherwise provided by this article."

And the only restriction upon such power of transfer is contained in section 1045, Civil Code:

"A mere possibility, not coupled with an interest, cannot be transferred."

It follows that the grantee of an easement by a conveyance containing words of grant without words of succession or inheritance is entitled to transfer to another the estate conveyed to him. The deed in question is to be construed as though the conveyance was to the Eel River & Eureka Railroad Company, its successors and assigns, and there is no good reason why the condition in the deed should not be construed in the light

of this fact. The deed itself authorized the grantee to convey its rights thereby acquired to others. The words "said company" in the condition subsequent should be read as applying not only to the grantee, but to its successors. The evident purpose of the grantor was to require that the property should be used for a railroad. It was certainly immaterial to the grantor who operated the railroad as long as it was in fact operated, and there is no indication in the language of the deed which justifies the conclusion that it was the intention that the rights of the grantee should be forfeited upon a transfer of the property by the grantee. There was no reference whatever in the deed to a transfer or to the rights of the grantor in case of a transfer. There was nothing said in the deed concerning the effect of the dissolution of the grantee and no indication that it was intended that the rights of the grantee should revert to the grantor upon such a contingency. The defendant states:

"If the limitation clause in the Gushaw deed had read 'so long as the said company, its successors and assigns shall actually maintain, use and operate its road upon said premises' there could have been no doubt that the estate did not cease by the transfer of the railroad to the San Francisco & Northwestern Railroad Company."

We hold that the deed should be construed as though it contained the words thus conceded by defendant to be sufficient to defeat its claim in this action.

If there is any doubt about the proper construction of the deed, the acquiescence of the heir in the transfer by the original grantee without objection to such transfer, or to the continued use and occupation of the premises by the successor to the Eel River & Eureka Railroad Company and by the plaintiff, would be a practical construction of the condition subsequent by the parties. *Duryee v. Mayor, etc.*, of New York, 96 N. Y. 477.

Briefs were filed after the argument, and it is stated in the respondent's brief that:

"Appellant at the oral argument admitted it did not get title by virtue of deed from Gushaw and abandoned its claim under the Gushaw deed. * * *"

This statement is incorrect. It is true that the argument was directed along other lines, partly by the attitude of the court and partly by reason of the previous decision of the matter by the District Court of Appeal. The argument of the appellant was largely based upon the assumption that the court might hold that there had been a breach of the condition subsequent. By reason of the questions of the court the argument was also diverted somewhat to the question of adverse possession by the defendant. But the appeal is on the judgment roll alone, and the findings do not show either an adverse claim of

title or payment of taxes by the defendant or its predecessor in interest, and hence, title by prescription was not established by defendant.

In its opening brief appellant thus states its contention:

"The transfer by the Eel River & Eureka Railroad Company of its property and rights continued in use for railroad purposes the land described in the Gushaw deed, and there was no reversion thereof."

This point has not been waived, and for the reasons above stated is correct.

Judgment reversed.

We concur: SHAW, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.;

186 Cal. 494

OVERSTREET v. MERRITT.
(Sac. 2765, 2875.)

(Supreme Court of California. July 26, 1921.
Rehearing Denied Aug. 25, 1921.)

1. Evidence ☞445(1)—Parol evidence as to agreement relating to matter not covered by written contract admissible.

Where contract for a business association between the parties left open for future negotiations the matter of contribution to the capital stock, parol evidence as to subsequent agreement relating to the matter of contribution was admissible.

2. Partnership ☞120—Count held insufficient to state cause of action for prospective profits.

In action for breach of contract to enter into business, count setting up the contract, its breach and defendant's representations as to the great profits to be derived from the proposed business, without alleging that a profit might or would have resulted as represented had the contract been carried into effect, and without giving data upon which a finding of prospective profits might be based, *held* insufficient to state a cause of action for prospective profits.

3. Partnership ☞122½—Findings held not to warrant recovery of prospective profits.

In action for breach of contract to enter into a business association, plaintiff could not recover prospective profits, in the absence of findings as to actual or potential profits upon which to base the conclusion that he was damaged by defendant's default.

4. Partnership ☞122½—Loss of prospective profits in business contemplated by contract and damages for loss sustained by sacrifice of plaintiff's existing business cannot both be recovered.

In action for breach of contract to enter into business with plaintiff, plaintiff could not recover for loss of prospective profits which would have been earned by the contemplated

firm, and at the same time recover damages sustained in sacrificing the business in which plaintiff was engaged at the time of making the contract.

5. Partnership ☞122½—Measure of damages for failure to enter into business association stated.

Where plaintiff, who had built up a profitable business in buying and selling cattle, was induced to dispose of such business at a sacrifice in order to enter into business with the defendant in another part of the country, on defendant's representations as to the prospective profits of such business, he could not, on defendant's refusal to perform and engage in such business, recover the prospective profits of such business, where such profits were largely speculative, but could, under Civ. Code, § 3300, recover the losses and expenses incurred in preparing to carry out his part of the contract, including the losses sustained in sacrificing his existing business, less the advances of money made by the defendant.

6. Partnership ☞122½—One who induces another to enter into business not liable to other for loss sustained in sacrificing previous business.

One who induces another to enter into a business association, and pursuant to the contract establishes the business and engages in the new business in good faith, is not liable to other party for loss incurred in sacrificing other business in which he was previously engaged.

7. Damages ☞22—One who violates contract in bad faith liable for all damages, including those which could not be foreseen.

Under Civ. Code, § 3333, one who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract.

8. Partnership ☞121—Evidence held to sustain verdict for \$50,000, for breach of contract to form business association.

In action for breach of contract to enter into business association, where plaintiff had been induced to sacrifice the business in which he had been previously engaged, and which had brought him a profit of \$20,000 a year, in order to enter into business with defendant, evidence *held* to sustain verdict for \$50,000.

9. Witnesses ☞275(5) — Cross-examination as to plaintiff's earnings, following defendant's breach of contract to enter into business with plaintiff, held improper.

In action for breach of contract to enter into business with plaintiff, question asked plaintiff as to his earnings after he had re-entered business, following defendant's breach of the contract, *held* improper cross-examination, the matter being relevant only for the purpose of mitigation or recoupment of defendant's liability, and being a matter of defense, and the witness not having been questioned on direct examination as to such matter.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by E. E. Overstreet against Hulett C. Merritt. From judgment rendered, both parties appeal. On hearing after judgment in District Court of Appeal reversing judgment of superior court, judgment of superior court affirmed.

Pendleton & Rankin, of Los Angeles, and C. W. Pendleton, Jr. (Chickering & Gregory, of San Francisco, of counsel), for appellant.

Farnsworth & McClure, of Visalia, and Frank Freeman, of Willows, for respondent.

SLOANE, J. Both parties appeal from the judgment in this action. The main point in controversy is the measure of damages; neither party being satisfied with the judgment of the trial court in this particular.

The action is one to recover damages for failure and refusal of defendant to carry out the terms of a contract for a business association between the parties.

The findings cover the history of the transaction as determined by the trial court under the pleadings and evidence, as follows:

That for many years prior to about August, 1913, plaintiff was engaged in the business of buying and selling cattle at National Stockyards in the state of Illinois; that by a great expenditure of money, labor and time, plaintiff had built up a large and very profitable business, from which plaintiff made profits of \$20,000 cash each year of the last three years during which he was engaged in said business, so that at the time said business was disposed of, as hereinafter found, said business and the good will thereof was of the value of \$100,000. That said business was personal in its character, and that no person other than the plaintiff could take advantage of the good will or benefit thereof, and that, in the absence of plaintiff's continued personal attention, the business would become, because of such character, of no value to him; that plaintiff was at all times mentioned, and now is, unusually competent to manage the cattle business generally, and was a well-versed and thoroughly competent man, unusually fitted to manage and control the cattle business as agreed to be entered into by plaintiff and defendant as hereinafter found and stated.

That the defendant at all times from the 1st day of November, 1912, to August, 1913, represented to plaintiff that he, defendant, was anxious to enter into the business of importing cattle from other states in the United States and from Mexico into California, and of breeding, fattening, and selling the same, and of breeding and raising cattle in California, all for the purpose of sale, and of selling the same for profit. That defendant further represented to plaintiff that he, defendant, was a man of great wealth, and that he owned and possessed property of great value; that he was amply able, willing, and desirous at any time to draw and use for all

the purposes of the proposed business of plaintiff and defendant large amounts of money, if plaintiff would engage in such business with defendant. Defendant further represented to plaintiff that he had for many years been seeking a man having the qualifications and characteristics that he knew plaintiff had, in order to induce such a man to become and be known to the world as his business associate during his lifetime; that plaintiff was that particular man; that defendant sought plaintiff as a business associate more because of his social and personal qualities than for the great profits he (defendant) expected to make from such proposed business association with plaintiff. Defendant further represented that he was the owner of a ranch in the county of Tulare, state of California, known as the Tagus ranch, claimed by experts to be the best and richest alfalfa ranch in the known world, consisting of about 2,800 acres of land, capable of producing an immense quantity of a superior quality of hay, all of which ranch and its products defendant promised to devote on advantageous terms to the uses of the proposed business, and that from such use large profits would be made in said business; that he owned contracts for the purchase of beet pulp in said Tulare county, from which a profit of \$25,000 to \$37,500 could be made each year, and that he controlled a large tract of land adjacent to said Tagus ranch from which a profit of \$100,000 could be made, both of which said last-named profits and the profits and the benefits of its properties and opportunities for the making of said profits he promised to assign and turn over to the business to be organized and managed by said plaintiff. Defendant promised that he could and would, at any time plaintiff desired, furnish the funds to use as plaintiff thought best in such proposed cattle business of plaintiff and defendant. Defendant further agreed that if plaintiff would dispose of and abandon his cattle business, hereinbefore described, at once, and come to the state of California to live, and would engage in said proposed cattle business with defendant, and manage the same, that he (defendant) would furnish \$100,000 in money, from his own funds, for capital to engage in said proposed cattle business of plaintiff and defendant, and would furnish for the plaintiff one-third of the said \$100,000 capital, provided plaintiff would execute his note to the defendant therefor for such time as plaintiff desired, which said note would bear interest at the rate of 5 per cent. per annum; that said business should be so managed and controlled by said defendant that plaintiff should be appointed manager thereof, should receive a salary of \$6,000 per year from the funds of the same, and should also receive payments in advance of plaintiff's profits from the said business, amounting to the sum of \$4,000 per

year, with interest at 5 per cent. per annum, until such time as the same would be repaid to the defendant from plaintiff's share of the profits of said proposed business when the same were realized. Defendant further represented to the plaintiff that, by means of the foregoing, a large business could and would be built up and operated whereby profits would be made of more than \$100,000 annually.

That plaintiff believed the said representations of the defendant and that defendant intended to keep and perform the said promises and agreements so made, and, so believing and relying thereon and for no other reason, plaintiff agreed with defendant to enter into the said contract and business, and to do and perform all the things provided for plaintiff to do and perform in connection therewith, and on or about July 1, 1913, plaintiff agreed with the defendant to dispose of plaintiff's said business as best he could and in the event of failure to dispose of the same to abandon said business, if necessary, in order to enter at once into the proposed business agreement with defendant.

That plaintiff was unable to dispose of his said business hereinabove described, and in order to conform to his part of the agreement with defendant was compelled to, and did, on or about the 1st day of August, 1913, abandon the said eastern business, receiving therefor only the actual moneys invested therein and the theretofore earned profits therefrom, and because of the said representations, agreements, and promises of the defendant and the belief of the plaintiff therein, and in reliance thereon, and in order to perform his part of said proposed agreement, removed his residence from the city of St. Louis to the state of California, for the sole purpose and intention and expectation of carrying out the agreement with defendant, and that at all times since said agreement plaintiff was ready, willing, able, and anxious to in every respect perform his contract with the defendant, and at all times offered so to do.

That plaintiff often demanded that defendant perform his part of said contract, but that defendant refused so to do, and abandoned the same, and without reason therefor refused to perform any part thereof; that the promises of defendant were made and his agreement was entered into by him with the fraudulent purpose and intent not to keep the same, but for the sole purpose of inducing plaintiff to abandon and give up his home and business in the East, and of inducing him to remove to California with the hope and belief on the part of defendant that when thus deprived of his business and residence plaintiff would be compelled for a salary to assist in founding a business of farming and cattle raising for the profit of defendant and his son.

That defendant did pay to, or cause to be

paid to, plaintiff the sum of \$500 a month for a period of 22 months, amounting in all to the sum of \$11,000, and did pay to, or cause to be paid to, plaintiff from time to time the further amount of \$4,000 a year, until the amount of \$5,387.46 had been paid to plaintiff in the manner agreed upon by plaintiff and defendant, and that such payments of salary and such advance payments were not made in good faith, but were made by defendant for the purpose and with the intent to deceive plaintiff and induce him to believe, and plaintiff did believe, that the same were made for the purpose and with the intent on the part of defendant to carry out said agreement between plaintiff and defendant, and with the purpose and intent by defendant to induce plaintiff to remain and conduct defendant's business for him. That because of such payments and pretense and the belief induced that defendant was delaying the commencement of said business for good cause, plaintiff did devote his time and endeavors to defendant's farming and cattle-raising business, but that plaintiff was given no personal interest in said business, and there was an entire refusal and failure on the part of defendant to carry out his part of the contract.

Most of the allegations and findings setting out the contract between plaintiff and defendant are sustained by correspondence between the parties, consisting of letters from defendant to the plaintiff, giving in considerable detail the resources and equipment of defendant by way of his alfalfa ranch, beet-pulp contract, and other facilities for producing and acquiring feed for fattening cattle, and proposing the terms on which he desired to associate plaintiff with him in the business, and urging him to dispose of his eastern business, and accept defendant's proposition. This proposal was accepted by plaintiff through a telegram to the defendant.

The only part of the arrangement left open by this correspondence was that relating to plaintiff's contribution to the capital fund of the venture. Defendant in his written proposal suggested a capital investment of \$100,000, of which amount he would advance one-third for himself, and one-third for his son, the plaintiff to provide the other one-third. The telegram of acceptance from plaintiff proposed a modification of this contribution. The message was as follows:

"Letter twelfth received feeding company do not need hundred thousand east capital can arrange that later I need income until company gets going if company allows me six thousand salary for one year from June first I accept and will be there by May first I have complete confidence in you am not bartering but above is necessary wire answer."

Replying to this the defendant wired the following:

"Terms outlined your telegram March twenty second accepted and satisfactory."

[1] This was, and we think properly held by the trial court to have left open for future negotiations the matter of contribution to the capital stock, and made admissible the introduction of parol evidence as to subsequent agreement between the parties on this point.

The testimony as to the agreement thereafter reached was conflicting, but plaintiff testified, and was corroborated by other evidence, to an oral agreement that defendant would advance all the money needed, taking plaintiff's note at 5 per cent. interest for his one-third thereof, payable at such future time as plaintiff desired. In this, as in other matters of conflict in the evidence, plaintiff's testimony, if not directly corroborated by other witnesses, finds support in the representations contained in defendant's letters as to his extensive resources, and in the prolific liberality of his proposals to provide all necessary financial support and assurances of great profits from the proposed business.

Without further discussion of the evidence we think it sufficient to say that the allegations of the complaint and the findings of the court are fairly supported by the evidence as to all the representations, terms, and conditions of the contract, and as to the refusal to carry out the same on the part of defendant.

The only point open to discussion is the evidence as to damages suffered by plaintiff, and the rules of law governing the same. The plaintiff presented his cause of action on the facts as stated, in two counts, one for a recovery of damages for the loss sustained by the sacrifice of his eastern business in order to enter into the association with defendant; the other, for damages from loss of prospective profits through defendant's refusal to carry out the contract. This latter division of the complaint may be ignored. There was but one cause of action stated in either or both counts of the complaint, and plaintiff is entitled to but one recovery for the breach of the contract to be measured by the "amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300.

[2, 3] Indeed, it may be doubted if the second count states a cause of action. It sets out the contract and its breach and the representations of defendant as to the great profits to be derived from the proposed business, but nowhere alleges that a profit might or would have resulted as represented had the contract been carried into effect, nor does it give any data upon which a finding of prospective profits might be based. The findings under the second count are defective in the same way, there being no findings of fact as to actual or potential profits upon which to base the conclusion that plaintiff was damaged by the default of defendant.

[4] However, while the court made a finding that plaintiff was damaged by the acts complained of in the sum of \$30,000 under the second count, no judgment was given under this finding, and had judgment been given thereon it could not be sustained in connection with a judgment on the other count, for the reason that plaintiff had but a single cause of action and was entitled to but one recovery.

For the reasons stated, plaintiff was not entitled to judgment on the second count, and we think the complaint and finding thereon may be entirely disregarded on this appeal.

The first count stated the same contract and breach thereof, with the added averments of the loss occasioned to plaintiff by reason of the sacrifice and abandonment of his eastern business at the instance of defendant, in order that he might enter into the business association with defendant.

[5] Plaintiff cannot recover the actual fruits of the business, which was never consummated. He may, however, recover damages caused by defendant's breach of his contract to establish such business. One element of that damage is that, through reliance upon his contract with defendant he was induced to incur certain losses and expenses which, while they were within his contemplation as part of his investment in the new business, have become a dead loss to him now that the business has failed to materialize.

[6] Of course, if defendant had carried out his part of the contract and established and carried on the new business in good faith, he would have assumed no liability to plaintiff for any loss incurred from the sacrifice by plaintiff of his old business, even though the new venture had proved wholly unprofitable. That was a risk plaintiff was assuming on the strength of the prospects offered by his contract with defendant of realizing the greatly increased possibilities held out to him by defendant's representations. But when defendant by the breach of his agreement deprived plaintiff of all opportunity to make good on the new venture, he became liable in damages for any loss suffered by the plaintiff as the natural result of such default, and which was within the reasonable contemplation of the parties in entering into this agreement.

The true measure of that recovery would be the amount the plaintiff would have realized under the contract if it had been faithfully carried out, less the necessary expense to him in performing on his part. But in a business of the character contemplated by the parties it is evident that the profits thereof were largely speculative. The business might have resulted in the \$100,000 per year net income that defendant estimated and held out to plaintiff as an inducement to surrender his former employment and investments, or it might have resulted in an actual loss,

Defendant cannot, however, on this account, after having held out these glowing assurances to the plaintiff, and after failing and refusing to allow the plaintiff an opportunity to make good on them, be allowed to avoid recompensing him both for the sacrifice of his old business, because the loss is too remote, and for the failure of profit on the new because it is uncertain and speculative. The defendant in any event should be estopped from disputing that the profits of the new business would have at least recouped the loss of the old. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *U. S. v. Behan*, 100 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.

The evidence here discloses that defendant had knowledge of the nature and general extent of plaintiff's established business, and it is alleged in the pleadings and found by the court that defendant was aware that the plaintiff was sacrificing and to an extent abandoning such established business in order to accept the contract with defendant, and was indeed urging him to adopt such a course, on the representations that the assured profits of the new enterprise justified such sacrifice. The contract may be said to have been entered into with this as one of the recognized conditions, and under such circumstances the rule is well established that the loss thus sustained, and unrecompensed from the new venture because of defendant's default, is a proper element of damages in the case.

The general rule covering this class of damages is established by a very long line of decisions founded on the leading case of *Hadley v. Baxendale*, 9 Ex. 341, 26 Eng. L. & Eq., 396, 156 Eng. Reprint 145, where it is said:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as would fairly and reasonably be considered either arising naturally; i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated."

The rule in *Hadley v. Baxendale* has been discussed in a multitude of cases and generally followed.

What *Sedgwick on Damages* refers to as the leading case in this country, *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, states the rule thus:

"The broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed."

The above case arose upon the failure of a contracting party to deliver a steam engine which he knew was to be used for a special service. It was held that the loss of profits could be recovered for the delay because the contractor had notice of the consequences that would follow. *Messmore v. N. Y. Shot & Lead Co.*, 40 N. Y. 422; *McHose v. Fulmer*, 73 Pa. 365.

Sedgwick on Damages states the rule as adopted from *Hadley v. Baxendale*, supra, as meaning that the plaintiff may recover such damages as normally result from the breach of the contract, or he may in addition allege and show certain special facts to have been known to the defendant at the time of the contract which would give notice to him that a breach of the contract would result in an otherwise unexpected loss, and in such case the plaintiff may also recover his special loss. *Sedgwick on Damages*, vol. 1, § 146; *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

The same author further says at section 182 of the same volume:

"Where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profit, the plaintiff should recover compensation for whatever profit he makes it reasonably certain he would have realized." *Barnes v. Berendes*, 139 Cal. 36, 69 Pac. 491; 72 Pac. 406.

So, as was held in *Ark. Val. Town & L. Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706, where the defendant, wishing the plaintiff to come into a new town, with his business already established in another place, guaranteed that a railroad would come to the new town, and plaintiff accordingly abandoned his old business and moved to the new location, and because of the railroad not being built the new business was unsuccessful, it was held that he could recover for the loss in making the change, and show the profits of the former established business to prove his damages.

Likewise, where a physician abandoned his profession to become agent for the sale of a patented article, giving his entire time to it, and the contract to furnish him the article was broken by defendants, it was held that he could recover, not only the amounts he had expended in the business, but the professional earnings he would otherwise have made. *Meylert v. Gas Consumers' Benefit Co.* (Cir. Ct.) 14 N. Y. Supp. 148.

The fact as disclosed in the findings of the court in this case that the abandoned business is one depending for its value upon the personality of the owner does not deprive it of a value, the loss of which should be compensated. The Supreme Court of Illinois in *Chapman v. Kirby*, 49 Ill. 219, says:

"We all know that in many, if not all, professions and callings, years of effort, skill, and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it be said that a party deprived of it has no remedy, and can recover nothing for its loss, when produced by another? * * * And to measure such damages, * * * what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted. * * *

In the instant case we not only have the liability arising from the breach of the contract which was the consideration for the abandonment of his former business by plaintiff, but the court finds that the inducements held out to plaintiff for making his change of occupation were in bad faith, and with no intention of their fulfillment.

[7] One who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract. *Beck v. Fleitas*, 37 La. Ann. 492; Civ. Code, § 3333.

Recognizing the element of bad faith, this court has said in *Kline v. Guaranty Oil Co.*, 167 Cal. 476, 140 Pac. 1:

"The element of bad faith would clothe a court, upon plain principles, with the power to fix damages according to the detriment shown by the existing special circumstances of the case. * * * The damages, therefore, would be those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances which were known to both parties."

We think the trial court in this case adopted the proper measure of damages in the absence of any means of determining the value of prospective profits of the contemplated business; this was the loss sustained by the plaintiff in preparing to carry out his part of the contract, less the advances of money shown to have been made to him by the defendant. The finding as to damages was as follows:

"That by reason of the acts of the defendant hereinbefore described plaintiff has been damaged by defendant in the sum of \$50,000 over and above all sums received by the plaintiff from or through the defendant."

The court has attempted here to fix a value by way of compensation to the plaintiff upon the loss incurred by the sacrifice of his former business in entering upon the contract with defendant. We do not agree with the contention that in doing this the court is confined to the mere loss of profits for the period he was engaged with defendant. He not only

sacrificed such profits for the time referred to, but obviously was placed at a disadvantage in returning to that or a similar line of business after a couple of years' absence. The value of any line of occupation depending upon the patronage of a clientèle largely gathered from the permanency and reputation of the business and its management is not limited by the yearly or monthly income. It is a capitalization of the reputation, skill, and personality of the owner, and cannot be laid down and taken up again after years of suspension without a serious loss to its earning capacity.

To reach a satisfactory determination of the loss sustained by plaintiff through the sacrifice of the business interests involved presents a very difficult problem, but the defendant, having caused the loss by his own wrongful conduct, cannot be absolved from liability because the damages are not susceptible to exact measurement. *Northern Light Co. v. Blue Goose Co.*, 25 Cal. App. 292, 143 Pac. 540; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Cederberg v. Robinson*, supra, 100 Cal. 99, 34 Pac. 625.

It appears that the business in which plaintiff was engaged and which he claims to have sacrificed in order to enter upon the contract with defendant was carried on by two corporations and a copartnership. Each of these branches of the business was conducted as an association of a few individuals, and dependent for its success upon the personal efforts and ability of the members, rather than upon the investment of capital.

[8] Defendant earnestly contends, however, that it does not appear from the evidence what part of the income or of the value of the business was represented by plaintiff's stock in the corporations, and what by the personal participation of the plaintiff. It is true that the only data the trial court had to go on was the testimony as to the general character and conduct of the business, and plaintiff's annual net income from all enterprises for a series of years, which amounted to over \$20,000 annually. Plaintiff sold his stock in the two corporations, on abandoning the business, and received therefor precisely the amounts of his cash investment. It is evident therefore that he suffered no loss of cash capital. Just what this amount aggregated is not shown but it is apparent that it was but a small element of the earning capacity of the business as a whole. It is fair to assume that with these conditions in view the trial court based its findings of a loss of \$50,000 to the plaintiff upon the value of plaintiff's personal experience, acquaintance, and association in the business. This was a capital asset which could not be sold, and which could not in the nature of things be transferred to a new business after a lapse of two or more years. In other words, the plaintiff sacrificed, not only the proportion of

the income incident to his personal connection with the old business for the two years he was in California with the defendant, but suffered the handicap of having to build up a new clientèle and patronage when he thereafter returned and started anew in the old field. The nature of his business was such that the situation may be likened to that of a lawyer or physician who, as the leading partner in a well-established firm, has abandoned this connection to enter a new business in another state. It is a fact confirmed by common experience, that if he returns to the same field after years of absence to re-enter the work of his profession, the loss from the abandonment of his established business is not compensated by making up the difference in his income for the period of his absence, but he must also face the handicap of building up a new practice. We are of the opinion that the facts in evidence here afforded a basis for fixing with reasonable fairness the detriment suffered by the plaintiff through defendant's fault, and that the amount so found is not excessive under all the circumstances of the case.

[9] The only other point raised on the appeal which we deem it necessary to refer to is the assignment of error upon the ruling of the court in sustaining an objection to defendant's query to the plaintiff as to the amount of plaintiff's net earnings in the year 1915, after he had re-entered business in St. Louis. The question was asked on cross-examination, and objection was sustained thereto, on the ground given by the court that it was not proper cross-examination. We think this ruling was correct. The matter was relevant only for the purpose of mitigation or recoupment of defendant's liability, and was a matter of defense. The witness had not been questioned on direct-examination as to this matter, and the burden was on defendant to establish such earnings by way of defense. *Lally v. Cantwell*, 40 Mo. App. 44, 50; *Wood, Master and Servant*, 245, 246; *Hahn v. Mackay*, 63 Or. 100, 126 Pac. 12, 991; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Gillis v. Space*, 63 Barb. (N. Y.) 177.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

185 Cal. 587

GEORGE L. EASTMAN CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.
(S. F. 9624.)

(Supreme Court of California. Aug. 2, 1921.
Rehearing Denied Sept. 7, 1921.)

I. Master and servant $\S$ 405(4)—Finding of cause of death of autotruck driver warranted by evidence in support of compensation claim.

In a proceeding for compensation, under the Workmen's Compensation Act for the death

of an autotruck driver, whose crushed body was found within the line of the trail made by the wheels of his truck, evidence held sufficient to support the finding of the Industrial Accident Commission that he was crushed to death by being run over by the truck.

2. Master and servant $\S$ 403 — Burden on compensation applicant to show injury arose out of employment.

The burden is on the applicant for compensation to show that the injury arose out of, as well as in the course of, the employment; there being no presumption that because an injury occurs in the course of an employment it arises out of or because of such employment.

3. Master and servant $\S$ 373 — Compensation recoverable for death of truck driver falling while suffering heart attack, brought on by exertion.

If the incapacity of a truck driver with heart disease to drive his truck was caused by a heart attack, brought on by exertion, sudden shock, or excitement incident to his employment on the highway, compensation may be recovered for his death by being run over after falling off.

4. Master and servant $\S$ 373—Injury, caused by disability arising solely from idiopathic condition, not compensable.

Where the proximate and immediate cause of an injury is from disability arising solely from an idiopathic or subjective condition, compensation cannot be recovered under the Workmen's Compensation Act, though the injury clearly occurs in the course of employment.

5. Master and servant $\S$ 373 — Employee's state of health incident of employment within compensation act.

The mere fact that an employee's state of health is such as to expose him to greater risks in performing his duties, or at times to incapacitate him from safeguarding himself from danger incident thereto, does not render such danger and risks less incident to the employment than if he were better able to meet them.

6. Master and servant $\S$ 417(7)—Findings on evidence in compensation case conclusive.

Where two rational conclusions can fairly be drawn from the evidence, one sustaining and the other opposing the right to compensation, the conclusion adopted by the commission is beyond the scope of review by the court.

7. Master and servant $\S$ 416 — Direct finding of ultimate fact warranting compensation held not affected by negative finding as to accident.

The commission's direct finding of the ultimate fact that the injury to deceased truck driver, who was run over by his truck, occurred in the course of and arose out of the employment, cannot be disturbed by a negative finding that "in some unexplained manner, which, however, was probably not connected with any heart or other subjective ailment, he was caused to be thrown or to fall."

In Bank.

Certiorari by the George L. Eastman Company and others against the Industrial Ac-

cident Commission and others, to review an order awarding compensation for injuries. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

SLOANE, J. This is an industrial accident case in which the petitioners are seeking to set aside an award of the Industrial Accident Commission on the ground of insufficiency of the evidence to sustain a finding that the injury arose from the alleged employment.

One Tylee W. Ellsworth, who was an auto-truck driver in the employment of the petitioner George L. Eastman Company, a corporation, was found dead at the intersection of Hollywood boulevard and Camino Real in the city of Los Angeles. His truck was standing at the curb of the latter street with one of the front wheels on the parking between the curb and the sidewalk.

No one witnessed the casualty resulting in his death. Enough can be deduced from the surrounding facts to clearly justify the conclusion that the deceased fell from his driver's seat and was run over by the right hind wheel of the truck. The course of the machine was plainly marked by the track of the tires for some distance back on Hollywood boulevard in the direction from which it had come.

The decedent, Ellsworth, driving the truck, in the course of his employment, had approached the place of the accident from the west on the right-hand side of the roadway. There was a slight upgrade in the direction he was driving, and his truck was loaded with decomposed granite, or gravel. At a point opposite the intersection of Martel street, which connects from the south with Hollywood boulevard, the truck had suddenly swerved to the left in a sharp curve, or at an angle of about 45 degrees, and had crossed to the opposite or northerly curb of the boulevard, where the left front wheel came in contact with the curb. The truck then proceeded easterly against the curb for a short distance, and then turned slightly out into the boulevard and continued easterly several yards until it reached nearly the center of the intersection of Hollywood boulevard with Camino Palmero, which latter street connects with the boulevard from the north. Here the truck made another abrupt curve to the left until it came to a stop at the place where found standing on the west line of Palmero street some 15 to 25 feet north of its intersection with Hollywood boulevard.

The dead body of Ellsworth was found at that point where this sudden turn of the machine into Palmero street began, and within the line of the trail made by the right-hand wheels of the truck. The body was found face down, with the head to the southeast

outside the wheel marks. The back was broken, the neck was broken, the ribs were all broken on both sides, the collar bones on both sides were broken, the right arm was broken, the liver was ruptured, the lungs punctured, the pericardium was punctured, the face had abrasions of the skin.

[1] Upon the facts stated and under the authority of numerous decisions, if the claim rested upon this evidence alone, it could not be doubted that there was justification in the evidence for the findings of the Commission that "Tylee W. Ellsworth, while employed as a truck driver on June 10th, 1919, at Hollywood, Cal., by defendant George L. Eastman Company, * * * sustained injury occurring in the course of and arising out of his employment" and that "in some unexplained manner he was caused to be thrown, or to fall from the seat of the truck he was driving, and crushed to death under the wheels of the truck." Certainly, in the absence of any other plausible or probable explanation, it might legitimately be inferred from all the circumstances given that the accident arose from some of the natural contingencies attendant upon the driving and operation of the truck. *Western Grain, etc., Co. v. Pillsbury*, 173 Cal. 136, 159 Pac. 423; *Robinson v. Western States Gas & Elec. Co.*, 194 Pac. 39; *Pacific Portland Cement Co. v. Industrial Acc. Comm.*, S. F. No. 9152 (writ of review denied); *Rosenberg v. Ind. Acc. Comm.*, S. F. No. 9269 (writ of review denied); *Sparks Milling Co. v. Ind. Acc. Comm.*, 293 Ill. 350, 127 N. E. 737; *Meyers v. Mich. Cent. R. Co.*, 199 Mich. 134, 165 N. W. 703; *Heileman Brewing Co. v. Shaw*, 161 Wis. 443, 154 N. W. 631. In the industrial accident cases above cited in which writs of review were denied by this court, employees were found dead with no witnesses to the accident, but there were traumatic injuries inferentially attributable to the employment, with no proof of other cause of death.

The autopsy in this case, however, disclosed that, while the decedent had been in apparently good health, and neither he nor his family or employers had any knowledge or premonition to the contrary, he was afflicted with a chronic myocarditis, a disease of the heart of long standing, and which the physicians stated was a condition which, while the subject might not know there was anything wrong with him, might at any time cause him to faint or cause sudden death.

While the evidence discloses that on this particular morning of the accident the decedent was in apparently vigorous health and in good spirits, and there is an entire absence of direct evidence of any effects from heart trouble, the petitioners insist that an attack of heart failure affords the only rational or plausible explanation for the loss of control of the truck and the falling from the driver's seat by the decedent. Even so, this inference

cannot be carried so far as to discredit the finding that the cause of death was from being run over and crushed by the truck.

Here was an obvious, palpable traumatic cause of death. There is no doubt but that the injury was inflicted, and that it was of a nature to cause immediate death. The mere possibility or even probability of the occurrence of an attack of heart failure cannot defeat the conclusion reached by the Commission that the truck caused the death, arising from the fact that the employee was alive and active a few minutes before the accident, and that when found dead he had just been run over and crushed by a heavily loaded automobile truck.

The evidence of the physicians is no doubt conclusive of the fact that Ellsworth had a diseased heart. Their opinions that he did or did not die from this affliction are of little value, for they are agreed that there was nothing divulged by the autopsy to indicate that death was from heart failure, and they are agreed that the injuries received from his being run over by the truck were such as would cause instant death.

The witness Dr. Wagner, whatever other possibilities he may have suggested, testified that he offered as his opinion at the autopsy that death was caused by a fracture of the cervical vertebrae in an automobile accident. Dr. Southworth, assistant medical director of the Industrial Accident Commission, answering a hypothetical question giving the subjective conditions of the disease of the heart, and the traumatic results of the injuries from the automobile, stated:

"I would say that these findings [as to the automobile injuries] so far overshadow the findings in the heart as to the cause of death, that it would be a larger percentage in favor of those conditions as causing death."

The only pretense of any basis for the theory that the decedent either fainted or died from heart failure while on the truck is the fact that his chronic condition was such that he was liable to such an attack, and that there is no other satisfactory cause shown for the erratic movements of the decedent's truck and for his falling therefrom.

It was, moreover, a fair deduction from the evidence that the decedent was at least in physical control of the truck up to the moment he fell off and attempting to guide it on its course. Both the surrounding conditions and the testimony of automobile experts indicate that every turn of the car from the time it left its due course opposite Martel street until its final turn into Palmero street must have been caused by manipulation of the steering wheel and of the gas throttle. Each turn was against the course of gravity. It was uphill to the north curb of Hollywood boulevard. The natural course of the car after running alongside the curb would have held it curb-bound. The turnout

toward the center of the street was toward a higher point, and the final swerve into Palmero street indicated a sudden turn to the left and still uphill. It is, moreover, doubtful, had the driver been dead or inanimate at the time he fell from the truck at this final turn, if he would have fallen under the wheels. The driver's seat is well to the front of the machine on the right-hand side, and it is argued that the conditions were such that in falling inertly the body would have landed well without the track of the wheels in this abrupt left-hand turn, and that it would only be by catching hold of the side of the machine in falling one would be thrown beneath the wheels.

Neither is there any evidence to justify a conclusion that death was the result of the fall itself. True, the decedent's neck was broken and there were some abrasions on his head and face, but the testimony shows that the machine ran over the body from about the waist to the neck, both collar bones being crushed, and this offers a much more probable explanation of the broken neck than would follow from the effects of the fall.

We are satisfied, therefore, that the finding of the Commission that decedent was crushed to death by being run over by the truck cannot be disturbed.

[2, 3] This brings us to the debatable question on the appeal. What was the proximate cause of the death? The injuries from being run over by the truck were the immediate cause, but if, as claimed by petitioners, a fainting spell brought on by the condition of the heart, or any other subjective disability, not arising from the exigencies of decedent's employment as a truck driver, apparently or presumptively was the cause of his fall under the machine, can the award be maintained in the absence of evidence of some other effective cause arising from the employment?

It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment.

It is quite evident that if decedent had not fallen from the truck he could not have been run over by it, and it is contended, on behalf of petitioners, that the fall is the proximate cause of the injury, and must be shown to have some causal connection with the employment to justify compensation in this case.

There is no direct evidence as to what caused the fall from the truck. But, excluding the theory that it was caused by a heart attack, as we have already stated it may be reasonably inferred that the driver lost his balance or was thrown out by some casual or inadvertent jolt or jar incident to the

traffic of the highway or the abrupt movement of the truck, there are only two theories of the cause of the erratic movements of the truck that would seem to support a legal inference. One is that on entering the intersection of Martel street, where the first sharp turn to the left was made, decedent thus suddenly diverted the course of his truck to avoid some vehicle coming into Hollywood boulevard from the south, and that after righting his car after running into the curb on the north side of the boulevard, and starting to regain his position on the right side of the roadway, he was confronted by another car from the east, and made the quick turn into Palmero street to avoid a collision, and was thereby thrown out. The only evidence aside from the known exigencies of automobile traffic to support such theory is the fact that at a point about opposite where decedent was killed the fresh tracks of an automobile skidding under set brakes were discovered.

It must be confessed, however, that the erratic movement of the truck, and the absence of any direct evidence of physical conditions on the road to account for it, would strongly suggest the probability that the driver was suddenly incapacitated to intelligently steer his truck, and that its irregular course and the consequent fall was at least contributed to by this condition of the driver.

Even conceding this to be the case, it does not necessarily follow that the accident cannot be attributed to the employment. If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration. *Fennah v. Midland, etc., Ry.*, 4 B. W. C. C. 440; *Peoria Ry. Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651; *Bradbury on Work. Comp.* 385; *Elliott's Work. Comp. Act* (7th Ed.), 9; *Fisher's Case*, 220 Mass. 581, 108 N. E. 361; *In re Madden*, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000; *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321. It can hardly be doubted under this rule that if decedent's incapacity to drive his truck was caused by a heart attack brought on by exertion or sudden shock or excitement incident to his employment on the highway, recovery could be had.

[4] Where, however, the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, the weight of authority, including the decisions of this state, are against recovery, though the injury clearly occurs in the course of employment. *Brooker v. Ind. Acc. Comm.*, 176 Cal. 275, 168 Pac. 126, L. R. A. 1918F, 878, citing *Van Gorder v. Packard Motor Car Co.*, 195 Mich. 588, 162 N. W.

107, L. R. A. 1917E, 522; *Butler v. Burton-on-Trent Union*, 5 B. W. C. C. 355; *Frith v. Louisianian*, 5 B. W. C. C., L. R., [1912] 2 K. B. Div. 155; *Rodger v. Paisley*, 5 B. W. C. C. 547; *Collins v. Brooklyn, etc., Co.*, 171 App. Div. 381, 156 N. Y. Supp. 957; *McCoy v. Mich. Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323; *Klawinski v. Lake Shore, etc., Co.*, 185 Mich. 643, 152 N. W. 213.

It will be noticed in all of these cases the injury or death was the direct result of a fall induced by some subjective condition of the injured party, and without any intervening or contributing cause connected with the employment.

Thus in *Brooker v. Ind. Acc. Comm.*, supra, the decedent was working on a scaffold 39 feet from the ground. He fell, and died from the result of the fall. He was subject to epileptic fits. It was held that the probable cause of the fall was an epileptic fit, and that this was the proximate cause of death.

[5] In the case before us it must be remembered that the cause of the fall, if accompanied by a heart attack, was the result of such heart trouble, combined with the irregular movement of the truck in suddenly being turned from its course, and that the immediate cause of death was not from the fall, but resulted from being run over by the truck.

There is nothing to indicate that the heart attack would have proved fatal, or that it entirely incapacitated the driver, or that the fall produced serious injury, or that the decedent would not be alive at the present time, if it had not been for whatever combination of circumstances brought him under the wheels of the moving truck, the instrument of his employment, after falling or being thrown from his seat.

A case very closely in point sustaining respondents' rights in the premises is *Carroll v. What Cheer Stables Co.*, 38 R. I. 421, 96 Atl. 208, Ann. Cas. 1918B, 346. The facts are very closely parallel with the facts here. A hack driver while engaged in his employment was presumed to have suffered an attack of dizziness or unconsciousness, induced by hernia, hardening of the arteries, and Bright's disease. There was evidence tending to show that his horses, being thus out of control, ran against the curbstone, and the driver was thrown out and injured. The court held that the evidence did not show that the fall was caused solely by the workman's diseased condition, but was contributed to by the subsequent movements of the vehicle running into the curb, and that the accident was one arising out of the employment. Such was the precise condition here. Mr. Justice Shaw, in the opinion of this court in *Brooker v. Ind. Acc. Comm.*, supra, reviewing the case just cited, recognizes the distinction between that and the *Brooker Case*, which we

have pointed out as applicable here. Although the unsafe movement of the team was apparently caused by the driver's illness, it was the subsequent lurching of the cab that at least contributed to the fall.

The case of *Wicks v. Dowell*, L. R. (1905), 2 K. B. Div. 225, goes further in sustaining industrial accident liability in such cases than is warranted under the decisions in this state, but we quote from that case the reasoning on which a distinction is made between the immediate and remote cause of the injury as connecting it with the employment.

In the case cited the deceased was seized with an epileptic fit while standing on a wooden stage in a ship close to the hatchway. By reason of the fit he fell into the hold and was injured by the fall. The court held that, while the cause of the fall was the fit, the cause of the injury was the fall that was incident to the employment over this open hatchway. In the case before us the alleged heart trouble may have caused the driver to lose intelligent control of the truck, but this was not the immediate cause of the injury, but only a contributing cause, and the reasoning of the court in the *Wick's Case* is peculiarly applicable to the conditions here. The court says:

"Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury, and its actual physical cause from the more remote cause, that is to say, from the fit, the difficulty arising from the words 'out of the employment' is removed. How does it come about in the present case that the accident arose out of his employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by his necessity for his standing in that position. Upon the authorities I think the case is clear; an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts, and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment. I think, therefore, that the present case comes within the purview of the Workmen's Compensation Act. * * *

"Cozens-Hardy, L. J. I agree, and have little to add. It seems plain to me on the authorities that what happened here was an 'accident.' It is also plain, and indeed is not contested, that the accident happened in the course of the employment; the only difficulty is whether it arose 'out of the employment'; on the whole I am of opinion that it did. If I could adopt the view that has been pressed upon us, that the employer is not liable for the remote consequences of a disability which the work-

man brings with him to his work, I should come to a different conclusion; but I think the truer view is that a man always brings some disability with him; it may be a disability arising from age; it may be of some other nature. A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the man's age. The same consideration applies to a tendency to illness or to a fit; and if a man with such a tendency is told to go to work in a dangerous position, and there meets with an accident, the accident none the less arises out of his employment because its remote cause is to be found in his own physical condition."

The mere fact that the employee's state of health is such as to expose him to greater risks in performing his duties, or to at times incapacitate him from safeguarding himself from dangers incident thereto, do not render such dangers and risks any less incident to the employment than if the employee were better able to meet them in safety.

As is said in *Hartz v. Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020:

"By the terms of our Compensation Act compensation is not made to depend upon the condition of health of the employee, or upon his freedom from liability to injury through a constitutional weakness or latent tendency. It is awarded for personal injuries 'arising in the course of and out of his employment' and for an injury which is a hazard of that employment."

As Chief Justice Rugg points out in *re Madden*, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000:

"It is the hazard of the employment acting upon the particular employee in his condition of health, and not what that hazard would be if acting on a healthy employee."

Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment, because it develops within it.

[6] Under the construction of the law as we have stated it, even if it appears that an attack of dizziness or unconsciousness from heart trouble was a contributing cause to the accident, the finding of death from injuries arising from the employment finds support under the evidence. It is only where there is such an entire absence of evidence as renders the findings of the Commission unreasonable or in excess of its powers that this court is empowered to set aside its findings. *Work. Comp. Act*, § 67b, Stats. 1917, p. 875; *Walker v. Ind. Acc. Comm.*, 177 Cal. 737, 171 Pac. 954, L. R. A. 1918F, 212; *Cardoza v. Pillsbury*, 169 Cal. 106, 145 Pac. 1015.

In denying an application for a hearing

in *Roebling's Sons Co. v. Ind. Acc. Comm.*, 36 Cal. App. 15, 171 Pac. 987, this court has said that where two rational conclusions can fairly be drawn from the evidence, one sustaining and the other opposing the right to compensation, the conclusion adopted by the Commission is beyond the scope of our review. The law and the facts of this case present such a condition.

[7] Petitioners complain of the insufficiency of the finding as to the source of the injury resulting in the employee's death, in that the Commission in its finding recite that death was caused "in some unexplained manner, which, however, was probably not connected with any heart or other subjective ailment, he was caused to be thrown or to fall." This by itself would be an inadequate finding that the injury arose from the employment, but in addition to this, as is elsewhere quoted in this opinion, the Commission expressly found that the injury occurred "in the course of and arising out of the employment." This negative statement, therefore, as to the unexplained manner of the happening and the probable absence of heart failure cannot disturb the direct finding of the ultimate fact.

The award is affirmed.

We concur: ANGELLOTTI, C. J., and LAWLOR, J.; LENNON, J.; SHURTFLEFF, J.

53 Cal. App. 236

LESSER V. NEW YORK LIFE INS. CO.
(Civ. 3831.)

(District Court of Appeal, First District, Division 2, California. June 17, 1921. Hearing Denied by Supreme Court Aug. 15, 1921.)

1. Death ⚡4—Proof of absentee's contact with peril unnecessary.

In order to establish the death of an insured who has been missing for less than the necessary seven years which would raise a presumption of death under Code Civ. Proc. § 1963, subd. 26, it is not necessary that the plaintiff produce evidence that the alleged decedent came in conflict with some specific peril to his life, and hence it could not be said as a matter of law that there was no evidence of death where insured, who was affectionate and very attentive to his wife, and had property of a net value of \$23,000, with an income of \$750 a month, disappeared from a bathing beach leaving his clothes in a bathroom.

2. Death ⚡2(3)—Evidence that absentee was seen admissible to rebut presumption of death.

Where action is brought to recover under an insurance policy based on the presumption of death of missing insured, insurer can show, to rebut plaintiff's case, that insured was seen after the supposed date of his death.

3. Death ⚡4—Circumstantial evidence sufficient.

It is competent in an action on a life insurance policy to prove from circumstantial evidence the fact and exact date of death of insured.

4. Insurance ⚡543—Proofs of loss held sufficient under life policy.

Where insured disappeared while on bathing beach, proofs of loss as required by policy were sufficient where beneficiary submitted numerous affidavits setting forth the facts constituting circumstantial evidence of the death, which facts later she showed to the trial court, which ruled that they were sufficient evidence of death.

5. Appeal and error ⚡882(7)—Party asking suspension of ruling on admission of evidence cannot complain of court failing to make formal ruling.

In an action on a life insurance policy, where defendants objected to the proofs of loss being read in the presence of the jury, and it was stipulated that the court might read the same and determine whether they were sufficient, defendant could not complain on an appeal that the trial court omitted to make a formal ruling on the admission of the proofs of loss, such proofs being sufficient, and no valid objection appearing as being made to the papers, and the case being conducted as though the proofs had been formally admitted.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Alice Lesser against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Meserve & Meserve, of Los Angeles, for appellant.

J. F. Clark and W. R. Law, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff sued the defendant to recover on a certain insurance policy. The jury returned a verdict in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

Emil Lesser, the husband of the plaintiff, was last seen at Venice, Los Angeles county, on the 2d day of November, 1915; at that time he was within a few feet of the bathing house where he was accustomed to go in bathing two or three times a week. In her complaint the plaintiff alleged that death occurred November 2, 1915, and the proof which she introduced to substantiate her allegation consisted wholly of circumstantial evidence. The plaintiff and the insured were married in 1896 at Birmingham, in the state of Alabama. In 1912 they removed to California, and at the time of the disappearance of the insured the family was residing at a house on East Adams street. At that time the family consisted of the husband and wife, a daughter, the wife's niece, and her nephew,

and Mr. and Mrs. Minnis. During their married life the husband's conduct towards his wife was very affectionate and very attentive. He left the house in the morning at about 8 o'clock daily, and returned home about 6 o'clock in the evening. The wife was an invalid, and her husband remained at home during the evenings, excepting such evenings as he went to lodge. He was a member in good standing of the Masons, the Elks, the Odd Fellows, and the Knights of Pythias. In Birmingham he had been a member of the Press Club, and had also been a member of the police commission. At the time of his disappearance he owned equities in properties in Alabama and Los Angeles of a net value of \$23,000, and one of the properties in Los Angeles, the Hotel St. George, was paying him net about \$750 a month. He had been in the habit of going to Venice once or twice a week to take a bath. During the forenoon of the 2d day of November he left the hotel saying that he was going to the beach, and, later in the day, he was seen within a few feet of the bath. At that time he was dressed in his street clothes, and was talking and laughing with another man. After that he was never seen again, but during that evening his clothes, underclothes, hat, shoes, stockings, and jewelry were found in one of the bathrooms. Thereafter the plaintiff, her attorney, and Mr. Minnis made inquiries, not only in and about Los Angeles, but in various states of the Union, and no trace could be had of the insured. The plaintiff notified the insurance company of the death as early as January 12, 1916, and the case was not brought on for trial until nearly three years thereafter.

After the discovery of the personal effects in the bathroom, much publicity was given in the newspapers regarding the disappearance of the insured. Although the bodies of drowned persons are generally drifted to the shore, no body came ashore that was identified as being the body of the insured.

The foregoing facts stand in the record without conflict, although there are some other matters in the record concerning which there is conflicting testimony. The principal question presented by the briefs is as to the sufficiency of the foregoing evidence to support the judgment.

[1, 2] It is statutory in California that a person not heard from in seven years is presumed to be dead. Code Civ. Proc. § 1963, subd. 26. Neither of the parties to this case contend that the rule so stated is exclusive. However, the appellant claims that he who would bring his case within a shorter period must produce evidence to the effect that the alleged decedent came in contact with "some specific peril to his life." The respondent, on the other hand, claims that the true rule is contained in the leading case, *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa, 170, 176,

96 Am. Dec. 136, 138, where the Supreme Court of Iowa states the rule otherwise, and illustrates the reason for the rule as follows:

"An honored and upright citizen, who, through a long life, has enjoyed the fullest confidence of all who knew him—prosperous in business and successful in the accumulation of wealth, rich in the affection of wife and children, and attached to their society, contented in the enjoyment of his possessions, fond of the associations of his friends, and having that love of country which all good men possess, with no habits or affections contrary to these traits of character—journeys from his home to a distant city and is never afterward heard of. Must seven years pass, or must it be shown that he was last seen or heard of in peril, before his death can be presumed? No greater wrong could be done to the character of the man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends. He could have lived a good and useful life to but little purpose, if those who knew him could even entertain such a suspicion. The reasons that the evidence above mentioned raises a presumption of death are obvious; absence from any other cause, being without motive and inconsistent with the very nature of the person, is improbable."

To the same effect are *Cox v. Ellsworth*, 18 Neb. 664, 26 N. W. 460, 53 Am. Rep. 827; *Boyd v. New England M. L. Ins. Co.*, 34 La. Ann. 848; *Northwestern Mut. Life Ins. Co. v. Stevens*, 71 Fed. 258, 261, 262, 18 C. C. A. 107; *Lancaster, Adm'r, v. Washington Life Ins. Co. of N. Y.*, 62 Mo. 121; *Coe v. National Council, K. & L. of S.*, 96 Neb. 130, 147 N. W. 112, L. R. A. 1915B, 744, Ann. Cas. 1916B, 65; *Harvey v. Fidelity & Casualty Co.*, 200 Fed. 925, 119 C. C. A. 221; *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 319, 22 Sup. Ct. 662, 46 L. Ed. 922; *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348; *Western Grain, etc., Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423.

As stated in the *Tisdale Case*, the facts there enumerated tend to show the probability of death. However, if the person at the time he was last seen was a fugitive from justice, was a bankrupt, or from other causes it would be improbable that he would be heard from even though alive, then no inference of death will be drawn. Such was the conclusion of the court in *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; *Nelson v. Masonic Mut. Life Ass'n*, 57 App. Div. 214, 68 N. Y. Supp. 290; *Groff v. Groff*, 36 App. D. C. 560; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18, 39; *Garden et al. v. Garden's Executrix*, 2 Houst. (Del.) 574, 579; *Modern Woodmen v. Ghromley*, 41 Okl. 532, 139 Pac. 306, L. R. A. 1915B, 728, Ann. Cas. 1915C, 1063. The very nature of such cases is to the effect that the weight of the evidence is a question for the jury. *Succession of Vogel*, 16 La. Ann. 139, 140, 79 Am. Dec. 571; *Smith v. Knowlton*, 11 N. H.

191, 197. And the Tisdale Case, *supra*, was reversed because the trial court gave an instruction which determined the weight of the evidence, which was the peculiar province of the jury. 26 Iowa, 170, 96 Am. Dec. 136, 139. It has been expressly ruled in cases where the evidence was not as strong as in this case that there was sufficient evidence to take the case to the jury, and that it could not be said, as a matter of law, that there was no evidence of death. *Cox v. Ellsworth*, *supra*; *Lancaster v. Washington Life Ins. Co. of N. Y.*, *supra*; *Coe v. National Council, K. & L. of S.*, *supra*; *Rogers v. Manhattan Life Ins. Co.*, *supra*; *Western Grain, etc., Co. v. Pillsbury*, 173 Cal. 135, 138-140, 159 Pac. 423. If, after the plaintiff had introduced the evidence above recited, the defendant had been able to show that the missing husband had been seen after the supposed date of death, such fact would have been admissible as rebutting the plaintiff's case. *Springmeyer v. Sovereign Camp, W. of W.*, 144 Mo. App. 483, 129 S. W. 273, 277. However, in this case, no such claim is made.

[3] Many exceptions by the appellant as to the admission of evidence are contained in the record; but all of the objections are disposed of by what we have just said to the effect that it is competent to prove by circumstantial evidence the fact and exact date of death. The jury having found for the plaintiff on the evidence which she introduced that her husband was dead, it had the right to find, and did find by its general verdict, that the husband died November 2, the day on which he was last seen. *Harvey v. Fidelity & Casualty Co.*, 200 Fed. 925, 928, 119 C. C. A. 221.

[4] The ruling regarding the admissibility of evidence in such cases also disposes of the contention of the appellant that the plaintiff did not submit proofs of loss. The appellant admits that she submitted numerous affidavits, but the contention of the appellant is that the affidavits contain *ex parte* statements of only such facts as she developed at the trial, and that such facts did not prove, nor tend to prove, the death of the plaintiff's husband. However, we have ruled against the appellant as to the probative effect of the facts proved by the plaintiff, and it follows that her proofs of loss were sufficient. In other words, she was entitled to make her showing to the defendant by affidavits setting forth the same facts which later she showed to the trial court.

[5] The appellant also makes a point on the fact that the trial court did not formally announce that the proofs of loss were admit-

ted in evidence. The record with reference to that matter shows that the first witness called was the plaintiff. Shortly after she had taken the stand the proofs were handed to the witness. She identified them, and identified a letter written by her attorney, Mr. Clark, as being copies of the papers which had been transmitted to the defendant April 6, 1916. It was stipulated that the same were received by the defendant about April 14, 1916. Thereupon, Mr. Clark was about to read the papers to the court in the presence of the jury, when Mr. Meserve, attorney for the defendant, objected to the same being read in the presence of the jury, because the jury might be unable to confine the papers and the contents thereof as being proof solely of the fact that proofs of death had been made, but might also use the contents of the *ex parte* affidavits as being evidence of the fact of death, etc. Thereupon the papers were handed up to the judge presiding at the trial, and the attorneys stipulated that he might read the same, and if he found the papers sufficient the trial court might thereafter state to the jury that the proofs had been made as of date April 6, 1916.

The record does not show that thereafter the trial court made the formal statement which had been contemplated; neither does the record show that either counsel asked the trial court to do so. All of the papers are in the record and all of them are regular in form and are very full and complete in view of the peculiar facts of this case—they cover 25 pages of the printed transcript. Thereafter the case was conducted in all respects as though the proofs had been formally admitted. The defendant's attorney asked its witnesses many questions regarding the defendant's copy of the proofs. The day before the case was submitted to the jury the papers were marked "Plaintiff's Exhibit 3, filed December 11, 1918. H. J. Leland, Clerk, by A. B. Yorba, Deputy." The court's ruling having been suspended on the request of the attorney for the defendant, and no valid objection appearing as being made to the papers, and the papers being free from any objection, if one had been made, we think that the appellant may not now be heard to complain that the trial court omitted to make a formal ruling on the admission of the proofs of loss.

No error has been called to our attention. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

53 Cal. App. 26

SHAW v. UNION ESCROW & REALTY CO.
(Civ. 3645.)

(District Court of Appeal, Second District, Division 1, California. June 3, 1921. Hearing Denied by Supreme Court Aug. 4, 1921.)

1. Vendor and purchaser ⇐351(8) — Negligence held to constitute "bad faith" on breach of contract to convey.

It is not necessary, in order to establish "bad faith," within the meaning of Civ. Code, § 3306, permitting the recovery of damages for loss of bargain in case of bad faith, that the vendor be shown to have refused to go on with the transaction because of some gain which would accrue to him; it being sufficient that he refused to convey, where through his own negligence he has put it out of his power to fulfill the obligations of his contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bad Faith.]

2. Vendor and purchaser ⇐349—Complaint in action for damages for breach held sufficient.

Complaint, in action for damages for breach of contract to convey land, was sufficient to warrant recovery of damages by reason of bad faith under Civ. Code, § 3306, where it alleged the making of the contract, the breach, the value at the time of the breach, and that the defendant, "without any just cause or just excuse," refused to make conveyance of the property.

3. Pleading ⇐406(1) — Defect in pleading waived by failure to demur.

If a complaint is imperfect in any respect, the defect is waived, where there is no demurrer and the parties proceed throughout the trial with the evident view that all of the issues adjudicated are properly before the court.

On Hearing in Supreme Court.

4. Vendor and purchaser ⇐350 — Evidence sufficient to justify finding of bad faith in refusing to convey.

In an action for damages for breach of contract to convey land, evidence held sufficient to justify finding that conduct of defendant in refusing to perform its contract amounted to bad faith within the meaning of Civ. Code, § 3306, permitting recovery of difference between value and contract price in case of bad faith.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Frank L. Shaw against the Union Escrow & Realty Company. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeals, and hearing denied in Supreme Court.

Haas & Dunnigan and Bordwell & Mathews, all of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

JAMES, J. This action was brought to recover damages alleged to have been sustained by the plaintiff because of breach of contract to convey real property. There was a judgment in plaintiff's favor, and defendant has appealed therefrom.

On the 5th day of June, 1919, defendant, then being the owner of two certain lots of land, entered into a written contract with the plaintiff whereby it agreed to sell and plaintiff agreed to buy the property. The purchase price as fixed by the contract was the sum of \$1,500 and was made payable \$200 upon the execution of the contract, the remainder in sums of \$20 (or more) with interest monthly, the installments to be payable on the 5th day of each month after the date of contract. The plaintiff made the initial payment on the 5th day of June in the year mentioned; he made the further payment on July 5th of \$20, and on the 5th day of August, 1919, tendered the third payment of \$20, which defendant refused to accept. Thereupon, or within a few days, the plaintiff made a tender of the entire remainder of the purchase price agreed upon, and demanded a conveyance of the property, which demand was refused. Defendant's refusal to comply with its agreement was based upon the following facts: On May 26, 1919, an employé of the defendant, who was duly empowered to act in that manner, wrote a letter to a firm of real estate agents, authorizing them to sell the same property, which was later bargained for by the plaintiff. The letter written to the agents authorized them to "sell on or before thirty days from date" the property therein referred to and contained a statement that a commission of 5 per cent. would be paid for their services. It seems that the employé who had the preliminary negotiations with the plaintiff respecting the sale of the same property was not advised of the fact of the sending of this letter. However, the court found that on "about" June 10, 1919, the agents referred to notified defendant that they had sold the lots in conformity with the terms of the letter of authorization. On the 21st of June, 1919, the general officers of the defendant corporation executed the deed to the purchaser produced by the agents. At the time the deed was made the employé of defendant who prepared the deed had no actual knowledge of the existence of the contract made with plaintiff. It was between August 1 and August 14, 1919, that this employé communicated the facts regarding the sale to the employé who had dealt with plaintiff. It appeared in evidence, and the findings express the fact, that the price obtained through the real estate agents was not as much as that agreed to be paid by the plaintiff, the difference being about \$300.

The defendant offered to pay back to the plaintiff all moneys delivered to it by him before the action was commenced. At the trial the plaintiff produced evidence showing that between the date of his contract and the date of the breach committed by defendant there had been a large increase in the value of the property, and the court found that on the 14th day of August, 1919, being the date when the plaintiff was advised that defendant would not fulfill its contract, the property was of the value of \$7,000 and there was ample evidence to sustain that finding. The judgment was computed accordingly, by the making of required deductions, leaving the sum of \$5,907, which plaintiff was held to be entitled to recover. This recovery was allowed under the finding that defendant had shown bad faith. Section 3306, Civil Code, provides as follows:

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

[1] The main contention of the defendant in its attack upon the judgment is that a case of bad faith was not shown, and that the measure of plaintiff's recovery was limited to such sums as had been paid on account of the purchase price, together with interest thereon. Under the evidence presented to the court it appears that the subordinate employees of defendant corporation who participated in the two transactions, to wit, that with plaintiff and that with the real estate firm, had within their control means of ascertaining exactly what had been done by either with respect to the property, and the case as made out is one of the clearest kind of negligence shown to have been committed in negotiating the sale of the property in question to two different parties at the same time. By the appellant the suggestion is made that the letter to the agents constituted a valid option to purchase of prior date to the contract with the plaintiff. We have already characterized that letter as an agent's authorization to sell, and it can be called nothing more. Whether it amounted to an authorization giving the exclusive right to sell to the particular agents it is not necessary to decide, as it would not add any weight to appellant's position. Not only was it lacking in sufficient terms to constitute it an option, but no consideration was paid for it. The contract with the plaintiff was executed, and the initial payment of \$200 made several days before the defendant had any notice from the agents that a purchaser had

been secured by them. As we understand the law, it is not necessary, in order to establish bad faith within the meaning of section 3306, Civil Code, that the vendor be shown to have refused to go on with the transaction because of some gain which would accrue to him. It is sufficient if he refuses to convey, where through his own negligence he has put it out of his power to fulfill the obligations of his contract. It has been characterized as an anomaly in the law of damages which prevents a vendee under a contract for the purchase of real property from collecting in all cases full compensatory damages, which would ordinarily and naturally include damages for what is termed "loss of bargain"; the accepted rule being that a person is entitled to have in damages the worth of that which would have been rendered him under full performance of the contract. Placing contracts to convey realty in an exceptional class, very early cases, notably that of *Flureau v. Thornhill* (2 Wm. Bl. 1078), determined, as expressed by Chief Justice De Gray, that:

"Upon a contract for a purchase, if the title prove bad and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost."

Considerable difficulty was encountered in subsequent decisions in reconciling the holding there announced with different facts presented, and the effort to so distinguish the cases seems not to have been always successful. The exceptional rule is justified on the reason given as that a vendor who contracts to convey a good title in the future, and who is unable to make such title clear, notwithstanding his best efforts so to do, should not be held for damages other than those which will return to the opposite party the purchase money paid, together with interest; and within the limitations of that reason the rule should find its scope. A full discussion of the history of the law may be found in any of the standard works on damages. See *Joyce on Damages*, vol. 3, § 1728; *Sedgwick on Damages* (9th Ed.) vol. 3, § 1002; *Sutherland on Damages* (3d Ed.) vol. 2, § 578. We find no decisions in this state which have directly adjudicated the matter from the angle presented here. The cases of *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, and *Clark v. Yocum*, 116 Cal. 515, 48 Pac. 498, in some degree of inference support the conclusions herein expressed. A case closely in point is that of *Sweem v. Steele*, 5 Iowa, 352. The court there said:

"If the person selling is honest, and is prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. * * * But if the person selling is in

default, and either *did or should have known that he could not comply with his undertaking; * * * or, having the title, at the time of the agreement, afterward disables himself from completing it, by a sale to a third person; or, at the time of the agreement, knew he had no title—in these, and in all cases where the inability arises from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land to the time the contract should have been executed*" (citing cases).

To our mind the code provisions have added nothing to the law already established when it is declared that in case only of bad faith on the part of the vendor damages may be recovered because of profits which might have accrued to the purchaser.

[2, 3] Appellant makes the further contention that the complaint in the action did not state facts sufficient to present the issue as to the bad faith of defendant. The complaint did allege the making of the contract, the breach thereof, the value of the property at the time of the breach, and that the defendant "without any just cause or just excuse" refused to make conveyance of the property. We think that the complaint was sufficient, and that it tendered all of the issues which were passed upon by the court. If it was imperfect in any respect, the defect was waived by the reason that there was no demurrer to the complaint, and the parties proceeded throughout the trial with the evident view that all of the issues adjudicated were properly before the court. We find no error to justify a reversal of the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. [4] The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

We are not prepared to accede to the unqualified statement that gross negligence is the equivalent of bad faith as that term is used in section 3306 of the Civil Code. In this case, however, the court below made a finding:

"That the defendant acted in bad faith in refusing to carry out its contract with plaintiff and to convey said property to plaintiff on August 14, 1919, and in having conveyed said property to R. M. Goodman on June 21, 1919, without making in said conveyance provisions for the protection of plaintiff's rights in said property secured to him under the contract of June 5, 1919."

Upon looking into the evidence in the case we are satisfied that there was sufficient therein to justify the trial court in finding that the conduct of the defendant in so refusing to perform its contract with the plaintiff amounted to bad faith within the meaning of that term as used in said section 3306.

SHAW, SLOANE, SHURTLEFF, LAW-
LOR, and LENNON, JJ., concur.

53 Cal. App. 126

LOS ANGELES COUNTY v. RINDGE CO. et
al. (two cases). (Civ. 3533, 3533½.)

(District Court of Appeal, Second District, Division 1, California, June 11, 1921. Hearing Denied by Supreme Court Aug. 8, 1921.)

1. Eminent domain ☞167(3)—Viewer method of condemning land for highway not exclusive.

Pol. Code, §§ 2681-2698, describing a method whereby counties may condemn land for highways, are not exclusive, and the county is not, in view of sections 2643 and 4041, restricted to the viewer method prescribed in sections 2681, etc., but may condemn by action instituted on resolution of the board of supervisors.

2. District and prosecuting attorneys ☞0—County attorney may consent to increase of compensation for land condemned.

Where there was an error in the computation of the compensation to which the landowner was entitled on condemnation, the county attorney acting as such may consent to an increase.

3. Eminent domain ☞66—Necessity for appropriation not subject of judicial cognizance.

When the use is public, the question of the necessity of appropriating any particular property is not a subject of judicial cognizance, but is one which appertains to the legislative branch of the government, and may either be exercised by the Legislature or such subordinate bodies to which by legislative grant the power is intrusted.

4. Eminent domain ☞167(2)—Property owner allowed compensation cannot question method provided by Legislature.

Where property owner is accorded his right to compensation secured by Const. art. 1, § 14, he cannot question the procedure or instrumentalities provided by the Legislature for acquiring his property.

5. Eminent domain ☞67 — Property owner cannot question statute making determination as to necessity conclusive.

Code Civ. Proc. § 1241, providing that before property can be taken by condemnation it must appear that the use to which it is to be applied is a use authorized by law, and that the taking is necessary, provided that, when the legislative body of the county shall by resolution adopted by two-thirds of its members determine that the public interests and necessity

require the acquisition, such resolution or ordinance shall be conclusive evidence of public necessity, that the property is necessary, and that the proposed improvement is in the manner which will be most compatible with public will, is not open to attack, on the theory that the question of necessity is judicial in its nature, by a property owner whose right to compensation under Const. art. 1, § 14, was secured.

6. Eminent domain ☞262(5)—Landowners not prejudiced by ruling on finding of necessity.

Although the court in the first instance ruled that the finding of the board of supervisors as to the necessity for condemnation of land for road was sufficient prima facie showing, yet where the court thereafter heard evidence which established the necessity, the owners were not injured.

7. Trial ☞419—Denial of nonsuit immaterial where defect is later overcome.

An order denying a motion for nonsuit will not be disturbed, though the evidence at the close of plaintiff's case was such that it might properly have been granted, where the defect was later overcome.

8. Highways ☞20—Power of county to condemn for road cannot be denied because there was no corresponding road at the county line.

The power of a county to condemn land for a highway through a large ranch cannot be denied because at the county line there was no corresponding highway, but the terminus of the road was in the ranch; there being no such restriction on the county and the question of necessity being for the board of supervisors.

9. Appeal and error ☞1040(6)—Sustaining of demurrer to answer harmless, where all defenses raised were allowed to be presented.

The sustaining of a demurrer to an answer is harmless, where all of the defenses raised were disposed of and defendants given abundant opportunity to introduce evidence thereon.

Appeals from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Two actions of eminent domain by the County of Los Angeles against the Rindge Company, a corporation, May K. Rindge, and others. From judgments for plaintiff, defendants appeal. Affirmed.

See, also, 174 Cal. 743, 164 Pac. 633; 200 Pac. 32.

Anderson & Anderson and Nathan Newby, all of Los Angeles, for appellants.

A. J. Hill, Co. Counsel, and Paul Vallee, Chief Deputy Co. Counsel, both of Los Angeles, for respondent.

SHAW, J. The above-entitled actions were instituted by the county of Los Angeles to condemn certain lands described in the complaints therein for use as highways. In each case an interlocutory judgment as prayed for was rendered for the plaintiff, followed by a final order of condemnation, from

which judgment and order so rendered in each case the defendants therein have appealed.

In the first above entitled case, and which appellants designate the "Main Road" case, the action was to condemn a strip of land from a public highway at a point on the southeasterly boundary line of the Malibu ranch, and through said ranch for a distance of some 20 miles or more to the westerly boundary line of Ventura county, at which point the proposed road terminated upon private land. In the other action, No. 3533½, it was sought to condemn land for a lateral highway beginning at a point on the proposed "Main Road" and running thence easterly to the east boundary line of the Malibu ranch and terminating likewise upon private lands owned by one Decker, which highway appellants designate as the "Alisos Canyon Road." The questions involved in each case are the same, and the grounds upon which appellants base their claim for a reversal are identical.

In both cases the proceedings were instituted by a resolution adopted ex parte and without a hearing accorded defendants by the board of supervisors of Los Angeles county. Omitting the description, the resolution initiating the proceeding as to the "Main Road" case (that adopted in the other being of like form and effect) is as follows:

"Whereas, the public necessity and interest of the people of the county of Los Angeles do require that a certain highway be constructed in said county over and across those certain parcels of real property hereinafter described, and for that purpose and for such public use it is necessary that those certain pieces or parcels of real property hereinafter described be acquired by said county by condemnation, namely, the following described property located in the county of Los Angeles, state of California, to wit: [Description of 40-foot right of way strip, and also of some 146 side parcels.] * * * Excepting so much of said land as is now included within any public highway, alley or lane.

"Further reference is hereby made to said county surveyor's map No. 8070, on which the location of all parcels of land herein described is accurately shown.

"Now, therefore, be it resolved, and it is the finding and determination of this board, that the public interest and necessity require the acquisition by the county of Los Angeles of those certain pieces or parcels of land hereinbefore described for a public purpose, namely, for public highway purposes, and for the construction and completion of a public highway thereover; and

"Be it further resolved, that those certain pieces or parcels of land hereinabove described be condemned for a public purpose, namely, for a public highway and the construction and completion thereof, and the county counsel of the county of Los Angeles is hereby directed to institute proceedings in the superior court of

the state of California in and for the county of Los Angeles for the condemnation of those certain pieces or parcels of real property hereinabove described for public highway purposes and to take all steps necessary for the condemnation of said pieces or parcels of land in the name of said county"

—in accordance with which the county counsel instituted the actions for the condemnation of the parcels of real estate described therein. Demurrers interposed by the defendants to the complaints were overruled.

[1] Appellants insist that such rulings constituted fatal error for the reason that the powers conferred by law upon the board of supervisors to establish public highways are those only embodied in sections of the Political Code numbered 2681 to 2698, inclusive, which procedure therein prescribed is designated the "viewer" method and not infrequently adopted by counties in acquiring lands for highways; hence the resolutions of the board of supervisors authorizing the condemnation suits were not sufficient to confer jurisdiction upon the trial court, from which fact it follows that all proceedings had pursuant to such resolutions were void, including the commencement of the actions and the judgments and orders appealed from. It is unnecessary to enter upon an extended discussion of appellants' voluminous brief and argument in support of this point. Suffice it to say the identical question, involved in the case of *Adamson v. County of Los Angeles*, reported in 198 Pac. 52, was decided adversely to appellants by the District Court of Appeal for the first district, and a transfer of the case denied by the Supreme Court. In that action *Adamson*, as a taxpayer, set forth in his complaint the proceedings had and taken by the board of supervisors in the acquisition of the property in question, and, insisting the entire proceedings for condemning the same were unauthorized and void, sought to have the county enjoined from proceeding with construction work in the "Main Road" case. In deciding the case the court said:

"The provisions of article 6 of chapter 2 of title 6 of the Political Code, comprising sections 2681 to 2698 thereof, do not purport to be exclusive, and may not be held to be so, in view of the express grant of power embodied in subdivision 4 of section 2643 above quoted, and of the even more comprehensive enumeration of the general permanent powers of boards of supervisors contained in section 4041 of the Political Code by which such boards are expressly authorized 'to acquire and take by purchase, condemnation, or otherwise land for the uses and purposes of public roads, highways and so forth.'"

The contention of appellant in the *Adamson* Case was identical with that here urged, the argument of appellant there was identical with the argument made in the instant cases, and the adverse decision of the court

in that case must be deemed determinative of the same question presented in these appeals.

[2] Another alleged erroneous ruling upon which appellants claim a reversal is that the court, upon defendants' motion for a new trial, denied it upon terms, the effect of which was an exercise by the court of the functions of the jury, by reason of which defendants were deprived of the constitutional right of having a vital element of damage determined by the jury. It appears that, among other things, the jury found it would require 29 miles of fencing to fence the Rindge Company's land along the roadway, and that the cost per mile would be \$650, aggregating the sum of \$18,850. On motion for new trial one of the specifications of error was that the jury improperly determined the number of miles of fencing which would be required, and it being made to appear to the court that, instead of 29 miles, as found by the jury, it would require 31½ miles, the cost of which would be \$1,625 more than that found by the jury, the court, as a condition of its order denying the motion for a new trial, made an order requiring that plaintiff consent to the increase in the judgment, whereupon counsel for plaintiff filed a written stipulation consenting to such increase in the amount of defendants' compensation, and thereupon the court made its order denying the motion for new trial. Upon the same contention, based upon the same facts and supported by the same argument made by the same attorneys, the court in the *Adamson* Case, supra, held that in an action by a county for the condemnation of land for a public highway the county counsel, as attorney representing the county, has authority on a motion for a new trial to consent to an order increasing the amount of compensation awarded to the defendant by the verdict of the jury due to an error in computing the amount of required fencing of defendant's land along the roadway.

In support of its case plaintiff offered in evidence the resolution, copy of which is hereinbefore set out, together with a minute entry of the board, showing that it was adopted by a vote of more than two-thirds of the members thereof. Thereupon plaintiff rested, and defendants moved for a nonsuit. The motion was denied, and the ruling is assigned as error.

[3-5] Section 1241, Code of Civil Procedure, provides that before property can be taken by condemnation it must appear:

"1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use; provided, when the legislative body of a county * * * shall by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, * * * by such coun-

ty * * * of any * * * public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed * * * public improvement; (b) that such property is necessary therefor, and (c) that such proposed * * * public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

Since the resolution declaring the land necessary for the proposed highway was adopted by a two-thirds vote of the members of the board of supervisors, it must, as provided by the statute, be accepted as conclusive evidence of the necessity for taking the property, unless, as claimed by appellants, that as so construed it is unconstitutional. This contention is based upon the claim that the determination of the facts so found by the resolution were in their nature judicial, and since the action of the board in adopting the resolution was had *ex parte* and without notice or hearing given to appellants, the effect of the judgment based thereon was to deprive them of their property without due process of law. That the purpose for which the property was sought to be condemned is a public use admits of no question. Section 1238, Code Civ. Proc. When the use is public, the necessity of appropriating any particular property therefor is not a subject of judicial cognizance, but one which appertains to the legislative branch of the government, and the right to so appropriate may be exercised by the state or such subordinate bodies to which by legislative grant the power is intrusted. See *Lewis on Eminent Domain* (3d Ed.) §§ 369, 595, 596; *Cooley on Constitutional Limitations*, p. 777; *Secombe v. Railroad Co.*, 90 U. S. (23 Wall.) 108, 23 L. Ed. 67; *Miss., etc., Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Lamb v. Schottler*, 54 Cal. 319; *Wulzen v. Board of Supervisors*, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; and *People v. Smith*, 21 N. Y. 595; all of which are authorities in support of the proposition that, in the absence of constitutional provisions so requiring it—and there are none in this state—the Legislature may delegate to the boards of supervisors of the counties of the state the power to determine *ex parte* by resolution, as in the instant cases, the necessity for taking property for public use, and make such resolution conclusive evidence of the facts enumerated in section 1241, Code of Civil Procedure. In *Cooley's Constitutional Limitations*, page 760, it is said that—

"A legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land,' and no further finding or adjudication can be essential, unless the Con-

stitution of the state has expressly required it."

And at page 777 of the same work it is said that, while the question of necessity may be referred to a local tribunal or submitted to a jury to decide upon evidence, "the parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly recognizes and provides for it." *People v. Smith*, supra, is authority for the statement that—

The Legislature "may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall, in its discretion, prescribe."

In the case of *Board of Water Commissioners v. Johnson*, 86 Conn. 151, 84 Atl. 727, 41 L. R. A. (N. S.) 1024, the court said:

"But the respondents urge that they have never had the opportunity to be heard upon the question of necessity, and that for that reason there has not been due process of law. They were not entitled to such opportunity. It is well settled that, as related to the exercise of the power of eminent domain, all questions which are political in their nature and lie within the legislative province may be determined without notice to the owner of the property affected, and * * * the owner is not entitled to a hearing upon it as a matter of right."

In *Wulzen v. Board of Supervisors*, supra, it is said:

"The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question, and not a judicial one. Its determination rests exclusively with the Legislature, or with such subordinate legislative bodies as it may be properly devolved upon, and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern."

Property is held in private ownership subject to the right of the state in its sovereign capacity to take it for public use; the only restriction upon such right being that—

It "shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Section 14, art. 1, Const.

Hence, where the owner of land sought to be condemned by the state for a use declared by law to be a public use is accorded

his constitutional right to compensation for the taking, he cannot question the procedure or instrumentalities which the Legislature has provided as a means for acquiring the property. Its motives or reasons for declaring that it is necessary to take the land are no concern of his. In our opinion, the provision of section 1241, Code of Civil Procedure, making the determination of the board of supervisors of the county conclusive evidence of the necessity for taking the land for a public highway, is not obnoxious to any provision of the state or federal Constitution.

[6, 7] However this may be, and contrary to the views herein expressed, the trial court agreed with defendants' contention that the resolution was not conclusive evidence of the facts so found, but did admit it as a sufficient *prima facie* showing of such facts, and upon this theory denied the motion for nonsuit. Thereupon, and after the denial of their motion, defendants were given the widest latitude in offering a mass of evidence for the purpose of showing there was no necessity for the proposed highway, followed by plaintiff, which, in rebuttal, introduced a vast deal of evidence, likewise touching the question of necessity for the improvement. Indeed, it appears from the voluminous record that no restrictions whatsoever were imposed upon either party in the introduction of evidence touching the question. Under these circumstances, and assuming the court erred in accepting the resolution even as *prima facie* evidence, nevertheless we cannot perceive how defendants were prejudiced by the circumstances, since the testimony which according to appellants' theory, should have been produced during plaintiff's presentation of its case in chief was later in the trial supplied. The error is predicated solely upon the order in which the evidence touching the question was admitted.

"It is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if upon the trial the defect is overcome by evidence subsequently introduced." *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400; *Lowe v. San Francisco, etc., Ry. Co.*, 154 Cal. 573, 98 Pac. 678.

Since both parties were permitted, after the ruling upon the motion, to introduce evidence, without restriction, touching the question of necessity, defendants could in no event have been prejudiced by the ruling.

[8, 9] As a separate defense the defendants May K. Rindge and Rindge Company alleged that all of the property which plaintiff sought to condemn was within the boundaries of the Malibu ranch in Los Angeles county; that while the ranch was owned in severalty by May K. Rindge and the

Rindge Company, it was, and had been for more than 20 years, with the knowledge of plaintiff, operated as a single ranch under one management and control; that the westerly end of said proposed highway terminates at and upon the boundary line between Los Angeles county and Ventura county upon the Malibu ranch, which, as owned by defendants, extends into Ventura county for a distance of ——— miles, all of which is managed, operated, and controlled by said defendants with the lands of said ranch so located in Los Angeles county; that there is no public road of any kind or character whatever within — miles of the Ventura county end of said ranch, and the only means of egress and ingress to the westerly terminus of said proposed road is by private trails and ways; that said proposed road or highway, if condemned, would be located wholly and solely upon that part of the Malibu ranch situated in Los Angeles county, and would end and terminate upon private property of the Rindge Company at the Ventura county line, and as constructed would give access wholly and solely to the private ranch property of defendants May K. Rindge and Rindge Company, and could not furnish any way of necessity or convenience to the general public; that the owners of said ranch have no need or desire for a public road thereon, which, if constructed, would be a constant menace and damage to their ranch property; by reason of which facts it is alleged the taking of said property for the purpose contemplated would be without necessity of any kind or right. Upon the grounds and for the reason that all of the matter so alleged as a separate defense was irrelevant, immaterial, surplusage, and conclusions of law, plaintiff moved to strike the same from the answer. This motion was granted, and appellants assign the ruling as error. Counsel for appellants insist the special defense so pleaded was upon the theory that an isolated road within the boundaries of what is practically one property and not desired by the owners thereof, and which could afford no real service to any part of the public as a road, could not possibly be a public necessity for which condemnation would lie. While this contention is fully answered by the fact that the resolution was conclusive evidence of the taking being necessary, nevertheless, conceding such theory warranted by the alleged facts, it appears that every material issue tendered by the so-called separate defense was not only raised by the complaint and the answers thereto, but that in the trial thereof defendant, without objection or restriction, was accorded every opportunity, of which it availed itself, in offering evidence touching every matter contained in the pleading so stricken out by order of the court. There was no error

in the ruling, but, conceding as much, it is impossible to perceive how defendants, under the circumstances, could have suffered any prejudice by reason thereof.

It appears that while the eastern terminus of the main road connected with a public highway, the western terminus thereof was at the boundary line separating Los Angeles county from Ventura county, at which point it connected with no road extending into or connecting with roads in said last-named county, and that the Alisos canyon road, likewise extending from the proposed main road to the boundary line common to the Malibu ranch and the lands of one Decker, was not connected with a highway; and, basing their contention upon these facts, appellants insist that the board of supervisors had no power to lay out highways terminating at county lines or points on private lands which did not connect with or intersect other highways affording means of continuous travel. There is no merit in the contention. No such restrictions upon the power of counties to establish highways are imposed by statute, and to hold that a county could not condemn lands for a highway to the line of another county unless there existed an established highway in such latter county with which to connect its proposed road would obviously lead to embarrassment and difficulty in establishing highways from one county to another. *Rice v. Rindge*, 53 N. H. 530.

The use for which the property was sought to be condemned is declared by section 1239, Code of Civil Procedure, to be a public use. The resolution adopted by a vote of two-thirds of the members of the board of supervisors not only vested the court with jurisdiction of the proceedings for condemnation, but when received in evidence the finding and determination of the board as therein expressed, to the effect that the taking of the parcel of land described in the complaint was necessary for such public use and the proposed improvement located in the manner most compatible with the greatest public good and least private injury, was conclusive evidence of such facts; hence, while not prejudicial, any evidence touching such issue of necessity or hearings had before the board of supervisors other than the resolution was immaterial. In no event, and from whatever angle the facts are viewed, are we able to perceive how defendants' substantial rights were prejudiced by any ruling of the court during the trial.

The judgments and orders are affirmed.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 796

**LOS ANGELES COUNTY v. RINDGE CO.
et al. (Civ. 3261.)**

(District Court of Appeal, Second District, Division 1, California. June 11, 1921.)

Eminent domain —244—Final judgment of condemnation of land for highway justifies possession by public.

Under Code Civ. Proc. § 1254, it is proper for the court, after final judgment of condemnation, to make an order allowing the county to take possession of land desired for the construction of a highway.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action of eminent domain by the County of Los Angeles against the Rindge Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 174 Cal. 743, 164 Pac. 633.

Anderson & Anderson and Nathan Newby, all of Los Angeles, for appellants.

A. J. Hill, County Counsel, and Paul Valle, Chief Deputy County Counsel, both of Los Angeles, for respondent.

SHAW, J. In a proceeding against defendants for the condemnation of a strip of land for use as a highway, the plaintiff had an interlocutory judgment, followed by a final order and judgment condemning the property. Thereafter, under and in accordance with the provisions of section 1254, Code of Civil Procedure, the court made an order under and by virtue of which plaintiff was authorized to take immediate possession and use of the property, from which order defendants have appealed.

In the case of *Adamson v. County of Los Angeles*, reported in 198 Pac. 52, the plaintiff therein, alleging the order was void, sought to have the county enjoined from the prosecution of work in the construction of the road. From an adverse judgment rendered by the superior court, Adamson appealed. The Court of Appeal held the order was valid, and that no ground existed for the attack made thereon. The determination of the court there had must be deemed decisive of the question. Upon the authority of the decision in that case and what is said by this court in an opinion this day filed in *County of Los Angeles v. Rindge Co. et al.* (Civil No. 3533), 200 Pac. 27, the order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 337

STAFFORD v. HILL et ux. (Civ. 3602.)

(District Court of Appeal, Second District, Division 1, California. June 28, 1921. Hearing Denied by Supreme Court Aug. 25, 1921.)

1. Contracts ☞71(2)—Extension of time of payment is valuable consideration for new promise.

An extension of time granted for payment of an existing obligation is a valuable consideration for a new promise.

2. Husband and wife ☞159—Wife's signature to trade acceptance for goods purchased by husband not without consideration.

Where an open account for goods sold was due subject only to the vendor's promise that he would take acceptances payable at such future dates as should be agreed upon, and a large part of the goods were furnished with the additional understanding that the purchaser would procure his wife's signature to the acceptances, her signature thereto was not without consideration, since, if it had not been furnished, the vendor would have been entitled to demand immediate payment of the account.

3. Bills and notes ☞1 — Trade acceptances within rules governing bills of exchange.

There is nothing in Federal Reserve Act, § 13, or in the regulations made thereunder by the Federal Reserve Board, changing the character of trade acceptance as bills of exchange, and they are within the rules, under Civ. Code, §§ 3089 and 3219, that a draft may be signed by the acceptor before the name of the drawer is filled in, that a drawer may be any one whom the acceptor may accept as such, and that a negotiable instrument may be drawn payable to the order of a payee who is not a maker, drawer, or drawee.

4. Husband and wife ☞159—Wife's guaranty not obtained by fraud because of her misunderstanding of the effect.

A wife's guaranty of trade acceptances executed by her husband was not obtained by means of fraudulent representations, though she believed that the placing of her signature on the back of the acceptances was a mere formality, required of her as the acceptor's wife and because of her interest in the community, where the party taking the acceptances made no such representations to her and had no part in the conversations by which she was induced by her husband to give him the use of her name.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. C. Stafford against Edwin F. Hill and wife. From a judgment in favor of the defendant Frances B. Hill, plaintiff appeals. Affirmed in part, and reversed in part.

J. Vincent Hannon, of Los Angeles, for appellant.

Herbert Cutler Brown, of Los Angeles, for respondents.

CONREY, P. J. In this action the complaint states three causes of action separately on three several bills of exchange, and a fourth cause of action on an account for merchandise sold by the plaintiff to the defendants. By reason of bankruptcy proceedings pending against the defendant Edwin F. Hill, prosecution of the action against him was stayed, and the case proceeded to trial to determine the liability of defendant Frances B. Hill. Judgment having been entered in her favor, the plaintiff appeals therefrom.

The defendants are husband and wife. The complaint alleged that at all times mentioned therein the defendants were associated together and engaged in the dairy business, conducting said business under the fictitious name of "Arden Dairy, Certified." Upon sufficient evidence the court found that Mrs. Hill was not interested or associated in the said dairy business; that her only relation thereto was that which a wife ordinarily has in the business affairs of her husband; and that the merchandise sold and delivered, as set forth in the findings, was sold and delivered to the defendant Edwin F. Hill only. The goods sold and delivered which are represented in the open account set forth in the fourth cause of action were so sold and delivered between the 18th day of November and the 6th day of December, 1918. The defendant Frances B. Hill never received any of said goods, and never at any time agreed to pay therefor. The judgment in her favor, so far as that cause of action is concerned, is fully justified.

Prior to November, 1918, the plaintiff, who was then engaged in the hay and grain business, was selling to Edwin F. Hill, and delivering from time to time at the Arden Dairy, hay and grain supplies. By agreement between them, the account was settled from time to time by agreed balances, for which accepted bills of exchange were executed by Hill, payable at such future times as were then mutually agreed upon between them. These were in the form known as "trade acceptances." On or about the 6th day of November there were two outstanding acceptances which had been issued in the early part of October, each for the sum of \$1,088.81, not then due, together with an outstanding open account for goods delivered. Thereupon, and at that time, it was agreed between the plaintiff and Hill that Hill should have his wife sign the future trade acceptances with him. Mrs. Hill was not present at the making of this agreement, nor was the same made known to her. This agreement having been thus made, the plaintiff continued to furnish merchandise to Hill, so that on November 23, 1918, there was owing from Hill on the open account the sum of \$2,594.82 for goods furnished from the 30th day of October to the 17th day of November.

At that time the plaintiff presented to Hill a statement of this account, together with two unsigned trade acceptances, each dated November 23, 1918, each for the sum of \$1,297.42. The second and third counts of the complaint are based upon these two acceptances. One of these was made due on December 20, 1918, and the other on January 5, 1919. In both of these the name of the drawer was left blank. In each of them, in the space provided for the name or names of the drawee, were typewritten the words "Arden Dairy Cert.," and, underneath, the words, "Edwin F. Hill—Frances B. Hill." Hill having signed these bills as acceptor, they were also signed, at his request, by his wife as acceptor. Hill did not explain to Mrs. Hill the intent or meaning of her signature, or discuss the matter with her other than to ask for her signature. Each bill was in the form of a draft, in which were written the words, "The obligation of the acceptor arises out of the purchase of goods from the drawer." At the top of each paper were the words, "Trade Acceptance." After these acceptances were delivered to the plaintiff, he wrote on one of them his own name as drawer, and caused the name of "Nicholls-Loomis Co.—J. E. Loomis, Sec.," to be placed on the other bill as drawer thereof. This was done by the secretary of that company, to which the plaintiff was then indebted. Thereafter the Nicholls-Loomis Company assigned and transferred said acceptance to the plaintiff. The Nicholls-Loomis Company had not, in fact, sold any merchandise to Hill, but had only made sales to the plaintiff. The obligation evidenced by said acceptance arose out of merchandise furnished by plaintiff alone to Hill. Frances B. Hill did not at any time purchase goods or merchandise from the Nicholls-Loomis Company, or owe it any money (unless she became indebted by reason of her signature to said acceptance). The placing on said acceptance of the name or signature of Nicholls-Loomis Company as the drawer thereof was without the knowledge of defendants, or either of them. The plaintiff was not present when defendant Frances B. Hill wrote her name across the face of said acceptances of November 23, 1918, nor at the interview between defendants concerning the same. It was found by the court—

"That defendant had never, before the placing of her signature upon the face of the said two acceptances of date November 23, 1918, signed any notes or bills of exchange or commercial paper for or with her husband, save on a few occasions when she had signed notes secured by mortgages; that she was not familiar with banking or commercial usages; that she believed that the placing of her signature upon the trade acceptances was a matter of formality required of her as the wife of defendant Edwin F. Hill, because of her interest in the community property; that she did not at any

time know or believe that she might be binding or affecting her separate estate."

The court further found:

"That the principal, if not the sole, purpose of plaintiff in requesting that these and the other trade acceptances be given was that the open accounts might be placed in negotiable form for discount at his bank or banks; that the consideration for the two trade acceptances dated November 23, 1918, was the goods delivered and the services rendered by plaintiff between the 30th day of October, 1918, and the 18th day of November, 1918, as set forth in the statement rendered defendant Edwin F. Hill on the 23d day of November, 1918; that it does not appear that any receipt was ever given by plaintiff for the payment in full or in part of said open account, nor was the said statement of account or bill therefor marked as paid; that the two trade acceptances of date November 23, 1918, were a transfer of the form of the open account, the total amount of which they together covered, and that no new or additional consideration was given therefor."

Upon these facts the court found that there was no consideration for the signature of Mrs. Hill upon these acceptances, and that the plaintiff was not entitled to recover judgment against her thereupon, notwithstanding the fact that none of the amounts sued for have been paid.

[1, 2] The statement in the findings of fact, and in the conclusions of law, that no new or additional consideration was given for these acceptances is an incorrect conclusion, drawn by the court from the other facts found. An extension of time granted for payment of an existing obligation is a valuable consideration for the new promise. Here the goods were sold upon an open account, which had become due subject only to the vendor's promise that he would take acceptances therefor payable at such future dates as should be agreed upon. A large part of the goods had been furnished upon the additional understanding that the purchaser would procure the signature of his wife to those acceptances. Except for the performance of that promise on the part of the vendee, the vendor would not have been under obligation to receive the acceptances, and would have been entitled to demand immediate payment of the account. Under these circumstances it cannot successfully be maintained by respondent that there was no consideration for her signature to those instruments. *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Rohrbacher v. Aitken*, 145 Cal. 485, 489, 78 Pac. 1054; *McDonald v. Randall*, 139 Cal. 246, 256, 72 Pac. 997, 1000. In the case last cited, the court said:

"But if A. and B. had agreed at the time the note was made that a surety should be obtained on the note, the fact that the surety may have signed a week or a month after the delivery of the note would not affect its validity as to him,

if he signed in pursuance of the original agreement."

We are of the opinion that upon the specific facts found—which are well sustained by the evidence—the court was not justified in finding that there was no consideration for the signature of Mrs. Hill, placed by her upon these acceptances, or upon the acceptance next to be discussed.

[3] Counsel for respondent in his argument sought to differentiate these instruments from ordinary bills of exchange by reason of the fact that they were executed in the form of trade acceptances conforming to the requirements of the Federal Reserve Act (39 Stat. 752). The pertinent provisions of that statute are found in section 13 thereof. See Fed. Stats. Ann. (2d Ed.) 1918 Suppl., p. 470. We find nothing, either in that law or in the regulations made thereunder by the Federal Reserve Board, sufficient to change the character of the acceptances as bills of exchange, or to change the obligations arising therefrom, so far as the parties to this action are concerned. There is therefore no merit in the contention of counsel that trade acceptances are not to be governed by the state laws relating to ordinary drafts or bills of exchange, and that they are not within the rule that an ordinary draft may be signed by the acceptor before the name of the drawer is filled in, or that a drawer may be any one whom the acceptor may accept as such. A negotiable instrument may be drawn payable to the order of a payee who is not a maker, drawer, or drawee. The bill may be accepted before it has been signed by the drawer, or while otherwise incomplete. Civ. Code, §§ 3089, 3219.

[4] The first cause of action set out in the complaint arises out of an acceptance dated December 11, 1918, due January 20, 1919, in like form as those heretofore discussed, except that respondent, Frances B. Hill, signed the same on the back thereof as guarantor, instead of signing on the face as an acceptor. The due date was actually written as January 20, 1918, but that was a mutual mistake of the parties; the intended date being January 20, 1919. The circumstances under which this instrument was executed are as follows: On the 11th day of December, 1918, one of the two October acceptances (each for the sum of \$1,088.81) became due, and the other was past due. The plaintiff called at the home of the defendants with these two acceptances, and stated to Hill that he was badly in need of money. Hill replied that he would take up one of these acceptances if plaintiff would extend the time on the other. The plaintiff agreed to this. Mrs. Hill was not present in the room during this conversation, and did not hear the same. Hill gave plaintiff a check for the amount of one of these trade acceptances then due. Thereupon plaintiff handed to Hill a new

blank form of trade acceptance, the blank spaces already partially filled in in typewriting, and Hill entered the date December 11, 1918, as the date thereof, and \$1,101.73 as the amount thereof, and January 20, 1918, as the date of payment. This is the date which the court finds was intended to have been written January 20, 1919, and was the date to which the plaintiff agreed to extend payment of the trade acceptance in lieu of which it was given. Hill thereupon signed the instrument as acceptor. Mrs. Hill was then called into the room, and plaintiff handed to her said new trade acceptance, and requested her to sign the same. As she was about to sign the same across the face of the instrument beneath the signature of her husband, the plaintiff told her she should sign on the back thereof. She replied that she had signed the other trade acceptances across the face. Plaintiff replied that the other signatures were a mistake, and that she should have signed them on the back. Defendant Frances B. Hill, being then greatly worried over the condition of her husband who was ill and in bed, and being anxious that he be not further disturbed or annoyed, signed the same on the back thereof at the place indicated by the plaintiff, and under words printed or stamped thereon, which stated that she guaranteed payment thereof. Hill did not and had not agreed that Mrs. Hill was to sign on the back of the instrument as guarantor, or otherwise, and did not know that she had done so until some weeks later. Neither the plaintiff nor Hill explained to Mrs. Hill that in signing her name on the back of this instrument she might be liable as a guarantor, or that she could or would thereby involve or affect her separate estate. Mrs. Hill believed that in placing her name on the back of said instrument she was doing no more than she had done before in placing her name under that of her husband as acceptor on the trade acceptances of November 23, 1918. She believed that the placing of her signature on the back of said trade acceptance was merely a matter of formality, required of her as the wife of Hill and because of her interest in the community. She did not at that know or believe that by so placing her signature on the trade acceptance she was or might be in any manner involving or affecting her separate property or estate. The foregoing statement of facts concerning said instrument of date December 11, 1918, is taken from the findings of fact. The court further found:

"That the said trade acceptance bearing date December 11, 1918, for the principal amount of \$1,101.73, was given by defendant Edwin F. Hill in lieu of a trade acceptance previously given by said defendant Edwin F. Hill to plaintiff, in the amount of \$1,088.81; that the principal sum of the trade acceptance dated December 11, 1918, was made up of the sum of \$1,088.81, being the principal sum of the said

trade acceptance previously given, and the sum of \$12.72, being interest on said last-named sum to December 11, 1918; that the said defendant Frances B. Hill had not signed or placed her signature in any manner upon the said trade acceptance for the principal sum of \$1,088.81, in lieu of which the said trade acceptance of date December 11, 1918, was given, and upon the back of which trade acceptance of date December 11, 1918, said defendant Frances B. Hill had placed her signature; that said trade acceptance of \$1,088.81 was given by defendant Edwin F. Hill to plaintiff in the early part of the month of October, 1918, and represented the agreed value of certain goods delivered and services rendered by plaintiff to defendant Edwin F. Hill prior to the giving thereof, and at the latter's instance and request."

The court further found:

"That plaintiff did not, in order to induce defendant Frances B. Hill to place her signature upon the back of the trade acceptance dated December 11, 1918, as a guarantor thereof, with intent to defraud said defendant or otherwise, advise and represent to her that her signature was required of her solely as the wife of defendant Edwin F. Hill, or solely as a matter of formality to perfect in any way the signature of her husband, but, on the contrary, the only representations made by plaintiff to defendant Frances B. Hill were those hereinbefore set forth."

From the facts thus found, the defense of the respondent Mrs. Hill, based upon her claim that her signature was obtained by means of fraudulent representations made by the plaintiff, is not sustained. The plaintiff was not responsible for her misapprehensions concerning the facts or concerning the legal effect of her signature knowingly placed by her upon these drafts. It is not established that she was incompetent to transact business, or that the plaintiff had any part in the conversations by which Mrs. Hill was by her husband induced to give him the use of her name in these transactions.

There are numerous specifications of insufficiency of the evidence to sustain the findings, but these need not be discussed. For the reasons herein stated, we are satisfied that the findings are insufficient to support the judgment.

The judgment, in so far as it relates to the fourth cause of action, is affirmed. As to all other parts thereof, the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 334

BROWN v. PEPPERDINE et al. (Civ. 3866.)

(District Court of Appeal, First District, Division 1, California. June 28, 1921.)

1. Negligence ☞ 32(1)—Owner owes licensee no duty except to avoid willful injury.

One entering the premises of another as a licensee does so at his own peril and is sub-

ject to the ordinary risks which attach to such premises, and the owner owes him no duty except to abstain from willfully and wantonly injuring him.

2. Negligence ☞ 32(1)—Ordinary care required as to invitee.

To an invitee the persons in control of premises are liable for mere failure to use ordinary care for his safety.

3. Landlord and tenant ☞ 167(8)—One using common entrance in calling upon tenant on business was an invitee.

Where defendants sublet a portion of their place of business to a tenant and used a common entrance to the premises, one using such common entrance to transact business with the tenant was an invitee of both the tenant and the defendants.

4. Landlord and tenant ☞ 167(8)—Sublessor using driveway in common with subtenant liable to person calling on subtenant for injury.

Where defendants sublet a portion of the building occupied by them and retained the right to use a driveway in common with the tenant, they were liable for an injury sustained by a person rightfully visiting the tenant due to the negligent operation of a motortruck on such driveway by their employee.

5. Landlord and tenant ☞ 169(3)—Complaint held to show one calling on defendant's tenant was where he had a right to be.

A complaint alleging that defendants conducted their business in a specified building, that they sublet a portion of the basement to P., that they and P. used a common entrance to the basement, that while plaintiff was entering the basement for the purpose of visiting P. on business as a salesman for his employer, and upon a runway going into such premises, defendant's employee so negligently operated an automobile truck as to collide with plaintiff, sufficiently showed that plaintiff was where he had a right to be and that defendants owed him the duty to exercise proper care for his safety.

Appeal from Supreme Court, City and County of San Francisco; John Hunt, Judge.

Action by W. Charles Brown against George Pepperdine, individually, etc., and another. From a judgment for defendants on demurrer, plaintiff appeals. Reversed.

George Appell, of San Francisco, for appellant.

John F. Sheran and F. A. Jeffers, both of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from a judgment entered in favor of the defendants upon plaintiff's refusal to further amend his complaint after a general demurrer thereto had been sustained.

The amended complaint alleges that the defendants Pepperdine and McCalla were co-partners doing business under the firm name of Western Auto Supply Agency, and as such

copartners conducted their business in San Francisco at No. 283 Golden Gate avenue; that on the 26th day of June, 1919, the plaintiff, being engaged as a salesman in the employ of the California Commerce Corporation, entered the basement of said copartners, which basement was located on the easterly side of Hyde street southerly from No. 283 Golden Gate avenue; that at said time Frank Pedro, an automobile machinist, rented and sublet from the said copartnership a portion of the said basement on Hyde street for and as an automobile repair shop; that the said copartnership and the said Frank Pedro used a common entrance into the said basement from Hyde street; that on said date and while the plaintiff was entering said basement for the purpose of visiting said Frank Pedro on business as a salesman for the California Commerce Corporation, and upon a runway going into said premises, the defendant Thomas H. Prior, an employee of said copartners, so unskillfully and negligently operated an automobile truck that he ran into and collided with the plaintiff, causing him serious physical injuries, to his damage in the sum of \$20,000.

The general demurrer to the amended complaint was sustained by the trial court upon the theory that as to the defendants composing the aforesaid copartnership the plaintiff in entering upon the said premises by the medium of said runway was a mere licensee, such entry not being made upon the invitation of said defendants; and this is the question discussed in the briefs.

[1, 2] If he were a mere licensee the defendants owed him no duty except to abstain from willfully and wantonly injuring him, for when one enters the premises of another as a licensee he does so at his own peril and subject to the ordinary risks which attach to such premises. If, on the other hand, the plaintiff was an invitee, the defendants would be liable to him for their mere failure to use ordinary care for his safety. *Giannini v. Campodonico*, 176 Cal. 548, 169 Pac. 80; *Foley v. Hornung*, 35 Cal. App. 312, 169 Pac. 705.

[3-5] We are of the opinion that the plaintiff, while using the common entrance to the basement to transact business with the tenant of the defendants, was an invitee of both the tenant and the defendants, and that, having been injured while he was such an invitee, the complaint states a cause of action against the defendants. It has been repeatedly held that when a building is let in flats or offices, the hallways, entrances, and stairways not being demised to the tenants but used in common by all, the landlord owes a duty to those visiting the premises to use ordinary care to avoid injuring them. 3 *Shearman & Redfield on Neg.* (6th Ed.) § 710; 1 *Taylor's Landlord*

and Tenant, § 175a. So here, the defendants having retained the right to use the driveway in common with tenant, they are liable for any injury sustained by persons rightfully visiting such tenant due to their ordinary negligence. While the allegations of the complaint are not as clear as might be desired, we think it sufficiently appears that the plaintiff was where he had a right to be, and that the defendants owed him the duty to exercise proper care for his safety.

Judgment reversed.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 279

FLINT v. CONNER. (Civ. 3539.)

(District Court of Appeal, Second District, Division 2, California. June 18, 1921.)

1. Vendor and purchaser ⇨296—Vendee in possession cannot repudiate contract and retain possession.

A vendee in possession of land cannot repudiate his contract of purchase and at the same time hold possession under and by virtue of it; such a repudiated contract being no protection to the vendee in possession against the vendor's legal title.

2. Ejectment ⇨26(2)—Defendant, to prevent recovery, must make out complete equitable title and right to possession.

When plaintiff in an action of ejectment is the owner of the legal title to the property, and defendant relies on an equitable defense, he must, in order to prevent recovery, make out a complete equitable title and the right of possession thereunder.

3. Vendor and purchaser ⇨189—Vendee estopped from questioning ownership of vendor.

The vendee of property, who took possession claiming under the vendor and in subordination to his title, is estopped from questioning the vendor's ownership.

4. Pleading ⇨406(8)—Objection of misjoinder not properly taken to complaint by demurrer waived.

An objection that several causes of action have been improperly united or are not separately stated is ground for demurrer under Code Civ. Proc. § 430, subd. 5, and if the complaint appears to be demurrable upon such ground, and no objection is taken by demurrer, the objection is waived under section 434.

5. Appeal and error ⇨873(2)—Order denying motion to recall writ of execution not reviewed on appeal from judgment.

Order denying defendant appellant's motion to recall writ of execution, a special order made after judgment, was an order appealable under Code Civ. Proc. § 963, subd. 2, and, no appeal having been taken from it, the appellate court, on appeal from the judgment, is without jurisdiction to consider the objec-

tion that the lower court improperly denied appellant's motion to recall the writ of execution.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Fred W. Flint, Jr., against W. J. Conner. From judgment for plaintiff, defendant appeals. Affirmed.

Howard Prowse, of Los Angeles, for appellant.

Donald Barker, of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondent.

FINLAYSON, P. J. This is an action to recover possession of a lot of land, with the dwelling house thereon, and certain personal property, consisting of household furniture. From a judgment in favor of plaintiff, defendant appeals.

Plaintiff and defendant entered into an oral agreement whereby the former agreed to sell, and the latter agreed to buy, the property, real and personal, for the sum of \$17,250. Pursuant to such oral agreement, plaintiff and wife signed two instruments; one purporting to be a deed to the lot and the other a bill of sale of the personal property. Neither instrument named any grantee or purchaser. On June 4, 1919, plaintiff delivered the instruments to the Title Insurance & Trust Company of Los Angeles as escrow holder, at the same time filing written escrow instructions authorizing the escrow holder to deliver both instruments "to parties in interest or their representatives, upon payment to you, within 20 days from date hereof, for my account, the sum of \$17,250." On July 2, 1919, the following, over plaintiff's signature, was written at the bottom of the original escrow instructions: "The time limit of this escrow is hereby extended to and including July 17, 1919." No grantee or purchaser is described by name in the escrow instructions. The only words in the writings signed by plaintiff to which resort might possibly be had to identify the intended grantee or purchaser are the words of the escrow instructions "parties in interest or their representatives." We have serious doubt as to the sufficiency of these words to meet the requirements of the statute of frauds. In order to ascertain who are the "parties in interest," it would be necessary to receive oral evidence as to which there might be a possible conflict. In *Potter v. Duffield*, L. R. 18 Eq. 4, the Master of the Rolls, speaking of a memorandum that described the seller as "vendor," said:

"If you could go into evidence as to the person who is described as 'vendor,' the answer would be that Polly was that person. But that is exactly what the act says shall not be decided by parol evidence."

However, it is not necessary for us to decide whether, in the instant case, there was a valid contract under the statute of frauds. For if, as we shall assume, the writings do satisfy all the requirements of the statute, nevertheless, for reasons presently to be given, defendant is not entitled to withhold possession from plaintiff.

Shortly after the oral agreement to sell, plaintiff caused the key to the premises to be delivered to defendant, who thereupon entered into possession. Defendant testified that during the oral negotiations he asked plaintiff for immediate possession and that plaintiff agreed thereto. Plaintiff's version of what was said during the negotiations leaves it doubtful whether the delivery of possession to defendant prior to payment of the purchase price was regarded by either as any part of the consideration moving from plaintiff to defendant for the agreed purchase money. But, be that as it may, we think that, for reasons to be stated, plaintiff was entitled to recover the property even if the contract did give defendant the right of possession prior to the time when the deed was to be delivered to him upon payment of the purchase price.

According to the testimony adduced by plaintiff, defendant promised unconditionally to pay the \$17,250 within 20 days from June 4, 1919, and nothing was said about the source whence defendant should obtain the money. Defendant, on the other hand, testified that he told plaintiff that he had, or expected to have, some money in escrow with the Title Insurance & Trust Company, and that from that source he would get the purchase money for the lot and furniture and thus pay plaintiff. He testified that he told the escrow holder's agent, a Mr. Geller, in plaintiff's presence, that "I am paying a certain amount of money, \$17,250, which was to be paid out of funds coming under my control in this escrow"—referring to an escrow to which plaintiff was not a party. It thus will appear that, according to defendant's theory of the case, his only obligation was to pay the purchase price out of a particular fund, namely, the money that he expected would come under his control in a certain escrow, and which thus would be available for the payment of the purchase money. According to the uncontradicted evidence of Geller, no fund was ever in escrow available for the payment of the purchase money. Geller, who handled the escrow as an employee of the Title Insurance & Trust Company, testified:

"There were never any moneys deposited with the Title Insurance & Trust Company in connection with this escrow which were paid over to Mr. Flint or to his account, nor were there any funds available in this escrow for that purpose."

Plaintiff has never received from defendant a sou marqué, or any consideration of any kind whatever.

On September 2, 1919, which was two weeks prior to the commencement of the action, plaintiff served on defendant a written notice and demand, whereby he notified defendant that, by reason of the latter's failure to comply with the conditions of the contract, plaintiff had withdrawn the instructions from escrow; that defendant's opportunity to acquire title to the property by compliance with the conditions of the escrow instructions had long since been forfeited; and that, by the withdrawal of the escrow instructions, plaintiff had terminated whatever rights defendant might have had to pay the purchase price of the property and acquire title thereto. By this same instrument, plaintiff demanded that defendant quit and deliver up the possession of the property, and notified defendant that if he failed to do so within three days action would be commenced to recover possession.

Appellant, though he has paid no part of the agreed purchase price, and doubtless never will be able to pay it from the source which he claims was to be the sole source whence he was to acquire the money, nevertheless claims the right to remain in possession of respondent's property. His position really is that, under his view of the contract, he may indefinitely keep possession of the property while refusing to make payment of the purchase money. It would be a woeful injustice if he could do this, and we do not think the law sanctions such a result. Appellant's theory seems to be substantially this: The contract gives him the right of possession pending the time when the purchase money should be paid and the deed delivered; time was not made of the essence of the contract; therefore a mere failure to pay the purchase price when due does not entitle his vendor to a recovery of possession. The authorities are not agreed as to whether a mere failure to pay, without notice to quit or demand of possession, will sustain the action. See *Browning v. Estes*, 3 Tex. 462, 49 Am. Dec. 760. It is, however, thoroughly established in the jurisdictions where a notice to quit is necessary that a failure to pay within a reasonable time after such notice entitles the vendor to sue for the recovery of possession. In *Fears v. Merrill*, 9 Ark. 559, 50 Am. Dec. 226, the court said that—

"A vendor, who executes a bond for title to his vendee, upon the payment of the purchase money at a future day, and puts him into possession, may, if the money is not paid when due, by first giving to the vendee reasonable notice to quit, avoid his contract, and maintain an action of ejectment for the land."

[1] But it is not necessary to decide the case upon the theory that there has been a mere failure to pay the purchase money, and

appellant errs when he assumes that he has done no more than merely fail to pay the purchase money as and when it fell due. If, as testified by respondent, as found by the court, and as indicated by respondent's written escrow instructions, appellant's contract was an unconditional agreement to pay the full amount of \$17,250 within 20 days from June 4, 1919, or within the subsequently granted extension of time to July 17, 1919, then, instead of merely failing to pay, appellant has refused to pay. For the evidence shows that, though importuned to pay the purchase price after the expiration of the time granted by respondent in his escrow instructions, appellant refused to do so save out of a phantom fund that never has assumed form or shape and which he must have known ever will be a thing of unsubstantiality. In short, appellant, as shown by his answer, as well as by the evidence in the case, has utterly repudiated the oral agreement which respondent testified was the contract that was entered into and which the court found was the contract actually made by the parties.

"A vendee in possession of land cannot repudiate his contract of purchase and at the same time hold the possession under and by virtue of it. A repudiated contract is no protection to an intending vendee in possession against the legal title." *Hicks v. Lovell*, 64 Cal. 18, 27 Pac. 942, 943 (49 Am. Rep. 679).

See, also, *Gaven v. Hagen*, 15 Cal. 208; *Stratton v. California Land, etc., Co.*, 86 Cal. 364, 24 Pac. 1065; *Gates v. McLean*, 70 Cal. 49, 11 Pac. 489; *Crane v. Ferrier, etc., Co.*, 164 Cal. 678, 130 Pac. 429; *Gervaise v. Brookins*, 156 Cal. 106, 107, 103 Pac. 329; *Burnett v. Caldwell*, 9 Wall. 290, 19 L. Ed. 712.

If the contract were as testified to by appellant, the result would be the same; for it is apparent from the testimony given by the witness Geller that there is no likelihood that any money will ever be in escrow available for payment of the purchase price of respondent's property. If Geller's testimony be believed (and in support of the judgment we must assume that the trial court accepted it as true), then there has been a total failure of consideration, and respondent therefore was entitled to rescind his contract to sell. This he did when he served the written demand and notice on appellant two weeks before commencing the action.

[2] When the plaintiff in an action of ejectment is the owner of the legal title to the property, and the defendant relies upon an equitable defense, he must, in order to prevent a recovery, make out a complete equitable title and the right of possession thereunder. *Wallace v. Maples*, 79 Cal. 433, 21 Pac. 860. Appellant has not alleged compliance with the terms of the contract which the court found was the one made by the parties, nor even a willingness to perform the stipulations of that contract. If, contrary to the

assumption that we are indulging for the purposes of this decision, the contract be void under the statute of frauds, it is possible, nevertheless, that, having been put in possession of the land, equity would have granted appellant a specific performance had he filed a suitable cross-complaint. But he has neither averred a tender of the purchase money nor offered to pay it. The legal title is in respondent, and appellant's defense is an alleged equity arising out of a contract to purchase. In no event can he be heard to assert this defense until he shall have offered to perform. In *Hicks v. Lovell*, supra, the court says:

"One who appeals to a court of equity to defend him against the legal title to land of which he is in possession must do equity by paying the price which he agreed to pay."

Not only has appellant not offered to perform, but he even affects to rely upon circumstances which, he claims, have relieved him from any obligation to perform, unless it be at the end of some indefinite duration of time and upon the happening of an uncertain and improbable event which, according to the terms of the contract as found by the court, was never within the contemplation of the parties, or, at any rate, was never contemplated by respondent. Thus does appellant hope to place himself in the grossly inequitable position of claiming both the land and the price. Courts will not countenance a position at once so gross and so at variance with fair dealing.

[3] There is no merit in appellant's contention that the finding that respondent is the owner of the property is not supported by the evidence. Having entered into possession, claiming under respondent and in subordination to his title, appellant is estopped from questioning respondent's ownership. In *Hoen v. Simmons*, 1 Cal. 119, 52 Am. Dec. 291, an action by the vendor of land against the vendee for possession, the court says:

"The defendants, having entered into possession, claiming under the plaintiff and in subordination to his title, are estopped from questioning it."

See *Gervaise v. Brookins*, supra.

[4] It is claimed that the complaint improperly joins a cause of action for the recovery of real property with one for the recovery of personalty. It is too late to urge that objection. An objection that several causes of action have been improperly united, or are not separately stated, is ground for demurrer (Code Civ. Proc. § 430, subd. 5); and if the complaint appears to be demurrable upon this ground, and no objection be taken by demurrer, the objection is waived (section 434).

[5] It is urged that the lower court improperly denied appellant's motion to recall the writ of execution. The order complained of,

a special order made after judgment, was an appealable order. Code Civ. Proc. § 963, subd. 2. No appeal has been taken from that order. This court therefore is without jurisdiction to consider the objection.

Judgment affirmed.

We concur: WORKS, J.; CRAIG, J.

53 Cal. App. 300

CARLSON v. LEONARD. (Civ. 3733.)

(District Court of Appeal, First District, Division 1, California. June 23, 1921.)

1. Appeal and error ⇐1008(1)—Finding as to whether negligence exists not disturbed.

The conclusion of the trial judge as to whether a given state of facts does or does not amount to negligence as a matter of law will not be disturbed on appeal, in absence of a clear showing of abuse of discretion.

2. Highways ⇐174—Facts held not to show applicability of doctrine of last clear chance.

Where boy, on seeing automobile approaching him, changed his mind twice as to which side of the road he would attempt to go, the last time there not being time for the driver to avoid striking the boy, but there being no danger of collision before that time, the doctrine of last clear chance is not applicable.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Harry Carlson, a minor, by H. A. Carlson, guardian ad litem, against H. B. Leonard. Judgment for defendant, and plaintiff appeals. Affirmed.

Harry M. McKee, of Fresno, and Vincent Surr, of San Francisco, for appellant.

George Graham, J. R. Fitch, and Everts & Ewing, all of Fresno, for respondent.

RICHARDS, J. The plaintiff, a boy between 13 and 14 years of age, brings this action through his guardian ad litem to recover damages for injuries sustained by him through being struck by an automobile driven by the defendant; the complaint charging the defendant with negligence and carelessness in the conduct of his machine. The answer denied such negligence and alleged that the plaintiff himself through his own negligence was the cause of the collision. The cause was tried by the court without a jury. It made findings of fact against the contention of the plaintiff and in favor of that of the defendant, and rendered judgment accordingly.

The circumstances of the collision were testified to with very little variation between the witnesses, and may be fairly stated to be as follows: The plaintiff and several companions about his own age were walking in

an easterly direction from Fresno to the golf links in the vicinity of that city when they were overtaken by a wagon. With the permission of its driver they climbed upon it, but had not proceeded far when they perceived an automobile truck approaching from the rear, and decided that, as the truck was moving faster than the wagon, they would, if possible, complete their journey upon it. Harry Carlson, the plaintiff, was the first to alight, and proceeded to cross over to the north side of the road. At this moment the defendant, driving his automobile at a speed of from 20 to 25 miles an hour, was approaching from the east, being about 80 or 90 feet distant. The plaintiff did not look in its direction, and may have been unaware of its approach, but two of his companions shouted a warning to him. The defendant, upon perceiving the boy, slowed his machine; but upon the boy reaching the north edge of that part of the road traveled by vehicles, thus leaving space enough for the defendant to pass between him and the wagon, he released his brakes and directed his course accordingly, when Carlson abruptly commenced to retrace his steps. The defendant immediately reapplied his brakes and veered his machine to the right, and would have safely passed the boy had not the latter again suddenly turned and attempted to gain the north side of the road. The defendant again applied his brakes and turned to the left to avoid striking him, but failed in this effort. The machine came to a stop within 5 or 6 feet of the point of collision, having passed partly over the plaintiff, who was taken from a point between the front and rear wheels of the automobile.

[1] Upon this state of facts it is the contention of the appellant that it was the duty of the defendant to bring his automobile to a stop when he first perceived the appellant crossing the road ahead of him, and that, not having done so, he was guilty of negligence, and that, if the defendant was driving too fast to be able to stop before reaching the plaintiff, this also constituted negligence; and the plaintiff accordingly argues that the defendant was thus guilty of negligence as a matter of law entitling the plaintiff to recover. If it can be said that the question of negligence as a matter of law arises under the facts of this case, it is well settled by recent decisions of the Supreme Court and of this court that the conclusion of the trial judge as to whether a given state of facts does or does not amount to negligence as a matter of law will not be disturbed upon appeal, in the absence of a clear showing of abuse of discretion. *Mayne v. San Diego E. R. Co.*, 179 Cal. 173, 175 Pac. 690; *Diamond v. Weyerhauser*, 178 Cal. 540, 174 Pac. 38; *Charves v. S. F. O. T. Rys.*, 186 Pac. 154; *Genta v. Illingworth*, 192 Pac. 1041; *Spring v. Tawa*, 192 Pac. 1051.

[2] It is also suggested by the appellant that the judgment should be reversed for the reason that the defendant, having a last clear chance to avoid injuring the plaintiff, neglected to take advantage of it. We do not think, however, that the facts above narrated make a case to which the principle of law referred to has application. There was no time up to the moment before the injury when the plaintiff was in an obvious position of peril from which he could not extricate himself. It is apparent that had he not changed his mind twice as to the side of the road he would find refuge from the oncoming automobile he would have been out of danger, and his final decision to cross from the south to the north side of the highway was taken too late to give to the defendant a clear chance to avoid striking him.

We think it follows that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 300

SPRING v. McCABE. (Civ. 3632.)

(District Court of Appeal, First District, Division 1, California. June 27, 1921. Hearing Denied by Supreme Court Aug. 25, 1921.)

1. Appeal and error $\S$ 994(3) — Whether plaintiff was impeached held a matter for determination of trial court.

Whether plaintiff, who testified to speed of the auto at the time of the accident, was impeached by the testimony of others that after the accident she stated that she was asleep at the time, and did not know how fast the machine was going, was a matter for determination of the trial court.

2. Negligence $\S$ 22½ — Automobile driver owes guest reasonable care.

An automobile driver is required to use reasonable and ordinary care not to increase the danger to one riding with him by invitation by fast and reckless driving, and if injury to the guest was directly or proximately caused by the driver's negligence, he is liable, in the absence of contributory negligence.

3. Negligence $\S$ 22½ — Exceeding statutory speed limit, negligence as to guest in automobile.

Operating an automobile on a state highway at a speed in excess of the 35 miles per hour expressly limited by Motor Vehicle Act is negligence as to one riding with the driver at his invitation.

4. Appeal and error $\S$ 931(4)—Finding of violation of statute presumed in support of judgment.

In support of the judgment for plaintiff for injury in auto accident, it will be presumed, in view of conflict of evidence on the question, that it was found that defendant was driving in excess of the speed limited by statute.

5. Negligence ☞ 22½ — Speed of automobile may be negligent, though not exceeding statutory limit.

The driver of an automobile may not escape liability for injury to one riding with him at his invitation through overturning of the car, merely because not exceeding the limit of speed fixed by statute, it being enough that he was operating without such control as to speed under the circumstances as a careful and prudent man in the exercise of due care and caution would have had.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Dorothy F. Spring against R. E. McCabe. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant.
J. P. Bernhard, of Fresno, for respondent.

WASTE, P. J. This action was brought by plaintiff to recover damages for injuries, alleged to have been occasioned by reason of the careless and negligent operation of an automobile driven by the defendant, in which plaintiff was riding by invitation, and as a result of which she was severely injured. Defendant denied that he was driving at a reckless rate of speed, or operating his car in a careless manner. The case was tried before the court without a jury. Judgment was entered in favor of plaintiff for \$1,000, from which defendant appeals.

The accident occurred on the morning of December 25th, on the state highway between Madera and Merced. The automobile, driven by the defendant, skidded off the roadway and turned over, crushing the plaintiff under the steering wheel, breaking her collar bone, and inflicting other injuries. The record presents an irreconcilable conflict as to the manner and the rate of speed at which the defendant was operating his car. The plaintiff's testimony was amply sufficient, if believed, to warrant the trial court in finding that the defendant was guilty of negligence in operating his automobile at a rate of speed far in excess of the statutory limitation, and without the control as to speed, under the particular circumstances, required of a careful and prudent man. The plaintiff testified that the defendant was drinking whisky; that he drove his automobile at the rate of 45 miles an hour, once running off the highway; that she was nervous and alarmed, and asked him not to drive so fast; that while it was going at 45 miles an hour the machine turned over. The defendant testified that he was not driving in excess of 25 miles an hour at any time, and denied that the plaintiff at any time during the morning requested him to drive more slowly. He declared that it was a foggy morning; that the highway was slippery at the point of the accident, and that

his automobile skidded without any apparent excuse.

Joseph Foster, a witness for the plaintiff, who arrived at the scene of the accident almost immediately, and while plaintiff was still under the overturned car, testified that the roadway was moist, but not wet, and that the highway at the point where the accident occurred was in good condition. Several witnesses who were familiar with the road at that point testified that it was a dangerous bit of highway, and that a car going at a speed of 20 or 25 miles was as liable to skid as one going at a greater rate of speed. They were also permitted to testify to other accidents of similar nature occurring under similar weather conditions as those described by the defendant as existing at the time of this accident. The defendant, who was an experienced automobile driver, had been over this particular strip of highway many times before, denied that he had any knowledge that it was a slippery or dangerous place.

[1] Appellant sought to impeach the plaintiff's testimony, as to the rate of speed at which the defendant was operating his car at the time of the accident, by the testimony of several other witnesses who testified that, in conversations with them after the accident, she stated that she was asleep at the time, and did not know how fast the defendant was driving. It is also the contention of the appellant that there is evidence tending to show that the action to recover damages was instituted by plaintiff as the result of a family feud, and an intense dislike of the defendant. Whether or not she was impeached by the testimony referred to was a matter for the determination of the trial court. By its judgment it has determined that she was not.

[2-5] In driving his automobile the defendant was required to use a reasonable and ordinary degree of care not to increase the danger to plaintiff by fast and reckless driving. *Blackmore on Automobiles*, § 1219; *Huddy on Automobiles* (1919 Ed.) § 87. If the accident was directly or proximately caused by his negligence, the plaintiff was entitled to recover, for it was not contended that she was guilty of any contributory negligence. *Nichols v. Pac. Elec. Ry. Co.*, 178 Cal. 630, 633, 174 Pac. 319. By the express provision of the Motor Vehicle Act the defendant was limited to a speed of 35 miles per hour in the operation of his automobile. If he operated his machine in violation of such express provision of the law, he was guilty of negligence in so doing. *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 701, 702, 178 Pac. 713. In view of the conflict in the evidence in this behalf, we must assume in favor of the judgment that the court found that at the time of the accident the statute was being violated. Again:

"The operator of a vehicle may not escape liability for a collision by simply saying that he was not exceeding the speed limit established by statute or ordinance when it happened. It may appear (the other party being without fault) that though a defendant was not exceeding the limit of speed prescribed by the ordinance, yet that he was operating his vehicle without such control as to speed under the particular circumstances as a careful and prudent man in the exercise of due care and caution would have had." *Opitz v. Schenck*, 178 Cal. 636, 639, 640, 174 Pac. 40, 41.

In either event plaintiff would be entitled to recover.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

53 Cal. App. 286

BERTHIAUME v. GROOM et al. (Civ. 3855.)

(District Court of Appeal, First District, Division 1, California. June 20, 1921.)

1. Receivers ⇨183—Complaint, in action to recover funds, held not to state cause of action.

A complaint, alleging that defendant was a receiver in a suit against plaintiff, and that as receiver he made a report of certain proceeds, which he was directed to pay to the clerk of court, and that defendant still retains this money paid to him as receiver does not state a cause of action, where there has been no final decision as to the ownership of the funds in the suit in which defendant was appointed receiver, though it also alleges that defendant as receiver received property belonging to plaintiff amounting to the sum sued for.

2. Receivers ⇨146—Party not entitled to recover funds from receiver before determination of ownership.

Though a receiver appointed in a suit against plaintiff made a settlement of his accounts and was directed to pay a specified amount to the clerk, but failed to do so, plaintiff cannot sue him and his sureties therefor, where there has been no final decision as to the ownership of the funds in the suit in which the receiver was appointed.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Henry N. Berthiaume against J. J. Groom and others. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

J. E. Manning, of San Francisco, for appellant.

Frank J. Murphy, Edward A. Cunha, Chas. N. Douglas, John T. Ryan, and E. F. Conlin, all of San Francisco, for respondents.

WASTE, P. J. This is an appeal from a judgment entered after demurrer sustained to plaintiff's second amended complaint without leave to amend. The action is against Groom as principal, and defendants Levy and Flinn, as sureties, on a bond of Groom as receiver, given in August, 1907, in an action between partners, then pending in the superior court of the city and county of San Francisco, wherein Thomas Bonner was plaintiff and Henry Berthiaume, this plaintiff, was defendant. After the bond was given by the receiver the superior court made an order, directing Groom, as receiver, to take possession of the assets of the parties and to sell and dispose of all the effects belonging to the partnership.

[1, 2] It further appears from the allegations of the second amended complaint that in 1916, some nine years after his appointment, Groom rendered a report which, after objections made and considered, the court settled. It charged Groom with \$5,000, the reasonable value of the personal property which came into his possession, credited him with \$2,392.50 as proper disbursements as receiver, and without in any way adjudicating the rights of the parties to the action, the court directed that he forthwith pay to the clerk of the court the balance, \$2,607.50, to await the further order of the court. This order was never complied with, and it is very manifest from a reading of the entire second amended complaint, that this action, sought to be maintained under a general order of the court for that purpose, is brought for the sole purpose of securing a judgment against the receiver and his bondsmen for the exact amount with which he was charged in the settlement of his accounts. The allegations in the complaint to the effect that Groom, as receiver, collected and received goods, moneys, and properties belonging to this plaintiff, amounting in value to the sum of \$2,607.50, and has failed to account therefor to the court or to plaintiff, does not have the effect of stating a cause of action in the face of the other facts alleged. The plaintiff has not shown a right in himself to the sole fund remaining in the hands of the receiver upon the settling of the account. Final disposition of the funds of the receivership does not appear to have been made. No adjudication of the rights of the respective parties in *Bonner v. Berthiaume* has been made. Until some such disposition of the receivership matter has been had, we are unable to comprehend by what right the plaintiff seeks to be subrogated to the entire fund, through the medium of an action against the receiver and his bondsmen.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

53 Cal. App. 361

DRACOVICH v. DRACOVICH. (Civ. 3541.)

(District Court of Appeal, Second District, Division 2, California. June 29, 1921.)

1. Divorce — 150(2)—Finding allegations of complaint are true sufficient.

In an action for divorce, the finding that all the allegations contained in the complaint are true is sufficient finding upon each and every issue arising out of the complaint and the denials in the answer.

2. Divorce — 150(2)—Finding that all allegations of answer false a finding on each issue tendered.

In an action for divorce, the finding that all the allegations contained in defendant husband's answer and cross-complaint, except those alleged in the complaint, are false, is a direct finding on each and every issue tendered by the affirmative allegations in defendant's answer, as well as each and every issue produced by plaintiff's answer to defendant's cross-complaint.

3. Divorce — 152—Judgment not ineffective because incorporated in same document with findings.

Judgment of divorce is not rendered ineffective merely because it and the findings are incorporated in the same document.

4. Divorce — 184(1)—If evidence sufficient to support finding of desertion, it is immaterial that findings of cruelty are unsupported.

In a wife's action for divorce, if there is sufficient evidence to support the trial court's finding of defendant husband's willful desertion of plaintiff wife, it is of no consequence to the propriety of judgment for plaintiff wife that there may not be sufficient evidence to justify the finding of defendant husband's extreme cruelty and willful neglect.

5. Appeal and error — 994(3), 1010(1)—Trial court exclusive judge of credibility of witness or weight of evidence.

The trial court is the exclusive judge of the credibility of the witnesses and the weight of the evidence, and its determination of questions of fact is conclusive on the appellate court, if there is any evidence tending to support its decision.

6. Divorce — 184(6)—Appellate court cannot disturb ruling below on motion to retax costs where affidavits contradicted.

The affidavits that were filed in support of the motion of defendant husband sued for divorce to retax certain items of cost, etc., being contradicted, it is beyond the power of the appellate court to disturb the ruling of the court below.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action for divorce by Gussie Dracovich against Vincent Dracovich. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Heath, of Los Angeles, for appellant.
Frederick Beutel, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action for divorce brought by the wife against the husband upon the grounds of willful desertion, willful neglect, and extreme cruelty. The court entered an interlocutory decree in favor of the plaintiff, from which the defendant appeals.

In his answer, defendant denies the material averments of the complaint respecting the several alleged grounds for divorce, and in a cross-complaint charging plaintiff with willful desertion, he prays that he be granted the divorce. The court adjudged that plaintiff is entitled to the divorce, and that on the expiration of a year from the entry of the interlocutory decree a final judgment be entered dissolving the bonds of matrimony. The court further adjudged that plaintiff have the custody of the minor children; that defendant pay plaintiff for the support and maintenance of the children \$10 per week; and that he pay her \$75 as attorney's fees, and likewise her costs.

The judgment makes no disposition of the community property, nor does it require the husband to pay any alimony. He, therefore, has no ground for complaint respecting either of those matters. His cross-complaint does not pray for a division of the community property, all of which is in his possession, and therefore he is not injured even if the decree does ignore his wife's prayer for such relief.

The findings, which are incorporated in the same document with the interlocutory decree, are as follows:

"The court finds that all of the allegations contained in the complaint are true, and that a divorce ought to be granted as prayed for in said complaint, and that all of the allegations contained in the defendant's answer and cross-complaint, except those alleged in the complaint, are false."

Appellant contends: (1) That the court has not found upon all of the issues raised by the pleadings; (2) that the finding that "all of the allegations contained in the complaint are true" is not justified by the evidence, in that (a) there was no evidence offered in support of the charge of extreme cruelty, (b) defendant had a sufficient excuse for leaving plaintiff, (c) he did not neglect, for a whole year, to provide his wife with the common necessities of life; and (3) that the judgment for attorney's fees and costs was procured by fraud.

[1] The findings are sufficient in form and dispose of every issue in the case. The finding that "all the allegations contained in the complaint are true" is a sufficient finding up-

on each and every issue arising out of the complaint and the denials in the answer. Such a finding has repeatedly been upheld by our Supreme Court. See *Gale v. Bradbury*, 116 Cal. 39, 47 Pac. 778, and *McKelvey v. Waggy*, 157 Cal. 406, 108 Pac. 268.

[2] The finding that "all the allegations contained in defendant's answer and cross-complaint, except those alleged in the complaint, are false" is a direct finding upon each and every issue tendered by the affirmative allegations in defendant's answer, as well as each and every issue produced by plaintiff's answer to defendant's cross-complaint. True, this finding is cast in a somewhat awkward form, but its meaning is clear and unequivocal. The language is equivalent to a finding that all the affirmative averments of the answer and cross-complaint are false, except such averments therein as are likewise found in the complaint. The finding leaves no uncertainty as to what affirmative averments in defendant's answer and cross-complaint the court intended to decide and find to be false. It is not like the findings in those cases where the court found that the allegations of the answer are true "except in so far as they are inconsistent with the allegations of the complaint," or "except in so far as they do not accord with the allegations of the complaint."

Such findings leave uncertain what allegations of the answer the trial court regarded as being "inconsistent" with or not in "accord" with the allegations of the complaint. But there is no such uncertainty here. The finding in the instant case, as we read it, is, in substance, a finding that all the allegations of the answer and all the allegations of the cross-complaint are false, save only such as are identical with corresponding allegations appearing in the complaint, as, for instance, the allegation that the parties are husband and wife, the allegations stating the time and place when and where the marriage was entered into, and the names and ages of the children. A finding that all the affirmative averments in defendant's pleadings are false, excepting such averments as are identical with corresponding allegations in plaintiff's complaint, leaves no uncertainty as to what the court intended to decide, and fully disposes of every issue raised by defendant's affirmative averments.

[3] The judgment is not rendered ineffective merely because it and the findings are incorporated in the same document. *Hopkins v. Warner*, 109 Cal. 139, 41 Pac. 868.

[4] If there is sufficient evidence to support the finding of defendant's willful desertion of plaintiff, it is of no consequence that there may not be sufficient evidence to justify the findings of defendant's extreme cruelty and willful neglect. For in that case the judgment can rest upon the finding of willful desertion. If, therefore, the finding of willful desertion is justified by the evidence, the in-

terlocutory decree must be affirmed. *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564.

[5] The evidence sufficiently establishes plaintiff's charge of desertion. Plaintiff's testimony shows the following: Defendant left his family and the home in which they were residing more than a year before the commencement of the action. When leaving, he said that he was going away, that he and his wife could not get along together, and that it was of no use trying living together. For three months thereafter plaintiff remained in the family residence. During that time the neighbors supplied her with food and wood; she sold, from time to time, parts of the furniture, thereby helping to eke out a bare existence on the proceeds. At the end of the three months she was compelled to go to her mother's home, where she and the children received shelter and some support. Defendant never sent for his wife nor did he ever offer to return and live with her. There was evidence of other witnesses in corroboration of these facts. Defendant sought to show that he did not leave with the intent to desert his wife, and that his conduct was justified. But upon these matters there was a sharp conflict in the testimony, and we therefore cannot say that the evidence is not sufficient to support the charge of willful desertion. The trial court is the exclusive judge of the credibility of the witnesses and the weight of the evidence, and its determination upon questions of fact is conclusive upon this court if there is any evidence tending to support its decision.

Four days after the entry of the interlocutory decree, defendant served and filed a written notice that he would move the court to retax certain items of cost, and also to strike from the decree the provision directing him to pay \$75 to plaintiff as attorney's fees. This motion, supported by the affidavits of defendant, his counsel, and others, was made upon the ground that, shortly prior to the trial, plaintiff and defendant had entered into an oral agreement whereby the latter agreed that he would not oppose the granting of a divorce to his wife on her complaint, and she, in consideration of such promise, agreed to pay her own costs and attorney's fees, and to permit her husband to have the custody and society of the minor children during their school vacations. In an affidavit made and filed by plaintiff's attorney, these charges of fraud and collusion are vigorously and categorically denied. The motion, according to the briefs of both parties on this appeal, was denied by the trial court, although the record before us is wholly silent as to what action was pursued by the court. However, since the parties have argued the point in their briefs upon the hypothesis that defendant's motion was denied, we shall assume that such was the action taken by the trial court.

[6] In denying defendant's motion, the

court thereby gave credence to the affidavit of plaintiff's counsel. And well it might; for the shameless effrontery of the affiants who, in aid of defendant's motion, confessed their participation in an alleged fraudulent scheme to impose upon the court and permit the procurement of a divorce by collusion and chicanery, was alone sufficient to discredit their sworn statements, however solemnly made. The affidavits that were filed in support of the motion being contradicted, it is beyond our power to disturb the ruling of the court below.

"In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established." *Doak v. Bruson*, 152 Cal. 19, 791 Pac. 1001.

Moreover, not only does the record before us fail to show what, if any, action was had on defendant's motion, but there is no appeal from any order denying the motion. Since the motion was made after the entry of the interlocutory decree, there is a question whether an order denying such a motion—a special order made after the entry of judgment—can be reviewed on an appeal from the interlocutory decree. If an interlocutory decree in a divorce action is to be deemed a "final judgment," within the meaning of the provision of subdivision 2 of section 963 of the Code of Civil Procedure, declaring that an appeal may be taken "from any special order made after final judgment," then it would seem that an order denying defendant's motion would be reviewable only on a direct appeal therefrom, and not on an appeal from the interlocutory decree. See *Dooly v. Norton*, 41 Cal. 439; *Empire Co. v. Bonanza Co.*, 67 Cal. 410, 7 Pac. 810; *Yorba v. Dobner*, 90 Cal. 337, 27 Pac. 185. However, it is not necessary to decide this question of jurisdiction, and we refrain from doing so.

Finding no prejudicial error in the record, the judgment appealed from is affirmed.

We concur: WORKS, J.; CRAIG, J.

53 Cal. App. 250

BOWEN v. HICKEY. (Civ. 3610.)

(District Court of Appeal, Second District, Division 1, California. June 17, 1921. Hearing Denied by Supreme Court Aug. 15, 1921.)

1. Public lands §106(1), 108—Decisions by Land Department officials and Secretary of the Interior as to residence conclusive where sustained by evidence.

The court has no power to revise decisions of the officials of the Land Department and the

Secretary of the Interior as to an entryman's nonestablishment of a residence on the land as required by Rev. St. U. S. § 2297 (U. S. Comp. St. § 4552), prior to amendment of 1912, and abandonment thereof, where such decisions are sustained by any evidence.

2. Public lands §108—When Secretary of Interior's finding is conclusive.

The finding of the Secretary of the Interior on appeal in any controversy over conflicting claims to the public land is conclusive as to all questions of fact in the absence of fraud or gross mistake, and is otherwise conclusive unless there has been a clear misapplication of the law.

3. Public lands §35(3) — Substantial residence and good faith by entryman under Reclamation Act necessary.

An entryman under Reclamation Act June 17, 1902 (U. S. Comp. St. §§ 4700-4708), does not acquire or maintain a residence by occasional visits or by going upon the land for the purpose of merely formal compliance with the law, substantial residence and good faith being necessary.

4. Public lands §41—Evidence held to show failure of entryman to establish residence upon land.

Determination of officials of the Land Department that entryman under Reclamation Act June 17, 1902 (U. S. Comp. St. §§ 4700-4708), failed to establish a residence upon the land held justified by the evidence.

5. Public lands §103(1)—Contest of entryman's right need not be decided within the five-year period commencing on date of entry.

Contest of entryman's right to land under Rev. St. U. S. § 2297 (U. S. Comp. St. § 4552), requiring such contest to be initiated before the expiration of five years from the date of entry, need not be decided within such five-year period.

6. Public lands §35(1)—Withdrawal orders held not to relieve entryman from compliance with law as to residence, cultivation, and reclamation.

Order withdrawing land from entry under Reclamation Act, § 3 (U. S. Comp. St. § 4702), did not relieve entryman from the duty of claiming land under section 5 (section 4704), and complying with Homestead Law as to residence and cultivation under Rev. St. U. S. §§ 2289-2291, 2297 (U. S. Comp. St. §§ 4530-4532, 4552), prior to amendment of 1912, where the land officials made a public announcement that the withdrawals of lands were not permanent, but were for the purpose of enabling preliminary investigations to be made as the feasibility of irrigation project.

7. Public lands §103(1)—Regulation of Land Department as to contest not applicable to contest initiated before the regulations took effect.

Regulations of the Land Department as to dismissal of contests did not apply to a contest initiated before the regulations took effect.

8. Public lands §103(1)—Land Department not authorized to suspend right of contest given by statute.

Officials of United States Land Department have no power to prohibit contests of land provided for by statute in the absence of a provision of a statute providing for the suspension of the right of contest.

9. Public lands §125—Plaintiff suing to have patentee declared holder of legal title in trust for plaintiff must recover on strength of own title.

In action to have patentee declared holder of legal title in trust for plaintiff on the ground that plaintiff was vested with the right to have patent issued to him, but was wrongfully prevented from the enjoyment of such right by erroneous decisions made by Land Department officials, the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of that of the defendant.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Theodore Bowen against Seth Hickey. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry M. Willis, Frank C. Prescott, and Prescott & Prescott, all of Los Angeles, for appellant.

F. E. Dunlap and H. F. Bridges, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the defendant.

Plaintiff brought this action in equity to secure a decree determining that the respondent, a patentee invested with legal title to certain lands described in the complaint, held such lands and the title thereto in trust for appellant. The cause of action had for its basis the asserted claim that appellant, having first become vested with the right to have patent issued to him covering the lands in controversy, was wrongfully prevented from the enjoyment of that right through erroneous decisions made by officials of the federal Land Department and the confirmatory decision of the Secretary of the Interior. On April 15, 1903, appellant filed with the district land office his application and affidavit setting forth facts required to be shown in order to perfect a homestead entry. The application was made subject to the provisions of an Act of Congress of June 17, 1902 (32 Stat. 388; Comp. St. Supp. 1907, p. 511 [U. S. Comp. St. §§ 4700-4708]), relating to reclamation of arid and semiarid lands. On March 20, 1908, respondent herein filed with the register of the land office within the district an affidavit of contest conforming to the provisions of section 2297, Revised Statutes (U. S. Comp. St. § 4552), in which affidavit he charged that appellant had failed to establish a residence upon the land, and had abandoned the land for more than six months.

Notice was given and due hearing had in the matter of the contest, and on April 15, 1910, the register and receiver rendered their decision holding that the contest should be sustained and the entry of appellant canceled.

An appeal was taken by appellant, first to the commissioner of the Land Office, and next to the Secretary of the Interior, and the decision of each of these officers was adverse to appellant. In the decision rendered by the Assistant Secretary of the Interior it was stated:

"The General Land Office found that the claimant failed to establish and maintain residence on the land or to make any cultivation of the same, as required by law. That finding is fully sustained by the testimony, and an examination of the records discloses no error in the decision of the General Land Office, and no tenable ground appears upon which a contrary decision could be sustained. The decision appealed from is therefore affirmed."

Under the provisions of the homestead law an entryman, in order to become entitled to patent, is required to make compliance with the conditions as they are expressed in sections 2289-2291, Revised Statutes (Ann. St. [2d Ed.] vol. 8, pp. 543-557 [U. S. Comp. St. §§ 4530-4532]), and in addition thereto reclaim at least one-half of the total irrigable area of his entry for agricultural purposes. One of the requirements of the homestead statutes is that the claimant shall establish a residence upon the land, and that he shall not abandon the land "for more than six months at any time" during the five-year period; otherwise the land shall revert to the government. Section 2297, R. S., prior to amendment of 1912.

[1] In reviewing the question as to the nonestablishment of a residence upon the land and as to the abandonment of the same by appellant, which were considered and determined by officials of the Land Department and by the Secretary of the Interior, the court has no power to revise such decisions where there is found any evidence upon which the determinations therein reached can be sustained.

[2] The finding of the Secretary of the Interior on appeal in any controversy over conflicting claims to the public land is conclusive as to all questions of fact in the absence of fraud or gross mistake, and is otherwise conclusive unless there has been a clear misapplication of the law. In such exceptional cases only may the courts inquire into the matter, and, in equity, where patent has issued, adjudge the title to be in the person having the right thereto. *Le Marchal v. Tegarden*, 175 Fed. 682, 99 C. C. A. 236; *Catholic Bishop v. Gibbon*, 158 U. S. 155, 15 Sup. Ct. 779, 39 L. Ed. 931; *Edwards v. Bodkin*, 249 Fed. 562, 161 C. C. A. 488; *Gage v.*

Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; McLaren v. Fleischer, 181 Cal. 607, 185 Pac. 967.

Considering the case irrespective of certain withdrawal orders which were made under terms of the Reclamation Act, and which give foundation for questions argued herein as to a suspension of the homestead requirements, and also as to the suspension of the right to contest an entry, the evidence showed that appellant went on the land on October 15, 1903, and stayed but one night; that in 1904 he did not go on the land at all; that in 1905 he started to take some material to erect a building on the property, but high water made it difficult for him to get his team there, and that he merely crossed the land, but did not stop. His next visit was in February, 1906, when he spent about three months on the land putting up a shack, 12 by 16 feet in dimensions, made of half-inch board, having two doors, but no floors nor windows. At that time he dug a shallow well, but did no clearing or cultivating. His next visit was for two days in the latter part of November, 1907, and then one night in December, 1907. He was not on the land again until after he had received verbal notice that the contest of respondent had been initiated, whereupon he declared to the contestant that he intended to hold the land, and thereupon went upon it. As was said by the commissioner in his decision:

"Until he (appellant) learned of pending contest proceedings, he did nothing towards establishing genuine residence on the land, but merely attempted to keep up a form of compliance with the letter of the law. While he took great trouble to go to the land, he lost no time in taking equal trouble to go away from it, and his occasional visits were evidently made with no thought of remaining."

[3] And the commissioner very pertinently added:

"It is well settled that residence cannot be acquired or maintained by occasional visits, or by going upon the land for the purpose of merely formal compliance with the law. Substantial residence and good faith are required."

[4] Appellant himself testified that he was a prospector, and had lived at various places, received his mail sometimes in Yuma or Phoenix, Ariz., sometimes in Tucson, and sometimes at Neighbors, the latter being the post office most convenient to the land claimed by him. As the question of residence is a question of fact, in the establishment of which the acts done by claimant, and his intention in connection therewith, are all to be considered, it appears that the decisions of the land officials made adversely to the claim of appellant here were wholly justified by the evidence. This case in its facts is not dissimilar to that of *U. S. v. Mills et al.*, 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752, where the decree annulled a patent for fraud. The holding there was that

a residence in good faith was not established under the evidence. The court, referring to the acts of the patentee, said:

"His only acts tending to show an actual personal residence * * * were that he would, about every four or five or six months take some bedclothes with him and go to the homestead and spend the night, sleeping either on the porch or in the house, and the next day would take his bedclothes and go home. * * * The evidence clearly shows that Mills never intended to live on the place during the five years succeeding his entry, and that he did not live on it; that he slept there one night in every four, five or six months so as to 'fulfill the law,' as he expressed it. * * * If this constitutes residence * * * he could have obtained in like manner a residence on a dozen other quarter sections at the same time. * * * It was not intended that a patent should be granted where the entryman never lived on the land—when he could have lived on it if he had wished to do so, and when, during the entire five years succeeding the filing of his claim, he had a home and residence elsewhere."

Additional cases may be cited: *Stewart v. McHarry*, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290; *Carr v. Fife et al.*, 156 U. S. 495, 15 Sup. Ct. 427, 39 L. Ed. 508; *Small v. Rakestraw*, 196 U. S. 403, 25 Sup. Ct. 285, 49 L. Ed. 527, the latter holding that a voting residence in another county was inconsistent with actual residence on homestead land.

[5] The point is urged by appellant that the contest allowed under the provisions of section 2297, Revised Statutes, must be initiated and decided within five years from the date of the homestead entry. The contest was initiated before the expiration of five years from the date of plaintiff's entry by the filing of the necessary affidavit. The formal notice of the contest was served on June 5, 1908, and hearing had before the local land officials at a subsequent date, decision being rendered on April 15, 1910. The provisions of section 2297 do not contemplate that a contest must be both commenced and disposed of all within the five-year term. As respondent well argues, if such was the law, then an abandonment of residence, where the six-months period expired on the last day of the five-year term, would be beyond the reach of a contest, although the statute plainly makes such abandonment ground for cancellation of the entry. Respondent suggests that this point was not raised before the Land Office officials; therefore, cannot be taken advantage of here for the first time. There seems to be merit in that position (*Carr v. Fife et al.*, supra), although we have already indicated an adverse view on the proposition, assuming that it was entitled to be considered. The default of appellant in the matter of residence had not been cured prior to the initiation of the contest, as was the situation considered in some of the cases cited.

[6] There were two withdrawal orders made under authority of the Reclamation Act. Section 3 of that act (U. S. Comp. St. § 4702) authorizes orders to be made withdrawing land from entry, the terms of the statute being as follows:

"That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act." Comp. St. 1901, Supp. p. 513.

These withdrawal orders are commonly referred to for convenience as being "first form" or "second form," according to sequence as the authority appears to be given in the statute. The first form withdrawal was ordered on September 12, 1903. It is not contended that the second form order was effective to relieve appellant from the duty to comply with the homestead law as to residence or cultivation, but it is his claim that after the first form withdrawal order was made all requirements as to residence, cultivation, or irrigation were suspended until the land was restored to entry. Section 5 of the Reclamation Act (U. S. Comp. St. § 4704) provides that the entryman, "in addition to compliance with the homestead law," shall reclaim at least one-half of the total irrigable area, etc., from which provision it is made clear that in any event full compliance with the homestead law is exacted.

Whether the claimant may be excused from subjecting the land to irrigation does not seem to be necessarily involved in the case, in view of the findings of the Land Department officials. It has been held by our Supreme Court that—

"The construction placed upon an act of Congress by the Land Department, with respect to the disposition of public lands, and its practical application thereof, is always given great weight by the courts in construing the law and is followed if it is at all reasonable." *McLaren v. Fleischer*, supra.

It is not indicated in the provisions of the Reclamation Act that an entryman, pending a withdrawal which is not permanent in form, but is for preliminary purposes, may disregard the requirement of residence, and

be protected in his entry after the withdrawal order has been abrogated. Under date of June 17, 1902, the Secretary of the Interior issued a circular of information respecting the withdrawals of land made under the Reclamation Act, in which it was stated that the principal purpose of such withdrawals was to enable surveys and investigations to be made to determine the feasibility of the particular irrigation project. The circular contained this language:

"Even if the project is feasible, only a portion of the lands withdrawn will be irrigated. The mere fact that surveys are in progress is no indication whatever that the works will be built."

On May 17, 1904, the Secretary, evidently for the purpose of advising entrymen of the construction which the Land Department was giving to the reclamation statute, directed that a circular letter be prepared instructing the local land officers to—

"notify all persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the Reclamation Act, that they will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the land, and that the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statute."

The latter instruction, of course, did not expressly cover cases where withdrawal orders under the first form might be made, but it indicates the view of the department that the residence and other requirements of the statute were not to be relaxed, even though the project of obtaining water failed of success. The land officials gave public announcement that the withdrawals of lands as made under the orders here considered were not permanent, that no promise was held out that water would be obtained, but that they were for the purpose of enabling preliminary investigations to be made which would determine whether the projects proposed to be carried out were feasible. When the time arrived that it was found that such projects were feasible, a permanent order would have no doubt followed.

[7, 8] Certain regulations of the Land Commissioner, referred to as those of June 6, 1905, as amended January 19, 1909, the amendment prohibiting contests of land included within a first form withdrawal, are urged as applicable in curing any claimed default of appellant. These regulations were considered by the Assistant Commissioner of the Land Office in the concluding portion of his opinion, wherein he said:

"In his brief, counsel for the defendant contends that the contest should have been dis-

missed by reason of the provisions of the regulations approved June 6, 1905, as amended January 19, 1909 (37 L. D. 365), relating to contests affecting lands included within withdrawals under the Reclamation Act. The amendment was not in force when the contest was initiated, and said contest was properly allowed under the regulations then controlling."

If the reclamation statute did not provide for a suspension of the right of contest authorized under section 2297, Revised Statutes, then the amended regulations of January 19, 1909, were void and of no effect, for it has been held that the power of the Interior Department, or Commissioner of the Land Office, is to enforce, and not change, the effect of statutes, to which end only they may adopt regulations. *Leonard v. Lennox*, 181 Fed. 760, 104 C. C. A. 296. The case of *Edwards v. Bodkin*, 249 Fed. 562, 161 C. C. A. 488, is not in point, because under the facts there considered it appeared that the entryman had resided upon the land continuously, and had not abandoned his residence, and the court particularly noticed that fact. Assuming that the Act of Congress of April 30, 1912, which was designed to excuse entrymen under the Reclamation Act from the duty to maintain residence or make improvements prior to the time water might become available for irrigation, may be said to apply to a case like that of appellant's, where the forfeiture period had expired and contest initiated before the passage of the act (and we do not agree that it does), there is one particular condition of that act which makes it inapplicable; namely, that it applies only to persons who have theretofore "established residence in good faith upon the lands entered." Under the facts as they were determined to be in this case, there was not good faith shown in the establishment of the residence of appellant on the lands in question.

[9] We are of the opinion that there was no irregularity in accepting and allowing the homestead application of respondent. However, that question is not important to be decided after it has been determined that the entry of appellant was properly canceled because of his abandonment of residence on the property. He must recover here, if at all, on the strength of his own title, and not upon the weakness of his adversary's. Such is the rule repeatedly announced in controversies of this kind. *Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691; *Id.*, 196 U. S. 403, 25 Sup. Ct. 285, 49 L. Ed. 527; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428.

We find no error requiring that the decree be set aside.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 367

JONES v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 3530.)

(District Court of Appeal, Second District, Division 1, California. June 30, 1921.)

1. Master and servant ☞417(7)—Findings on evidence in compensation case final.

An award of the Industrial Accident Commission will be annulled only where there is no evidence to support it.

2. Master and servant ☞405(2) — Evidence held to show compensation claimant's employment was not casual.

Evidence held sufficient to support the finding of the Industrial Accident Commission that compensation claimant's employment as carpenter in repairing a roof, from which he fell, was not casual, but one reasonably requiring work extending over the statutory period of ten days.

Certiorari by S. Jones against the Industrial Accident Commission of the State of California and others to review an award under the Workmen's Compensation Act (St. 1917, p. 831). Affirmed.

D. Z. Gardner, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

JAMES, J. [1, 2] Certiorari to review proceedings had and award made in the matter of the claim of one Rush heard by the Industrial Accident Commission. Award for compensation in the sum of several hundred dollars was made in favor of Rush against the petitioner here, and the latter contends that the findings and award are not supported by the evidence. It is particularly insisted that under the evidence the Commission erroneously found that the employment of Rush was not casual. The second contention, which refers again to the evidence, is that the principal injuries for which compensation was awarded were not shown to have been sustained by the claimant while in the employ of petitioner, and that the claim as to such injuries was fraudulent. The authority of this court in making a review of the evidence heard before the Accident Commission upon which an adjustment of a claim is made is limited to determining whether there is any evidence to be found in the record which will support the findings as made; in other words, that an award will be annulled only where there is no evidence to support it. The transcript of the evidence shows, in that part setting forth the testimony given by the claimant Rush, that he was employed by Jones to do certain repair work; the witness' narrative of the conversation occurring at the time of his employment being as follows:

"We went upstairs, and there were two rooms there he showed me. He said, 'I want the paper taken off, and both these rooms sealed on the side, and the ends.' Well, then I came downstairs, and he said, 'I want you to inclose the sink and put a sink board over it, and take these windows and fix them so they will move, and put in these two big lights, and fix these doors that scrape on the floor, fix these door locks and the jambs to the doors; and then I want you to fix outside the railing on that porch, and put the baseboard around these rooms, and I want you to fix that toilet—while there is nothing wrong with it, I want you to put a new board in, or do something with it.' And I looked over the whole thing, and I said, 'Mr. Jones, you have a lot of work here;' and he said, 'I know it.' He said, 'I want you to take hold of it, at eight hours a day, and follow it through until it is done; I don't know how long it will take you.' That was the explanation to me.

"Q. What about the roof? A. Well, the room was to be ceiled under the roof; the roof was to be covered—I had forgotten that; he said, 'I want you to go over that roof and fix it the first thing because I am afraid it will rain. We will get that done, and then you can do the inside work if it rains.' So I went to work first on the roof. * * *

"Q. Did you make any estimate of the time it would take you to do the work he said he wanted to have done if you agreed to the schedule you have given? A. It would take me at least three or four weeks to finish what he told me, and I don't believe I could do it in three weeks, I think it would take me a month."

Under the provisions of the act relating to industrial compensation, if the work contemplated to be done would require more than 10 days for its execution then the employment would not be termed "casual," and would be one under which compensation could be claimed in the event of injury. We note immediately that there was a conflict in the evidence as to the length of time which the work Rush was engaged to do might require. There was a conflict first between Rush's statement as to what he was engaged to do and the statement of Jones relating to the same matter. Petitioner Jones testified that he had employed Rush "by the day and told him I didn't know just how much we would have to do about the place; that I would determine that later as he went along; that the roof was the first thing I wanted him to fix. And he completed the roof, and fell off the house." Mrs. Jones, the wife of petitioner, testified that the work "Mr. Jones intended to have done by Mr. Rush himself took another carpenter a day and a half to do." By the testimony of Mrs. Jones it would appear that very much less work was contemplated to be done by Rush than was included in his statement. Rush, according to his own testimony, had only partially completed the roof work, which was the first of the work commenced, when he fell and suffered the injuries complained of. Rush

testified further that he had been a carpenter and builder all of his life and had held the position of an architect. This we think qualified him to estimate as he did, and, as appears in the testimony first quoted, the length of time which would be required for him to complete all the work which he was employed by Jones to do.

From what has been now stated it appears very clearly that there was evidence sufficient to support the finding of the Commission that the employment of the claimant by Jones was not a casual one, but was one which reasonably required work extending over a period of more than ten days. The claim that the injuries, alleged by the claimant to have been suffered as the result of the fall from the roof of petitioner's house, were in fact due to a prior accident not connected with his employment under petitioner, must be considered in the same way. The claimant admitted that at a prior time he had slipped upon a floor and had fallen, but he insisted that he had recovered from any injuries which might have been produced by that fall. The Commission had before it evidence as to all of these matters, and also evidence of physicians who had attended the injured man after he fell from the roof of petitioner's house, and the question as to what injuries were then suffered became one of the things to be determined upon that evidence, and we cannot say that the finding reached on that branch of the inquiry was unwarranted.

The proceedings and award are affirmed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 225

Ex parte CARLTON. (Cr. 578.)

(District Court of Appeal, Third District, California. June 17, 1921.)

1. Criminal law $\S$ 991(3)—Under indeterminate sentence law the court need not fix minimum or maximum penalty for felony.

Under the indeterminate sentence law in a felony case the judgment of sentence should merely be that the defendant be confined in one of the state prisons without fixing either the minimum or maximum penalty.

2. Criminal law $\S$ 1208(9)—Board of prison directors shall determine the maximum penalty only under indeterminate sentence law.

Under the indeterminate sentence law the board of prison directors shall determine only what maximum penalty the prisoner is to suffer, and neither the board nor prisoner is concerned with the minimum penalty.

3. Criminal law $\S$ 1208(9) — Statute fixes maximum penalty for second degree burglary, but implies minimum.

Although Pen. Code, $\S$ 461, provides only a maximum penalty for second degree burglary, there is nevertheless an implied minimum pen-

alty, and under the indeterminate sentence law the prison board is vested with a discretion as to fixing a maximum within that fixed by statute.

4. Habeas corpus — 30(3)—Prisoner not entitled to release for irregularity of judgment of sentence.

If a prison board on conviction of a felony was without authority to fix the length of time during which the prisoner should suffer imprisonment, then the power to do so remained in the superior court, and the failure of the judgment of sentence to fix the time would be only an irregularity subject to correction by the court, and in no event would the prisoner be entitled to discharge from custody upon habeas corpus.

Application of Carl Carlton for writ of habeas corpus to be directed to the warden of the state prison at Represa to secure petitioner's release on the ground that the board of prison directors exceeded their authority in fixing punishment. Writ denied.

Carl Carlton, in pro. per.

HART, J. To the writer, as a justice of this court, the petitioner, who is confined in the state prison at Represa, state of California, under a sentence of five years for burglary of the second degree, addresses this petition, claiming that his restraint by the warden of said prison is unlawful for the reason that the state board of prison directors, in fixing his punishment under the indeterminate sentence law, exceeded its jurisdiction for reasons to be hereinafter stated.

The petitioner presents this application in propria persona or without being represented by an attorney, and, as I find, upon examination of the same, that it is plainly my duty to deny the application, it is believed to be only just to him that the reason for so doing should be briefly stated.

Section 461 of the Penal Code provides that "burglary of the second degree is punishable by imprisonment in the state prison for not more than five years." Thus it will be observed that no minimum penalty is specifically prescribed for said crime. It is alleged in the petition, however, that the petitioner was given an indeterminate sentence of "from nothing to five years," and it is contended by the petitioner: First, that the prison board is without legal authority to fix the term of the prisoner in those cases where there is no minimum penalty specifically prescribed by the law; second, that if said board is in such cases authorized to fix or determine the time during which the prisoner shall remain in prison, and the court sentencing the prisoner has not, in its judgment of sentence, fixed or specified the minimum penalty, then, in its order determining what length of time the prisoner shall serve, said board must also fix or specify the minimum term, and that omission to do so renders the determination or

order void. In support of the proposition first stated the case of *Ex parte Heath*, 194 Pac. 68, is cited.

Referring now to the point first stated, I first observe that, in the absence of a better showing than is here made of the nature of the sentence pronounced by the court against the petitioner, I will not assume or believe that any such sentence was pronounced, as it would involve a palpable absurdity, assuming that the fixing of a minimum and a maximum or any penalty in the judgment of sentence by the court is necessary under the law, or that it adds any legal force to the judgment of sentence.

[1] But I do not think that the specification of any penalty is required to be made in a judgment of sentence. Under the indeterminate sentence law (St. 1917, p. 665) the court, in a felony case, where a conviction has been had, can do no more, in the matter of passing sentence, than to pronounce judgment of sentence, which merely involves an adjudication by implication from the verdict of conviction, of the prisoner's guilt and his punishment by confinement in one of the prisons of the state, designated in the judgment. In the case of *People v. Lee*, 36 Cal. App. 323, 334, 172 Pac. 158, 162, it was suggested, but not decided, that—

"It would seem from the language of the section [1168, Penal Code; see Stats. 1917, p. 665] that it was contemplated that judgment of sentence should merely be that the defendant be confined in one of the state prisons, without fixing or naming either the minimum or maximum penalty for the offense of which he was convicted."

I think that that expression involves a correct construction of the law, or, in other words, discovers the intention of the Legislature in that particular.

[2] As to the nature of the order of the prison board determining the term during which the prisoner shall serve, the statute itself seems to be very clear. It provides that said board shall, after the expiration of the minimum term of imprisonment of any prisoner, determine what length of time such prisoner shall be confined. This means, of course, that the board shall determine only what the maximum penalty the prisoner is to suffer shall be. Obviously neither the board nor the prisoner is concerned with the minimum penalty when the time at which the board may determine what the maximum penalty shall be has been reached.

The point last above stated is also without legal force. The petitioner misapprehends the purport of the decision in *Ex parte Heath*, supra. There the petitioner had been convicted of the crime of robbery, together with a prior conviction of burglary. In such a case the punishment provided is imprisonment in the state prison for the term of the

prisoner's natural life. Sections 213 and 667, Pen. Code. In other words, there is in such a case, under the law, no minimum penalty either expressly provided for or implied from the language fixing the penalty. Neither the court nor the prison board is, in such case, vested with any discretion in the matter of determining what length of time the prisoner shall serve. The law itself has determined and fixed that time and fixed it at straight life imprisonment. What with obvious propriety is held in the Heath Case and intended by this court to be held therein is that where, as in that case, the law provides a straight, definite term during which the prisoner shall serve in prison, and so leaves in the court or prison board no power or discretion to fix any other or different penalty, then, there being no minimum penalty which can be fixed, the indeterminate sentence law does not and cannot apply.

[3] In the case of second degree burglary, as is also true as to some other crimes which could be named, while there is no minimum penalty specifically prescribed by the statute, there is, nevertheless, an implied minimum penalty. As seen, the punishment for daylight burglary, as fixed by the statute, is any term not exceeding five years, which manifestly constitutes the maximum penalty. The minimum may be for one day or for one hour or even less, as the prison board may determine, and thus, as stated, there is a minimum penalty for the offense, even though, so far as the statute itself is concerned, it is indefinite or not specifically fixed. In such case the prison board is vested with a discretion in the matter of determining "what length of time" the prisoner shall be confined in prison, whether the limit of the maximum term prescribed or anything less to the smallest fraction of time, and, within the fair and reasonable import of the statute, may in such a case, at any time after the prisoner has been committed to the custody of the prison and the authorities thereof, determine what shall be the length of the prisoner's term up to the maximum time for which he can be punished.

[4] But, it may be added, if the prison board was in such a case without authority to fix the length of time during which the prisoner shall suffer imprisonment, the power to do so still remains in the superior court, and since the judgment of sentence would, for failure to fix the time therein, amount only to an irregularity, or, in other words, not render the judgment absolutely void, the court would have the right to correct its judgment in that particular (In re Silva, 38 Cal. App. 99, 175 Pac. 481), and therefore, in any event, the prisoner would not be entitled to his discharge from custody.

The application for the writ herein prayed for is denied.

53 Cal. App. 797

Ex parte DENECKE. (Cr. 579.)

(District Court of Appeal, Third District, California. June 17, 1921.)

Application of Art Denecke for writ of habeas corpus directed to warden of state prison at Represa to secure petitioner's release. Writ denied.

Art Denecke, in pro. per.

HART, J. The petitioner has addressed his application to me, as a justice of this court, for a writ of habeas corpus. Said petitioner is confined in the state prison at Represa under a sentence of imprisonment for the crime of burglary of the second degree. The prison board fixed the term of his imprisonment at three years. He now claims that he is under illegal restraint of his liberty, his claim being that the said prison board exceeded its authority or jurisdiction in determining what his term of imprisonment should be. The specific grounds upon which the petitioner claims that he is entitled to be released are the same as those relied upon by the petitioner in the case of *Ex parte Carlton* (Crim. No. 578) 200 Pac. 51, in which on this day an opinion was filed holding that the grounds upon which the said petitioner claimed to be entitled to his release from custody are without legal force, and thereupon denying the petition for the issuance of the writ of habeas corpus. It follows, of course, that the petition herein for a writ of habeas corpus must be denied, and, upon the authority of the said case of *Ex parte Carlton*, such is the order.

53 Cal. App. 303

PRICE v. SMITH MFG. CO. et al.
(Civ. 3865.)

(District Court of Appeal, First District, Division 1, California. June 24, 1921.)

1. Patents $\S$ 218(2)—Royalty due on sale of machine in absence of stipulation as to time of performance.

Under a contract entitling an inventor to a royalty on each invented machine manufactured and delivered, the agreed royalty became due to inventor immediately upon the sale of each of the machines manufactured under Civ. Code, $\S$ 1657, in the absence of a stipulation in the contract as to time of performance.

2. Frauds, statute of $\S$ 138(1)—Royalties on machines manufactured during first year recoverable, though contract was one for a period exceeding one year.

An inventor, entitled under a contract to a royalty on every machine manufactured and sold, could recover royalties due on the machines manufactured during the first year, though the contract was for a definite period of time exceeding one year, and was not in writing, as required by the statute of frauds, since where a series of things is to be done occupying in the whole more than 1 year, but each item as it

is performed drawing with it a separate liability therefor, the statute of frauds does not prevent an action upon such items as are performed within the year to recover the stipulated compensation.

3. Frauds, statute of §119(1)—One will be estopped from invoking statute where it is inequitable to so do after receiving the benefit of part performance.

Where it is clearly and unequivocally made to appear that there has been a performance of an oral agreement required by the statute to be in writing under such circumstances as to make it inequitable to allow the party receiving the benefit thereof to invoke the statute, he is estopped from doing so.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by E. L. Price against the Smith Manufacturing Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Owen D. Richardson, of San Jose, for appellants.

Louis Oneal, of San Jose, for respondent.

WASTE, P. J. Plaintiff brought this action to recover from the defendants 10 per cent. of the selling price of certain can-filling machines, manufactured and sold by the defendants under a license. The defendants interposed a counterclaim for \$200, which the court allowed, and gave judgment for the plaintiff from which the defendants appeal.

The plaintiff, claiming to be the inventor of a certain can-filling machine, applied to the government for a patent in September, 1917. About that time he entered into an oral agreement with the defendants by which it was agreed that if plaintiff would permit the defendants to manufacture his machine, they would undertake to do so, and would pay the plaintiff 10 per cent. of the selling price, which was to be fixed by the defendants. Plaintiff entered the employ of the defendants, and perfected his drawings and details, the defendants engaging in the manufacture of the machines. This arrangement continued until March 1, 1919, when the plaintiff revoked the license. The defendants had, in the meantime, manufactured and sold 48 machines for the aggregate sum of \$26,087.40. The court found that the defendants did agree to pay plaintiffs 10 per cent. of the selling price of the machines as a royalty for their manufacture, and also found 10 per

cent. of the selling price to be the reasonable value of the license and of the right to manufacture and sell the machines, and to use plaintiff's design and invention, and gave judgment in plaintiff's favor in the sum of \$2,608.74, less \$200, the counterclaim allowed. These findings are amply supported by the evidence.

[1-3] It is the contention of the appellants that the oral agreement between the plaintiff and the defendants was invalid under the statute of frauds, because, by its terms, it was not to be performed within a period of 1 year, but was to extend over the life of the patent, or a period of 17 years. The trial court found, however, that the license was to continue until revoked by plaintiff, and we think this finding is amply supported by the testimony. Furthermore, plaintiff did not receive his patent from the government until January 7, 1919, and 42 of the machines were manufactured and delivered by the defendants before that time. There was no term fixed for the performance of the contract, and it seems to have been entered into with an understanding that it was subject to revocation by either party at any time. No time for performance being specified, and the act consisting of the payment of money, the agreed royalty became due from the defendants to plaintiff immediately upon the sale of each of the machines manufactured. Civil Code, § 1657. Even assuming that the contract was one for a definite period of time exceeding 1 year, the defendants may not invoke the statute of frauds in defense of plaintiff's claim for royalties on the machines already manufactured. In certain kinds of contract, as where a series of things is to be done, occupying in the whole more than 1 year, but each item as it is performed drawing with it a separate liability therefor, the statute of frauds does not prevent an action upon such items as are performed within the year to recover the stipulated compensation. Brown on Statute of Frauds (4th Ed.) § 285. Where it is clearly and unequivocally made to appear that there has been a performance of an oral agreement required by the statute to be in writing, under such circumstances as to make it inequitable to allow the party receiving the benefit thereof to invoke the statute, he is estopped from doing so. Pearsall v. Henry, 153 Cal. 314, 318, 95 Pac. 154, 159. The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

53 Cal. App. 267

HOUSTON v. WILLIAMS. (Civ. 2284.)

(District Court of Appeal, Third District, California. June 17, 1921. Hearing Denied by Supreme Court Aug. 15, 1921.)

1. Brokers ⇨42—Commission recoverable where broker licensed at time of procuring customer, though not when employed.

Under St. 1919, p. 1252, declaring it unlawful to act as real estate broker without first obtaining a license, and that one cannot maintain action for broker's commissions, unless he was licensed when the cause of action arose, it is enough that he had a license when he procured a customer, though not when he was employed.

2. Appeal and error ⇨171(3), 193(5)—Objection to lack of allegation in complaint held not available for first time on appeal.

Any objection that complaint, alleging the making of a contract between the parties on a certain day, should have alleged that plaintiff then had a broker's license, is unavailable for the first time on appeal; the complaint having been treated, throughout the trial, as sufficient in that respect.

3. Brokers ⇨86(5)—Evidence held sufficient to show financial ability of customer produced.

Evidence in broker's action for commissions held sufficient to show that customer produced was financially able to meet the required terms.

4. Brokers ⇨46—Procuring customer in stipulated time held entitled to commissions, though owner had previously procured customer.

Under contract whereby owner appoints a broker his agent to sell his property, agrees to sell it to any purchaser obtained, and provides that the authority shall continue for 90 days, the broker, producing a customer within that time, is entitled to a commission, though the owner himself had already procured a customer, subsequently, however, to notification that the broker was negotiating with a prospective buyer.

Appeal from Superior Court, Madera County; George A. Sturtevant, Judge.

Action by G. F. Houston against C. A. Williams. Judgment for plaintiff, and defendant appeals. Affirmed.

Fee & Ring, of Madera, for appellant.

Conley & Conley, of Madera, for respondent.

BURNETT, J. The action was for a broker's commission for the sale of real estate and the plaintiff had judgment, from which the appeal is taken.

The cause of action is set forth in identical phraseology in two counts, except for the provisions of paragraph 3 in each count. Said paragraph in the first count is as follows:

"That thereafter, and prior to the time limited for the expiration of said contract, plaintiff

by his own efforts procured one G. A. Lombardi as a purchaser of said real property, at the price and upon the terms and conditions fixed by said contract (Exhibit A); that on or about the 10th day of January, 1920, plaintiff produced the said G. A. Lombardi before defendant herein, at and upon the said real property of defendant; that the said G. A. Lombardi, in the presence of plaintiff, did then and there offer to said defendant to purchase said real property at the price and upon the terms and conditions fixed by said contract (Exhibit A); that at the time of making said offer the said G. A. Lombardi was ready, able, and willing to purchase said real property at the price and upon the terms and conditions fixed by said contract (Exhibit A)."

The corresponding paragraph in the second count is substantially the same, with the addition of the following allegation:

"That the defendant then and there refused, and has ever since refused, to sell the said property to the said G. A. Lombardi, upon the terms and conditions and at the price fixed by said contract (Exhibit A), or otherwise, or at all."

The first count rests upon the theory that the broker obtained a purchaser for the property and was therefore entitled to his commission. The second count was designed, so respondent claims, to meet the requirement of the rule that—

"When the broker in good faith finds a purchaser within the period allowed by the terms of the written contract of employment, and prior to the revocation of his authority, places the matter in such a position that success is practically certain and immediate, or has in good faith expended money and effort in seeking a purchaser, the revocation by the vendor of the broker's authority (by sale to another or otherwise), and the termination of his agency before the completion of the sale, against the express provisions of the contract of employment does not deprive the broker of his right to his commission, but the principal is liable therefor, if the purchaser is ready, able, and willing to pay the purchase money before the expiration of the period named in the agency contract."

The first count is probably broad enough to cover either theory of plaintiff, but the second count could obviously do no harm.

The trial judge found that all the allegations of the amended complaint were true and also:

"That the said real property was sold by defendant to W. S. Ricketts of Fowler, Cal., but that said sale took place after plaintiff had produced before defendant one G. F. Lombardi as a purchaser ready, able, and willing to purchase, and who offered to purchase, said real property in accordance with the terms and conditions and at the price named in said contract."

The contract of agency was as follows:

"The undersigned, G. F. Houston, hereby agrees, during the life of this agreement, to

endeavor to sell or exchange the property described on the reverse side of this card.

"In consideration thereof, I hereby appoint G. F. Houston my exclusive agent to sell or exchange for me said property, and to receive deposit on the same.

"I agree to sell said property to any purchaser able and willing to purchase the same for the price and upon the terms stated on the reverse side of this card, or for any less price or different terms hereafter authorized by me.

"I agree to furnish an abstract or certificate showing merchantable title in me to date of sale, and to convey title by good and sufficient deed of grant or contract of sale. Purchaser pays for all lumber for our house; also all other materials for this price.

"Should G. F. Houston, either personally or through his agents, be instrumental in obtaining a purchaser to whom the owner of this property shall sell or contract to sell said property during life of this agreement, or within six months after the expiration thereof, I agree to pay G. F. Houston 5 per cent. of the selling price as commission for selling the same.

"Any deposit retained by me for failure of a purchaser to make a further payment shall be equally divided between my said agent and myself.

"This authorization is to continue for the period of 90 days."

On the back of said contract the terms of the sale appear as follows:

"40 acres, \$9,500. Name, C. A. Williams. Located 5 miles of Madera on State Highway Ave. Road, Sec. 4. Purchaser pays for all lumber and material for same on new house. * * * Terms: \$9,500. How payable—\$1,000 pr. annum. And assign contract with Frank Hope and wife for \$5,000 at 7 per cent."

[1] 1. Appellant contends that the commission contract is void by reason of the fact that plaintiff at the time said contract was executed had no license to act as a real estate broker as required by the statute for the regulation of such brokers, approved May 27, 1919. Stats. 1919, p. 1252. Section 1 of said act provides:

"It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor."

Section 2 of said act defines a real estate broker and it is not disputed that plaintiff was such broker. Section 17 of said act makes the failure to take out a license by one engaged in the business punishable—

"by a fine of not to exceed two thousand dollars, or by imprisonment in the county jail or state prison for a term not to exceed two years, or both such fine and imprisonment."

In *Wood v. Krepps*, 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851, the rule in such cases is stated as follows:

"When the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent im-

proper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public or in the interest of public morals, health, or police, the imposition of the penalty amounts to a prohibition against doing the business without a license, and a contract made by an unlicensed person in violation of the statute or ordinance is void."

However, it was held in that case that the ordinance in question was solely for the purpose of yielding a public revenue, and therefore contracts made in the course of the business by one who had not obtained a license were valid. The purpose of the act in question herein was decided by our Supreme Court in *Riley v. Chambers*, 181 Cal. 589, 183 Pac. 855, 8 A. L. R. 418, to be primarily to require that real estate brokers and salesmen be "honest, truthful and of good reputation." It was designed, in other words, to protect the public against unscrupulous operators, and not principally to secure revenue. It would seem to follow that a contract having in view the performance of any of the acts recited in said statute, if said contract was executed by one to whom no license has been issued, would be invalid, unless there is something in the act itself which operates to limit or modify said rule. We think such limitation is found in section 20 of the act, providing that—

"No person, copartnership or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of the state for the collection of compensation for the performance of any of the acts mentioned in section 2 thereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

Manifestly the Legislature herein undertook to prescribe an essential condition of recovery, but limited its operation to the time when the cause of action arose. By implication any earlier period was excluded. It is a reasonable construction of the act to hold that it is unlawful for any one to engage in the business of a real estate broker without having secured a license, but he is not precluded from recovering compensation for his services if he had such license at the time his cause of action arose, although his contract may have been executed prior to that time when he had no license. Herein, manifestly, the cause of action arose when plaintiff obtained a purchaser for the property, and it is not disputed that then he had the proper license, and it was so alleged in the complaint.

[2] At any rate there is nothing in the statute to require the pleader to allege specifically that he had the license at the time he entered into said contract, and from the aver-

ment "that on the 23d day of October, 1919, plaintiff and defendant entered into a certain contract in writing, a copy of which is attached to and made a part of this complaint," the inference would follow that plaintiff had the capacity and the lawful authority to enter into such an undertaking, and it would be incumbent upon defendant to challenge it by denial if he desired to present such issue. Especially should this position be taken in view of the failure of defendant to make any such point in the court below. His contention as to the sufficiency of the complaint was stated as follows:

"The contract in question, which is attached to the complaint and made an exhibit thereto gives to the plaintiff in this action an exclusive agency to sell the property of the defendant for a certain time. The contract in question, however, does not give to Mr. Houston the exclusive right to sell that property and in the absence of such condition in the contract the owner himself, of course, may sell the property through his own efforts, and if he does so without the aid of Mr. Houston, Mr. Houston is not entitled to a commission. This complaint is for the sale of the property or for finding a buyer ready, able and willing to buy. I believe under such condition the complaint should allege that at the time Mr. Houston procured a buyer ready, able and willing to sell that the owner himself had not sold through his own individual efforts."

When asked by the court if that was the feature that appellant desired to present by the demurrer, he replied, "That was the main feature." The same attitude was maintained throughout the trial, and no suggestion was made that the complaint should have contained said allegation in reference to the license. Under such circumstances any doubt as to the sufficiency of the complaint in the respect indicated should, of course, be resolved against the appellant. *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572.

[3] 2. It is contended that the evidence is insufficient to show that the purchaser produced by plaintiff was financially able to pay for the property as required. The parties agreed to add \$500 to the price to cover lumber on the premises, which had been furnished by appellant, and Mr. Lombardi, the proposed purchaser, seems to have understood that he was required to pay the entire sum of \$10,000 in cash when the deed was executed. Upon the theory that the contract so provided, the court was justified in concluding that he was able to meet the demand. He had \$1,813.15 in cash in bank, \$600 in bonds, \$6,000 on a one-day note of the California Associated Raisin Company, and a \$6,000 interest in a land contract. The sufficiency of this last asset only is questioned by appellant. But, as pointed out by respondent, the Bank of Italy had offered to lend Lombardi the sum of \$5,000 on this security, and we think it is an entirely reasonable inference that Lombardi was in a position to

pay the whole amount if appellant had not declined to sell to him. The facts of *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87, and *Merzoian v. Kludjian*, 191 Pac. 673, made an entirely different showing.

Moreover, the contract required the payment of only \$1,000 immediately and the balance in annual payments of \$1,000. This the terms of the contract leave in no doubt whatever; and though Lombardi was willing to make the entire payment at once, and the parties may have discussed the question as though the contract so provided, it cannot be controverted that it was sufficient for the purchaser to be able to meet the terms upon which the owner and the agent had agreed.

[4] 3. The third point rests upon the claim that the owner reserved the right to make the sale himself without being liable for a commission. Herein a question of fact may first be considered. It is not disputed that a sale to another party was made by appellant, but the controversy is as to whether it was prior or subsequent to the procurement by the agent of a purchaser. That said sale was not fully consummated until after plaintiff had produced Lombardi cannot be seriously questioned. Appellant, however, claims that it was only necessary for him to secure another purchaser who was ready, able, and willing to purchase in order to relieve him of liability; in other words, that the right and privilege he reserved was similar to that conferred upon the agent and that he actually secured such purchaser before Lombardi was produced. As to the fact, the defendant testified:

"On the day that Mr. Houston came there, on the 10th day of January, I had already sold the property to a man by the name of Ricketts, or, at least, Mr. Ricketts was on the property at that time and had told me prior to the time Mr. Houston arrived that he would take the place."

It was not disputed by plaintiff that, when he with Lombardi arrived at the place, Ricketts was there, and it must be accepted as a fact that said sale was agreed upon, though no deposit had been made nor had any instrument in writing been executed. But there can scarcely be any doubt that, if the power to sell without liability was reserved by the owner, it included the right to secure a purchaser ready to buy and thereby avoid the payment of any commission.

As to the principle of law involved, appellant cites *Dreyfus v. Richardson*, 20 Cal. App. 800, 130 Pac. 161; *Snook v. Page*, 29 Cal. App. 246, 155 Pac. 107; *Roth v. Thompson*, 40 Cal. App. 208, 180 Pac. 656; *California Land Security Co. v. Ritchie*, 40 Cal. App. 246, 180 Pac. 625; *Faith v. Meisetschlager*, 187 Pac. 61. In the first of these it is said:

"We attach little importance to the fact that defendant, without other consideration than the mutual covenants implied in the contract, made

plaintiff her sole agent for an indefinite period. She not only had the right to revoke such agency at any time before he had secured a purchaser, since the agreement did not purport to give plaintiff an exclusive right of sale (*Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606), and conceding that during the existence of the contract she was prohibited thereby from placing the property in the hands of another agent with authority to sell the same (*Dole v. Sherwood*, 41 Minn. 535, 16 Am. St. Rep. 731, 5 L. R. A. 720, 43 N. W. 569), she as owner, however, could without revoking the contract negotiate the sale thereof or accept an offer to purchase the same."

The Snook Case was to the same effect, the court saying that—

"If it had been the intention to deprive the owner of the right to sell, or in case of such sale to create a liability for commissions, it could, and no doubt would, have been easily and clearly expressed."

In the Roth Case it was held that the evidence was sufficient to support the finding of the lower court that the broker did not produce a purchaser ready, able and willing to buy the property, and in reference to the brokerage agreement it was said that—

"It cannot be construed as vesting in the plaintiff the exclusive right to sell the property. Indeed, it does not even go so far as to make him the exclusive agent for that purpose, nor does it specify any time during which his authority to sell should exist. Conceding it to be sufficient to have authorized him to sell the property, it is so phrased that the Thomsons were at liberty to terminate it at any time before he procured a purchaser able, willing, and ready to purchase on the terms stated therein. But, however this may be, it is clear, as stated, that the Thomsons had the right to sell the ranch without the assistance or intervention of the plaintiff."

In the California Land Security Company Case there was a similar brokerage agreement, and the same doctrine announced as to the right of the owner to sell before the broker had secured a purchaser, without being liable for a commission.

The Faith Case goes further in upholding the right of the owner to sell without being liable for a commission than any of the other decisions. Therein the brokerage contract provided:

"I hereby appoint the Action Realty Company of Fresno my agent, with the *exclusive right* to sell the property," etc.

However, the court held that, considered as a whole, the contract did not deprive the owner of the right to make a sale without any liability; the agent having failed to secure a purchaser.

Respondent claims that in the foregoing cases the broker never performed his contract, but sought to recover a commission by reason of the sale made by the owner; whereas herein "Houston does not seek to recover a commission because of Williams'

sale to Ricketts, but because Houston performed fully, within the time limited, by producing Lombardi as a purchaser ready, able, and willing to buy the real property under the terms and conditions and at the price fixed in the agency contract," and that the case falls within the rule announced in *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 Pac. 354; *Sill v. Ceschi*, 167 Cal. 639, 140 Pac. 949; *Roth v. Moeller* (Sup.) 197 Pac. 62. In the first of these it was held:

"Where a broker, employed to sell land, in good faith finds a purchaser within the period allowed by the terms of the written contract of employment, and prior to the revocation of his authority places the matter in such a position that success is practically certain and immediate, the revocation by the vendor of the broker's authority and the termination of his agency before the completion of the sale, against the express provisions of the contract of employment, does not deprive the broker of his right to his commissions, but the principal is liable therefor, if the purchaser is ready and willing to pay the purchase money before the expiration of the contract period."

In that case the contract of agency was as follows:

"I hereby authorize Mr. L. Oesterreicher to sell blocks 899, 900, 901, 903, outside lands, for the sum of \$1,500 each; will allow him \$100 as commissions for his services on each block. This contract to be in force for 10 days from date hereof."

The decision was based upon the theory that the owner had impliedly bound himself not to prevent the agent from earning his commission within the 10 days; in other words, if the agent secured a purchaser within that period, he was entitled to his commission, regardless of what might be done by the owner to prevent such sale. It is significant that the court cites with approval the case of *Lane v. Albright*, 49 Ind. 279, "where the owner of the real estate sold it pending the negotiations of the agent in making a sale, and prior to the expiration of the time given by the owners to the agent, and where the agent within the time given did find a purchaser," and quotes from said decision the following:

"The appellant performed all that he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by the appellant. The fact that the appellee had authorized appellant to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant."

It is to be observed, also, that the Supreme Court distinguished the earlier case of *Brown v. Pforr*, 38 Cal. 550, by stating that—

"The contract in that case does not expressly stipulate that it shall remain in force 30 days, and the opinion of Justice Sanderson clearly

intimates that, if there had been a provision in the contract that it should remain in force for such length of time, the defendant would not have been permitted to prevent performance and escape without making compensation to the agent."

Herein it may be said that it is expressly provided that the agency "is to continue for the period of 90 days," and the only difference between this case and *Blumenthal v. Goodall* is in the manner of the revocation of the agency; it being herein by a sale to another purchaser, and therein by an express notice that the owner revoked the authority of the agent and declined to proceed further in the consummation of the sale through him.

The *Ropes Case* approves the *Blumenthal* decision, but holds that the agent had not found a purchaser within the time limit and therefore had not earned his commission. These decisions are cited with approval in *Sill v. Ceschi*, supra, and it was said:

"Since the authorization was for 30 days, a revocation within that period would not have been effectual, if plaintiff, prior to the attempted cancellation, had expended money and effort in seeking to find a purchaser."

In *Roth v. Moeller*, supra, it was held that the agent, having carried out his agreement within the period prescribed to obtain the acceptance of a proposition to exchange properties, could not be deprived of his commission by the withdrawal of the offer on the part of his principal. However, a hearing was granted by the Supreme Court and a decision therein rendered by that tribunal on March 29 last. *Roth v. Moeller*, 197 Pac. 62. Therein as to revocation it was said:

"A principal may, however, curtail his right of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he still retains the power to terminate the agency, and the termination cannot be prevented by the agent; but a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract"—citing cases.

But it was held that the contract of agency therein contained no provision that the authority of the agent should remain irrevocable for any period, and that the case falls within the principle of *Brown v. Pforr*, supra, and not of that line of decisions of which *Blumenthal v. Goodall*, supra, is an example. The court concluded that either party was

at liberty at any time to terminate the relation of agency and that—

"Since plaintiff proved no services prior to the revocation entitling him to reimbursement, defendant was not liable for compensation under the contract, or for the value of services rendered."

It is manifest, from a consideration of the foregoing cases, that the Supreme Court makes a vital distinction between the provision in a contract of agency wherein the owner promises to pay the agent a commission "if within a certain period" he obtains a purchaser, and a provision expressly authorizing him for a definite period to sell the property, and agreeing that the agency shall continue for that period. In the former instance the provision is construed as a limitation upon the authority of the agent, and in the latter upon the right of revocation by the owner.

Herein, not only does the contract expressly limit the right of revocation by the owner, and the agent had obtained a purchaser within the prescribed period, but the case possesses an added feature, since evidence appears that, before the owner had any thought of selling to *Ricketts*, plaintiff had entered into negotiations with *Lombardi* for its purchase and had informed *Williams* that he had a proposed buyer. It is, indeed, a fair inference that the agent was in the midst of negotiations, "which were evidently and plainly approaching to success," and hence it would be just to apply the principle "that there was an implied contract on the part of the owner to allow a reasonable time for performance," and, as full performance was prevented by the act of the owner, the agent had earned his commission. *Blumenthal v. Goodall*, supra.

Moreover, the owner expressly agreed to sell to a purchaser that might be obtained by the agent. Of course, he could not sell the property to such purchaser, if he sold it to another. By selling to another within the prescribed period he necessarily violated this provision of the contract, and was liable for the commission since the agent performed his agreement. This provision is utterly inconsistent with the theory that the owner reserved the right to sell without being liable for compensation, notwithstanding the agent may have obtained a purchaser.

We are satisfied the decision is right, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 356

WAGNER et al. v. CITY OF INGLEWOOD et al. (Civ. 3588.)

(District Court of Appeal, Second District, Division 1, California. June 29, 1921.)

1. Municipal corporations —33(2)—Description sufficient for private grant good enough in annexation proceedings.

If description of property contained in resolution for annexation of property to city is sufficiently definite to answer for a private grant or conveyance, it is sufficient for annexation purposes.

2. Evidence —23(2), 48—Judicial notice taken of government surveys and official acts.

Under Code Civ. Proc. § 1875, courts will take judicial notice of government surveys of public lands as public and official acts of the executive departments of the United States.

3. Municipal corporations —33(2)—Description of land in annexation proceedings may be aided by government maps.

A resolution for annexation of a tract of land to a city which described the lines of the tract as section lines is sufficient if, when aided by official map of the United States, of which the court may take notice, it is made certain.

4. Evidence —23(2)—Judicial notice taken of government map which showed projecting lines of confirmed Mexican grant.

Where the United States, on acquiring the territory of California from Mexico, confirmed private grants by that state in such territory, which grants overlapped the township section lines, and officially surveyed the land and mapped it, showing the projection of lines of the grant over the section lines, the map is one of which the court, under Code Civ. Proc. § 1875, may take judicial notice to aid description of territory annexed to city, including part of a private grant thus overlapping section lines, the lines of description being described as section lines, as against contention that, by reason of the fractional nature of sections, that map was of private nature as to the overlapping lines of private grant.

5. Municipal corporations —33(2)—Call in description in annexation proceedings held sufficiently definite.

Where resolution for annexation of territory to city in describing the land gave the commencement of a call and the terminus of the call, the contention that the line could not be followed because of curves at intersecting streets was untenable, the line being described as a straight line.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Suit by John Wagner and others against the City of Inglewood and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellants.

Clyde Woodworth, John Schlegel, and F. A. Stephenson, all of Los Angeles, for respondents.

JAMES J. Plaintiffs, alleging themselves to be property owners within certain territory proposed to be annexed by the municipality of Inglewood, brought this action to secure judgment declaring proceedings theretofore taken on the part of the municipality in the direction of effecting such annexation void, and to secure a decree enjoining said city from holding an election to decide the question of annexation. Demurrer to the complaint was overruled, and answer was filed. The cause went to trial, judgment being rendered against the plaintiffs. From that judgment this appeal has been taken.

It is contended that the evidence does not sustain the findings of the court as to the issue made by the pleadings respecting the boundaries of the district proposed to be annexed. It is because of alleged uncertainty in the boundaries described in the resolution of the board of trustees that the plaintiffs make their principal contention against the validity of the proceedings. It is first contended that the lines stated in that description as being lines of sections 22, 27, and 34, township 2 south, range 14 west, S. B. M., did not constitute such a description as would enable persons interested to determine the boundaries fixed by those lines, because there was no map on file as a public record showing that official surveys had been made of which the court might take judicial notice.

[1, 2] Preliminarily, it may be stated that, if the description contained in the resolution was sufficiently definite to have answered for a private grant or conveyance, it would be sufficient for annexation purposes. In *re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Central Irrigation District v. De Lappe*, 79 Cal. 351, 21 Pac. 825. And under section 1875, Code of Civil Procedure, the courts will take judicial notice of government surveys of public lands as public and official acts of the executive department of the United States. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; *Kimball v. McKee*, 149 Cal. 435, 86 Pac. 1089; *Waters v. Pool*, 130 Cal. 186, 62 Pac. 385.

[3, 4] It is admitted by the appellants that if at the time of the making of the resolution there was of record any map made under the official direction of the United States land surveyors, which map showed all of the lines referred to in the description contained in the resolution, such description would then be sufficient—this with the qualification that a map as so made and existing must have been a map of the public lands of the United States. The qualification pre-

sents the contention that, even though through governmental agencies official surveys are made, platted, and recorded, judicial notice will only be taken of such portions of the map as delineate the public lands, and not portions showing lines projected upon lands owned in private.

In order to better understand the contentions of appellants it is necessary to make a further statement of facts:

Upon the acquisition of the territory of California from the government of Mexico, certain grants of land were held by individuals under authority of the latter government, which grants were later confirmed by the United States. In 1873 there was patented to one Abila by our government a large tract of land in and about the present municipal limits of the city of Inglewood under the name of Rancho Sausal Redondo. A patent and a map defining the boundaries of the grant were filed in the office of the United States Surveyor General at San Francisco, and a copy was recorded in the office of the county recorder of Los Angeles county at about the same time. The boundaries of that rancho at the north and east were irregular, in that they were not coincident with the south boundary line of section 22, or the west boundary line of sections 27 and 34 of the township mentioned, but were so laid that the rancho included portions of the southerly part of section 22 and the westerly part of sections 27 and 34. With this condition in mind, appellants use it as a basis for the argument that the sections of the public land, portions of which were included within the grant of the rancho, became fractional sections, and that therefore there could be no public survey which would show officially the southerly line of section 22 or the complete westerly lines of sections 27 and 34.

We cannot admit that the latter contention is a valid one, in view of the documentary evidence which the record discloses, and which was before the court at the trial. If the court had been limited to the patent issued to Abila and its attendant plat in determining whether the resolution contained a sufficient description as to the lines referred to, such evidence would be insufficient. However, defendants introduced before the court a map which purported to show complete township No. 2 south, with section lines indicated for the four sides of each of sections 22, 27, and 34, quarter section lines indicated on section 22, and on the east half of section 27. This map bore the following indorsement:

"The above map of township No. 2 south, range 14 west, San Bernardino Meridian, is strictly conformable to field notes of the survey thereof on file in this office which has been examined and approved. The Surveyor General's Office, San Francisco, Cal., March 31, 1868. L. Upson, Sur. Gen. Cal."

This map, it seems, was filed also in the United States Land Office at Los Angeles in 1871. As to its official character no question is made. The further indorsements on the map referred to designated various surveys which had been made use of in the preparation of the plat. There was first mentioned a survey of the north boundary of the township as having been made by Henry Washington, October 4, 1852, and this legend appears following: "Rest of township lines. Henry Hancock, July 5, 1853." Following these indorsements were legends referring to various rancho surveys, including this:

"Boundaries of Ro. Sausal Redondo, located by George Hanson under instructions from Surv. Gen. 1868. Section lines George Hanson, February 7, 1868."

The plat attached to the official patent of the Rancho Redondo bears the indorsement that the land represented thereon had been—"segregated from the adjoining public lands under direction from the U. S. Surveyor General by George Hansen, Dep. Sur. 1868."

This is not a case where upon the existence only of a patent map the court has assumed to take judicial notice of the existence of section lines. The plat relied upon by defendants is a general plat of the township, and in so far as it exhibited section lines or quarter section lines, even though such lines extended into or across lands granted by the government to a private owner, they nevertheless lost none of their official character; neither, in our opinion, does the map become, as to that part of it, a map merely of private lands, and hence not one of the records recognized under the provisions of section 1875, Code of Civil Procedure. Moreover, in a strict sense, at the time the section lines were surveyed and delineated by Hansen (according to the indorsement on the map) in 1868, the lands embraced within the boundaries of Rancho Redondo were still a part of the public domain; this for the reason that, while they may have been by that same survey segregated from the general body of the land of the United States, title was not confirmed in the grantee by patent issued until February, 1873. It has been held that persons entitled to land under grants of the Mexican government were considered not to have a vested interest in any particular land after the territory was acquired by the United States, but that they possessed a vested interest in a specific quantity of land which it was necessary to have allotted and measured off by the officers of our government before the right was confirmed. *Waterman v. Smith*, 13 Cal. 373. We think that the court was justified in looking to that map, and in taking judicial notice of all the boundaries officially expressed thereon.

[5] Appellants complain of another alleg-

ed fatal inaccuracy in the description used in the annexation proceedings. The particular call in the description as to which question is made reads as follows:

"Thence easterly in a straight line along the westerly prolongation of the southerly line of said Lindley Drive, the southerly line of said Lindley Drive and easterly prolongation of the said southerly line of Lindley Drive to the quarter section line which divides the east and west halves of section 26, township 2 south, range 14 west."

The whole difficulty claimed rests upon the fact that, at the intersection of a street which crossed Lindley Drive at right angles between the starting point and terminus, the corners of the street so intersecting the southerly line of Lindley Drive were turned in the form of arcs of a circle in order to allow room for a small public park located at the center of that intersection. Appellants' argument is that with the curved corners the line could not be followed as indicated in the description contained in the resolution. We find no difficulty in following that description, for, as counsel for respondents well say, the point of commencement of the last call in the description is plainly indicated; the terminus of the line is indicated as being in the section line at the east of the starting point; the line is stated to be a straight line; hence the curves at the intersecting street corners would be disregarded without creating any ambiguity or uncertainty as to what was intended to be indicated by the call.

The findings of the court appear to fairly determine the facts and to sustain the judgment as entered.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 93

GRISWOLD v. MORRISON et al.
(Civ. 3312.)

(District Court of Appeal, Second District, Division 2, California. June 7, 1921.)

1. Fraud ☞42—Intent must be alleged.

Fraud has its foundation in intention, and that intention is a fact which ought to be alleged.

2. Contracts ☞328(1)—Partial failure of consideration may be pleaded in reduction of damages.

Where, as the result of fraud, there is a partial failure of the consideration of a contract, and the amount of damages is definite and can be ascertained by calculation, the fraud may be pleaded in reduction of damages as a defense pro tanto.

3. Sales ☞354(1)—Illegality and failure of consideration held insufficiently alleged in defense in action on note.

In an action on a note given for hogs, an affirmative defense alleging that defendants purchased the hogs for the purpose of fattening them for the market, which fact was communicated to plaintiff, that they were not sound, but were suffering from cholera, that the plaintiff knew the condition of the hogs at the time of the sale, but defendants did not, and by reason of diseased condition of the hogs the sale was illegal and contrary to public policy, was insufficient where it did not allege that plaintiff misrepresented the condition of the hogs or withheld from defendants knowledge of their condition for the purpose or with the intent to deceive or defraud, nor was a second defense good which in addition alleged that plaintiff represented that the hogs were sound and free from disease, and that by reason thereof there was a failure of consideration for the note in a certain amount.

4. Sales ☞251—"Fraudulent representation" and "warranty" distinguished.

A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or arrangement of the contract; while to constitute an express warranty the statement must be a part of the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraudulent Representation; Warranty.]

5. Sales ☞261(2)—No particular forms of words essential to warranty, which depends on intention.

Although to constitute an express warranty no particular form of words is essential, and it is not necessary that the word "warranty" should be used, it must at least appear that the buyer understood that the seller's affirmation was a warranty; that is, that it was intended to be a part of the contract.

6. Set-off and counterclaim ☞44(1)—One or all joint tort-feasors may be sued.

As one may sue one or all of joint tort-feasors, and if he elects to sue but one is entitled to a judgment against that one, so a defendant may allege fraud of plaintiff and another who is not a party and set it up as a counterclaim under Code Civ. Proc. § 438.

7. Sales ☞364(1)—Instruction in action on note where fraud was defense held error.

In an action on a note given for hogs, where defendants set up as affirmative defenses that they purchased the hogs for the purpose of fattening them for the market, which fact they communicated to the plaintiff, that they were not sound, but were suffering from cholera, that the plaintiff knew the condition of the hogs at the time of the sale, but defendants did not, and by reason of diseased condition of the hogs the sale was illegal and contrary to public policy, and there was a failure of consideration in a certain amount, an instruction in substance that, if jury believed from a fair preponderance of the evidence that plaintiff represented to defendants that the hogs were

sound and free from disease, that defendants believed such representation and relied thereon, and that the hogs when sold were not sound, then that they should find that plaintiff had been guilty of fraud and deception and had received the note under misrepresentation, was erroneous as permitting a finding of fraud in favor of defendants without requiring the jury to find a scienter, as the instruction should have required the jury to find not only that the representation was false, but that plaintiff had knowledge of its falsity, or what in law is equivalent to the proof of the scienter.

8. Fraud ☞13(2)—Representation must be knowingly made.

To constitute deceit the false representation must have been made with knowledge of its falsity or what in law is equivalent thereto and with intent to deceive.

9. Fraud ☞13(3)—Statement believed to be true when actual fraud.

A positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true, does not constitute actual fraud unless it is made with intent to deceive the other party to the contract or to induce him to enter into it under Civ. Code, § 1572.

10. Bills and notes ☞358—One taking note as collateral for pre-existing debt holder for value.

An indorsee of a note merely as collateral security for a pre-existing debt owing to him by his indorser is a holder for value and in the usual course of business, and the note in the hands of such indorsee, if at the date of the indorsement it is taken without notice of any infirmity in the instrument, is not subject to existing equities between the original parties, under Civ. Code, §§ 3105-3110.

11. Bills and notes ☞357—Indorsee to indemnify against future loss holder for value.

The indorsee of a note, indorsed, not to secure a pre-existing indebtedness due to him from his indorser, but to indemnify him against future loss on account of an existing liability to a third person, is a transferee for value and in due course under Civ. Code, §§ 3105-3110, 3135.

12. Bills and notes ☞357—Indorsee for indemnity has lien on note.

A person to whom a promissory note has been indorsed as collateral to indemnify him against possible future loss arising out of an existing liability incurred for and on behalf of his indorser, under Civ. Code, § 3108, has a lien on the note to the extent of any loss that he may sustain by reason of such liability.

13. Bills and notes ☞334—Transferee of note as collateral for indemnity for liability assumed by him for transferer not affected by notice of infirmity in note not received until after assuming such liability.

Civ. Code, § 3135, providing that a transferee of a note receiving notice of infirmity therein before completing payment therefor is a holder in due course only to the extent of the amounts then paid by him, applies only

where the obligation incurred by the holder of the note is such that, on such discovery of infirmity, he is relieved from all further legal obligation to make further payment, as, for example, where the note has been transferred in consideration of his future payments to the transferer, and hence was inapplicable to a case where note was transferred as collateral to indemnify the holder against possible future loss arising out of an existing liability to a bank incurred by the holder for and on behalf of the transferer, the liability of the holder to the bank being fixed and unconditional at the time of the transfer, so that he must have had notice of infirmity before transfer, to be affected thereby.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by H. H. Griswold against S. T. Morrison and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Ault & Anderson, of Calexico, for appellant.

Kenton A. Miller, of Los Angeles, and Utley & Smith, of Calexico, for respondents.

FINLAYSON, P. J. This is an action on a promissory note for \$1,000, dated May 29, 1919, and executed by defendants to one Akers as payment for certain hogs bought by defendants from Akers. The latter, before the maturity of the note, indorsed and delivered it to plaintiff, who, claiming to be an innocent indorsee in due course of business, for value, and without notice of any infirmity in the instrument, sues defendants as the makers. The case was tried before a jury, the verdict was in favor of defendants, and from a judgment that he take nothing by the action, plaintiff appeals.

In their answer defendants set up two affirmative defenses and four counterclaims. In their first affirmative defense (designated in the answer as the second defense, the first defense consisting of denials) defendants allege, in substance and effect, that plaintiff and Akers owned the hogs, or plaintiff had some interest therein; that defendants purchased the hogs for the purpose of fattening them for the market, which fact was communicated to plaintiff and Akers; that the hogs were not sound, but were suffering from cholera; that plaintiff and Akers knew the condition of the hogs at the time of the sale, but defendants did not; and that, by reason of the diseased condition of the hogs, their sale to defendants was illegal and contrary to public policy. There is no allegation that plaintiff or Akers misrepresented the condition of the hogs or that either withheld from defendants knowledge of their condition for the purpose or with the intent to deceive or defraud. In short, nowhere in defendants' first affirmative defense is there any allegation of scienter or of fraudulent intent.

The second affirmative defense (designated in the answer as the third defense), after repeating the allegations of the first affirmative defense, alleges that plaintiff and Akers represented to defendants that the hogs were sound and free from disease; that, shortly after their purchase by defendants, some of the hogs, the aggregate value whereof was \$764, died from cholera; and that by reason thereof there has been a failure of consideration for the note to the amount of \$764.

In their counterclaims defendants allege that they purchased the hogs from plaintiff and Akers; that plaintiff and Akers falsely represented that the hogs were sound and free from all contagious or infectious diseases; that defendants relied upon such representations; that such representations, when made, were known by plaintiff and Akers to be false, and were made with the intent to defraud defendants; that upon discovering the falsity of the representations and that the hogs were suffering from cholera, defendants tendered them back to plaintiff and Akers and demanded a rescission of the contract of sale and the return of the promissory note, which, it is alleged, plaintiff and Akers refused to do; that, by reason of the cholera with which the hogs were affected, defendants were damaged in various sums, namely, \$60 for veterinary services and medicines furnished the hogs, \$150 for wages paid a man to care for the hogs while they were suffering from cholera, \$1,000 damages to defendants' ranch by reason of the presence of the diseased hogs thereon and the dissemination of the cholera germs, and \$1,000 damages resulting from loss of profits that would have been made had the hogs been sound and had they been sold by defendants after they had been fattened for the market.

To each affirmative defense and counterclaim plaintiff interposed a general demurrer, which he claims should have been sustained.

[1-3] The first affirmative defense is fatally defective in that it fails to allege that either plaintiff or Akers made any false representation fraudulently, or that either of them concealed the condition of the hogs with intent to deceive. Where, as the result of fraud, there is a partial failure of consideration, and the amount of damages is definite and can be ascertained by calculation, the fraud may be pleaded in reduction of damages as a defense *pro tanto* (Russ, etc., Co. v. Muscupiabe, etc., Co., 120 Cal. 529, 52 Pac. 995, 65 Am. St. Rep. 186; Harrington v. Stratton, 22 Pick. [Mass.] 510; Burnett v. Smith, 4 Gray [Mass.] 50); but, to avail himself of such defense, the defendant must show affirmatively a right of action in his favor arising out of the fraud (Reese v. Gordon, 19 Cal. 147). It has been held that if, with the intent to deceive his vendee, the vendor of such food animals as hogs or cattle, knowing that they are diseased and that

the vendee intends them for the market, nevertheless sells them at a sound price, and the vendee is ignorant of their true condition, the vendor is guilty of a fraudulent concealment, and the rule of caveat emptor does not apply. Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421; Puls v. Hornbeck, 24 Okl. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202, 138 Am. St. Rep. 883. But in such cases it is necessary to allege that the concealment was with intent to deceive. Hanson v. Edgerly, 29 N. H. 343; Clark v. Bamer, 2 Lans. (N. Y.) 67; Jordan & Sons v. Pickett, 78 Ala. 331. Fraud has its foundation in intention, and that intention is a fact which ought to be alleged. It is one of the facts constituting the fraud. Woodroof v. Howes, 88 Cal. 190, 26 Pac. 111; Feeney v. Howard, 79 Cal. 528, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Sheldon v. Davidson, 85 Wis. 133, 55 N. W. 161; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 433; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551. Though it has been said that the intent to deceive must be charged in positive terms, and not left to inference (Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; McKibbin v. Ellingson, 58 Minn. 205, 59 N. W. 1003, 49 Am. St. Rep. 499), we think that, if the terms employed by the pleader, taken in their ordinary signification, necessarily include the idea of fraudulent intent, that is enough. Thus, for example, it is a sufficient allegation of fraudulent intent to aver that the false representation or the concealment was fraudulently made. Sallies v. Johnson, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913A, 386. Unfortunately for respondents, they are not in a position to avail themselves of this liberal rule; for nowhere in their first affirmative defense is any fact alleged from which an intent to deceive may be inferred. It is not even alleged that plaintiff or Akers knew, or had reason to believe, that defendants were ignorant of the diseased condition of the hogs. True, it is alleged that defendants did not know and that plaintiff and Akers did know that the hogs were sick and diseased; but there is no allegation that plaintiff or Akers was aware of defendants' ignorance respecting the true condition of the hogs. There is, therefore, a failure to allege facts showing a fraudulent intent, and for that reason the demurrer to the first affirmative defense should have been sustained.

Respondents, as their sole reply to appellant's objection to the sufficiency of the first affirmative defense, contend that the defense is based, not on fraud, but on the illegality of the contract. There is no merit in this contention. Because the Penal Code makes it a crime to suffer infected animals "to be driven on the public highway" (Pen. Code, § 402d), respondents argue that the contract of sale was contrary to public policy and

void. But there is no allegation that the contract of sale contemplated that the hogs should be "driven" on the public highway. For aught that appears from the allegations of the first affirmative defense, it is quite possible that the hogs were to be conveyed to respondents' ranch without being "driven" thereto, or without being driven thereto on any "public highway."

[4, 5] What we have said of the first affirmative defense applies with equal force to the second, unless, as respondents claim, the second affirmative defense shows the breach of an express warranty. The sole basis for the claim that there was an express warranty is the allegation that at the time of the sale plaintiff and Akers "represented to the defendants that said hogs so purchased were in good health and sound physical condition and free from cholera or other infectious or contagious diseases and were merchantable hogs." There is a definite distinction between a fraudulent representation and a warranty. A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or element of the contract. On the other hand, to constitute an express warranty, the statement must be a part of the contract. 35 Cyc. pp. 368, 372. Although, to constitute an express warranty, no particular form of words is essential, and it is not necessary that the word "warranty" should be used, it must at least appear that the buyer understood that the seller's affirmation was a warranty; that is, that it was intended to be a part of the contract. 24 R. C. L. p. 167; 35 Cyc. 374. Here there is no allegation that plaintiff or Akers "warranted" the soundness of the hogs, nor is there any equivalent averment, as, for example, an averment that the buyer understood that the alleged representation was to be a part of the contract of sale. For these reasons we think that the demurrer to the second affirmative defense should have been sustained.

[6] Each counterclaim alleges that plaintiff and Akers falsely and fraudulently represented that the hogs were sound and free from disease. Akers is not a party to the action. A counterclaim must be one in favor of a defendant against a plaintiff "between whom a several judgment might be had in the action." Code Civ. Proc. § 438. Appellant claims that if, as alleged by respondents in their counterclaims, he and Akers together fraudulently misrepresented the condition of the hogs, there could be no several judgment against him in favor of respondents, but only a joint judgment against himself and Akers, and that therefore any damages which defendants may have suffered by reason of the alleged fraud cannot be set off as a counterclaim in this action. This, as we understand it, is the sole objection urged here by appellant against the sufficiency of the counterclaims. There is no merit in that objection.

The counterclaims are based on tort; i. e., the fraud alleged to have been perpetrated by appellant and Akers upon respondents. If, as the counterclaims allege, plaintiff and Akers were guilty of fraud, they were joint tort-feasors. But a plaintiff may sue one or all of joint tort-feasors (30 Cyc. 122); and if he elects to sue but one he is entitled to a judgment against that one (*Chetwood v. California Nat. Bank*, 113 Cal. 426, 45 Pac. 704; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31). This, therefore, is a case where, if the allegations of the counterclaims be true, defendants are entitled to a several judgment against plaintiff. See *Walker v. Johnson*, 28 Minn. 147, 9 N. W. 632.

Appellant complains of certain instructions given by the court. From so much of the testimony as is set forth in the briefs, we infer that there was no evidence that appellant was a part owner of the hogs or that he had any interest therein or any direct connection with their sale. The theory that respondents adopted at the trial seems to have been substantially this, that appellant was not an indorsee of the note for value and in due course of business, and that, therefore, he held the note subject to respondents' defense of fraud in the sale of the hogs.

[7-9] By instruction No. 11 the court, in substance, charged the jury that, if they believed from a fair preponderance of the evidence that Akers represented to defendants that the hogs were sound and free from disease, that defendants believed such representation and relied thereon, and that the hogs, when sold, were not sound, then that they should find that Akers had been guilty of fraud and deception and had received the note from defendants under misrepresentation. This instruction is assailed on the ground that it permits a finding of fraud in favor of defendants without requiring the jury to find a scienter. The criticism is that the instruction should have required the jury to find, not only that the representation was false, but that Akers had knowledge of its falsity, or what in law is equivalent to proof of the scienter. The criticism is just. We are aware of no authority which will sanction a defense grounded on deceit unless the false representation has been made with knowledge of its falsity, or what in law is equivalent thereto, and with intent to deceive. A misrepresentation knowingly made is sufficient to warrant an inference of fraudulent intent; but to hold that the knowledge or the intent of the person making the misrepresentation is immaterial would be against principle and authority. *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Cowley v. Dobbins*, 136 Mass. 401.

Respondents remind us that the positive assertion, in a manner not warranted by the information of the person making it, of that

which is not true, though he believes it to be true, is, in law, the equivalent of actual knowledge of the falsity. Civ. Code, § 1572, subd. 2. But the vice of the instruction is that it did not require the jury to find either that Akers had actual knowledge of the falsity of the alleged misrepresentation or the legal equivalent of such actual knowledge. While it is true that there are cases where the author of a false assertion may be guilty of actionable deceit though he believes his representation to be true, yet the facts upon which this constructive knowledge is made to depend should be found by the jury under appropriate instructions. The instruction here complained of entirely ignores the element of scienter. Moreover, the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, does not constitute actual fraud unless it be made with intent to deceive the other party to the contract or to induce him to enter into it. Civ. Code, § 1572. The instruction entirely ignores the necessity of such intent. The giving of the instruction was prejudicial error, necessitating a reversal of the judgment and a new trial.

By instruction No. 12 the jury was told, in substance and effect, that if plaintiff purchased the note before maturity, for a valuable consideration, and in good faith, without knowledge of the alleged infirmity in the instrument, and honestly advanced money upon the faith of the note, then he "would be entitled to recover only such sum or sums as he honestly advanced upon the face of said note in good faith before he was notified or informed by the defendants that said hogs were suffering from cholera or other infectious or contagious diseases." Appellant claims that this instruction is misleading in that it assumes that, instead of purchasing the note outright, he made advancements thereon from time to time. Respondents, on the other hand, assert that appellant parted with nothing before he received notification of their rescission of the contract, and that therefore he stands in no better position than his indorser, Akers.

To understand the criticism aimed at this instruction, it is necessary to make a further statement of the facts. It seems that prior to and at the date of the sale of the hogs Akers was indebted to two banks in sums that aggregated \$762. To each of these banks Akers had executed his promissory note for the amount of his indebtedness. Appellant, in some manner not disclosed by the record, but probably as an accommodation indorser, was liable for the payment of these notes. The record does not show when Akers' notes to the banks matured. We have no means of knowing whether either of them had matured prior to the transfer by Akers to appellant of the note that is in suit here. On the very

day that respondents executed to Akers, as payee, their note for \$1,000 in payment for the hogs, Akers indorsed and delivered it to appellant. At the same time appellant gave Akers \$50, who at the time was further indebted to appellant in the sum of \$36.20, the balance due appellant on a note previously executed to him by Akers. Some months after the transfer to appellant of the note in suit here—the note for \$1,000 that respondents had given to Akers in payment for the hogs—appellant paid to the banks the amounts due upon the two notes upon which he was liable as a guarantor or surety for Akers. At the time when Akers indorsed and transferred to appellant the note in litigation here, they agreed that after appellant should succeed in collecting from respondents the principal and interest of the note, and after he had reimbursed himself for any sums that he might have to pay to the two banks on account of Akers' notes to those institutions, and after he had satisfied, from his collection on respondents' note, the other amounts owing him by Akers, namely, the sums of \$50 and \$36.20, respectively, the balance of his collection on the \$1,000 note should be paid to Akers. From these facts it is apparent that the note in suit here was transferred by Akers to appellant as collateral security: (1) To secure an indebtedness of \$86.20 then due to appellant from Akers, made up of the \$50 that he then was loaning Akers (under the facts stated the \$50 was received by Akers as a loan) and the \$36.20 that was due to appellant as the balance of a note previously given him by Akers; and (2) to secure or indemnify appellant against any loss that he might sustain by reason of his liability on the two notes that Akers had executed to the banks—obligations for which, as between themselves, Akers was liable as the primary debtor and appellant as a guarantor or surety only. The day after Akers indorsed the note to appellant the latter was informed by respondents that they had rescinded the contract of sale on account of the alleged false representation, or fraudulent concealment, respecting the condition of the hogs.

[10] If appellant was without notice of the alleged fraud at the time when respondents' note was indorsed to him by Akers, then, without doubt, instruction No. 12 is not only erroneous, but prejudicial; for in that event appellant, regardless of any notice that he subsequently may have received respecting Akers' fraud in the sale of the hogs, would be entitled to recover from respondents the sum of \$86.20 at least; i. e., the said sum of \$50 that he loaned to Akers at the time when the note was indorsed to him, and Akers' pre-existing indebtedness of \$36.20, the balance due on the note previously executed by Akers to appellant. A more difficult problem is presented by the question whether, as to the \$762 for which appellant was liable to the

banks as an accommodation indorser for Akers, the former took the note in litigation as a holder for value and in due course of business.

While there has been much conflict in the decisions, it is the established law in the federal courts and in most states, including our own, that an indorsee of a note merely as collateral security for a pre-existing debt owing to him by his indorser is a holder for value and in the usual course of business, and the note, in the hands of such indorsee, if at the date of the indorsement it is taken without notice of any infirmity in the instrument, is not subject to existing equities between the original parties. This is the majority rule, and is usually referred to as the federal rule; while the contrary rule, which until the adoption of the Uniform Negotiable Instruments Law, prevailed in New York and about a dozen other states, is frequently referred to as the New York rule. 8 Corp. Jur. 488. The federal rule is, as we have said, the one that obtains in this state. Sackett v. Johnson, 54 Cal. 107; Negotiable Instruments Law (Civ. Code, §§ 3105-3110); note to German Am. Bk. v. Wright, Ann. Cas. 1917D, 387.

[11] The difficult question with which we are confronted is this: Under the so-called federal rule, is the indorsee of a note, indorsed, not to secure a pre-existing indebtedness due to him from his indorser, but to indemnify him against future loss on account of an existing liability to a third person, a transferee for value and in due course?

Though he was liable to each bank for the amount that it had loaned Akers, still, until appellant paid the amounts due the banks, Akers, who was primarily liable therefor, did not become appellant's debtor. As to the amounts that appellant was obliged to pay to the banks to satisfy these obligations for which Akers was primarily liable, the note in suit here was not indorsed to appellant by Akers to secure an existing indebtedness then owing to him by Akers. Rather, as to those amounts, the note was indorsed to appellant as indemnity to indemnify or secure him harmless against future possible loss, namely, loss in the event that he should thereafter become obliged to pay the amounts that Akers had borrowed from the banks. Under these circumstances, is appellant protected by the so-called federal rule? We have found no case directly in point. Of the cases to which our attention has been called, those most nearly in point are two Alabama cases, Bank of Mobile v. Hall, 6 Ala. 639, 41 Am. Dec. 72; and Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669. Those cases would be in point but for the fact that the New York, and not the federal, rule obtains in Alabama. In these two Alabama cases the Supreme Court of that state held that a negotiable in-

strument received as indemnity against a possible future loss, even though that loss afterwards actually occur, is not taken in the usual course of trade, and therefore the note remains subject to existing equities between the original parties. But, as we have said, Alabama is one of those states where the so-called New York rule obtains, or, at any rate, did obtain at the date of those decisions. So that these Alabama cases may not be persuasive precedents in states where, as with us, the federal rule prevails.

So far as the question before us is concerned, we are unable to see any distinction between an antecedent debt in the form of an absolute obligation due to the transferee from his transferor and an existing, but previously created, liability upon which the transferee may suffer a future loss or damage, even though that loss may be contingent upon the failure of the transferor to pay the debt for which his transferee, for his accommodation, became liable as a guarantor or surety. It seems to us to be sufficient if the transferor of the collateral note is in such contract relation with his transferee as renders it advantageous to the latter to have additional security for the performance by his transferor of the antecedent obligation. This conclusion finds support in the reasoning pursued in the following cases: First Nat. Bank v. Busch, 102 Minn. 365, 113 N. W. 898; Brown v. James, 80 Neb. 475, 114 N. W. 591; State Bank v. Holland, 60 Tex. Civ. App. 515, 128 S. W. 435; Forstall v. Fussell, 50 La. Ann. 249, 23 South. 273; Lee v. Whitney, 149 Mass. 447, 21 N. E. 948.

We can see no force in the argument advanced by the Alabama court to the effect that, because the transferee of the note given as collateral security may never have to pay anything on account of the pre-existing liability assumed by him for the benefit of his transferor, he therefore should not be regarded as a holder in due course. In every case where collateral is put up to secure the performance of an obligation, as, for instance, the payment of a debt immediately owing to the transferee by his transferor, it is possible that the security may never have to be enforced. It is always possible that the debtor may pay his debt without making resort to the security necessary. And yet no court, in a jurisdiction where the federal rule obtains, would for a moment hold that the indorsee of a note transferred to secure an antecedent debt due to him from his indorser was not a transferee for value and in due course merely because the indorser might voluntarily pay the debt that he owes his indorsee without compelling the latter to have recourse to the note given as security.

The Alabama cases, it will be noticed, proceed upon the theory, not that value was

given for the note, but that the transaction is not a dealing in the usual course of trade. Such a holding is not warranted by the Negotiable Instruments Law of this state. That law defines a holder in due course as one—

"who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Civ. Code, § 3133; Stats. 1917, p. 1540.

If appellant had no notice of the infirmity in the note at the time when it was indorsed to him, then he took it under all the conditions prescribed in this Code section as those necessary to constitute one a "holder in due course," unless it can be said that he did not take it for "value." Under the reasoning pursued by the courts in *First National Bank v. Busch*, supra, *Brown v. James*, supra, *State Bank v. Holland*, supra, *Forstall v. Fussell*, supra, and *Lee v. Whitney*, supra, appellant did take the note for value even though, with respect to his liability on Akers' notes to the banks, his danger of loss thereon was not absolute but contingent.

[12] Moreover, appellant is a "holder for value" under the Code definition obtaining in this state since the enactment of the Negotiable Instruments Law. Section 3108 of our Civil Code now reads:

"Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

A person to whom a promissory note has been indorsed as collateral to indemnify him against possible future loss arising out of an existing liability incurred for and on behalf of his indorser has a lien on the note to the extent of any loss that he may sustain by reason of such liability. Plaintiff, therefore, became a holder of the note for value to the extent of the amounts for which he was liable to the banks as a guarantor or surety for Akers.

[13] We are not unmindful that it also is provided by the Negotiable Instruments Law (Civ. Code, § 3135, as amended in 1917) that—

"Where the transferee receives notice of any infirmity in the instrument * * * before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

In our opinion this provision is applicable only where the obligation incurred by the holder of the note is such that, on discovering the infirmity in the instrument, he is relieved from all further legal obligation to make any further payment, as, for example, where the note has been transferred to him in consideration of his promise to make future payments to his transferer. In that case, if it should turn out that, by reason of fraud on the part of the transferer, the maker of the note had a defense thereto, the transferee would be under no legal obligation to pay the balance of the amount that he had agreed to pay to his transferer as a consideration for the transfer. In the instant case, however, appellant's liability to the banks continued regardless of any discovery he may have made respecting the fraud alleged to have been perpetrated by his transfer on these respondents as the makers of the note. Appellant's antecedent liability to the banks was the consideration for the transfer of the note to him as collateral security. The extent of that liability never varied after the note was indorsed to him. His liability to the banks was fixed and unconditional, even though his loss or damage by reason of that liability were contingent upon the failure of Akers to pay to the banks the amounts due from him as the primary obligor. Appellant's liability to the banks being fixed, definite, and unconditional, it follows that, unless he had notice of the alleged fraud at the time when the note was transferred to him, he is in the position of an indorsee who does not receive notice of the infirmity until after the completion of his purchase of the note for value. And the rights of such a purchaser are not affected by such after-acquired notice. The meaning of section 3135 of the Civil Code is substantially this: If the transferee receives notice of the infirmity before he has paid all the consideration for the note, he is a bona fide holder for value only to the extent that he had paid the consideration that he agreed to give. But in the instant case the consideration for the indorsement of the note to appellant, in addition to the \$50 and the \$36.20, consisted of appellant's pre-existing and unconditional liability to pay certain fixed and definite debts for which, as between themselves, his indorser was primarily liable, namely, the amounts due or to become due to the banks. Appellant's liability to the banks, as a guarantor or surety for Akers, was, of itself, a sufficient consideration for the indorsement of the note to appellant. As having some bearing upon this phase of the question, see *Miller v. Marks*, 46 Utah, 257, 148 Pac. 412.

For the foregoing reasons we conclude that the instruction No. 12 was misleading and not applicable to the facts of this case.

CONDLEY v. CONSOLIDATED LUMBER CO. (Civ. 3467.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1921. Hearing Denied by Supreme Court July 25, 1921.)

The conclusion at which we have arrived respecting instructions 11 and 12 renders it unnecessary to consider any of appellant's remaining assignments of error. What we have said should suffice to guide court and counsel on the retrial of the case.

There is one other fact that, perhaps, ought to be mentioned. Prior to the sale to respondents Akers had given appellant a chattel mortgage on the hogs. Though the evidence upon this phase of the case is exceedingly fragmentary and unsatisfactory, we infer that this mortgage had been given to appellant to indemnify him against any loss that he might sustain by reason of his liability on Akers' notes to the banks. Appellant did not release the chattel mortgage on the hogs until July 9, 1919, or about six weeks after the indorsement to him of the note that had been given by respondents for the purchase price of the hogs. Because appellant had agreed to turn over to Akers any balance of the proceeds of respondents' note, after he had reimbursed himself for all amounts previously loaned by him to Akers and any sums that he might have to pay to the banks on account of Akers' indebtedness thereto, we have concluded that the indorsement of the note to appellant was for the purpose of security only. We have inferred that the note was indorsed to appellant either as additional security to the chattel mortgage or as a substitute security. It is possible, however, that, when all the facts are adduced on the retrial of the case, it may appear that it was agreed between Akers and appellant that the latter's surrender or release of the chattel mortgage should, of itself, constitute, in part at least, the consideration for Akers' indorsement of the note to appellant. If so, it may be that such agreement alone would constitute a sufficient consideration for the transfer, thus affording a different, but sufficient, ground for holding that appellant is a holder for value and in due course. However, as we have said, the evidence upon this phase of the case is hopelessly uncertain and indefinite, and for that reason we have preferred to reach our decision without considering what favorable effect, if any, this chattel mortgage and the release thereof may have upon appellant's claim to be a holder of the note for value and in due course.

The judgment is reversed, and the cause remanded, with directions to the lower court to sustain appellant's demurrers to respondents' first and second affirmative defenses (designated in the answer as the second and third defenses, respectively), with leave to respondents to amend their answer should they be so advised.

We concur: WORKS, J.; CRAIG, J.

1. Sales ⇨181(11)—Evidence held insufficient to support finding that buyer was ready, willing, and able to perform contract.

In buyer's action for failure to deliver, in which the seller claimed that buyer by failure to make payments according to the contract violated the contract, justifying the seller in repudiating it and in refusing to deliver the goods, evidence held insufficient to support finding that the buyer was at all times ready, willing, and able to perform the contract and to pay for the goods.

2. Sales ⇨181(11)—Evidence insufficient to prove waiver by seller of payment at time specified by contract.

In buyer's action for failure to deliver, following seller's repudiation of contract for buyer's failure to make payments according to the contract, evidence held insufficient to support finding that seller waived the making of payments at the times specified by the contract.

3. Sales ⇨174—Buyer's failure to make payment at time specified in contract justified seller in repudiating contract and refusing to deliver.

On buyer's failure to make payment at the time specified in the contract, the seller was not required to sue for the purchase price, but could repudiate the contract and refuse to deliver the goods.

4. Sales ⇨82(1)—Time held of essence of contract for sale of lumber.

In contract for sale and delivery of lumber, providing for payment of price at specified times, time was of the essence of the contract, though the contract did not expressly so state.

5. Sales ⇨195—Inability to request delivery did not excuse failure to make payment at time specified by contract.

Where contract for sale of lumber provided for payment of purchase price, a part 30 days from date, and the balance 30 days thereafter, and provided for delivery of the lumber when requested by buyer, the fact that the lumber was to be used for a bridge to be constructed by the municipality under proceedings authorized by the Vrooman Act, and that delay in the procedure prevented the buyer from requesting delivery, did not excuse buyer from making payments at times specified by the contract.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Darrell Condley, doing business under the fictitious name and style of the Darrell Condley Company, against the Consolidated Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Turner & Grainger, of Los Angeles, for appellant.

G. C. De Garmo, of Los Angeles, for respondent.

SHAW, J. Action to recover damages for the alleged breach of a contract by defendant. Judgment went for plaintiff, from which defendant appeals.

The material facts are that on May 12, 1919, plaintiff, by a written order addressed to defendant, directed it to deliver certain lumber and building material to a designated place for the purpose of constructing a bridge, and in said order agreed "to pay for said lumber and building material the sum of \$1,299 net as follows: One-half in 30 days from date; balance 30 days thereafter—which order was duly accepted in writing by defendant. While the order was silent upon the subject, the parties stipulated that delivery of the material was to be made "when and as requested by plaintiff."

Plaintiff made default in the payment of the amount, which under the order was due and payable 30 days from the date thereof, and about June 30, 1919 (prior to which time defendant had without success sought plaintiff's permission to deliver the material), and during negotiations between the parties for the purchase of another bill of lumber from defendant, which plaintiff declined to make at the price offered, the latter stated that he was going to hold defendant to the contract here involved. Thereupon the manager of defendant said, "I am ready to deliver the Sherman street job right now," and stated, "I am not going to hold onto that lumber unless you pay 5 per cent. on it," which payment plaintiff refused to make because, as he said, "I don't have to." Thereupon defendant's manager said, "We will cancel the contract," and further said that the company would not deliver the lumber in accordance therewith. And thus the matter stood until November 18, 1919, when plaintiff, through his attorney and without making payment of all or any part of the amount which he had agreed to pay within 30 and 60 days from the date of the order, demanded of defendant that it deliver the material in accordance therewith, and later, on December 1, 1919, he, subject to the condition that defendant should first deliver the material, offered to pay therefor. Defendant refused to make the delivery, and thereupon plaintiff purchased like material elsewhere at a price of \$771 in excess of that for which defendant had agreed to deliver the same.

[1-3] In our opinion, the facts thus stated are insufficient to support the finding made by the court that plaintiff, subsequent to May 12, 1919, was at all times ready, willing, and able to perform all the terms and conditions of the contract on his part, and to accept and pay for said lumber, and likewise insufficient to support the finding that there

was a waiver on the part of defendant of plaintiff's covenant to make payments as provided in the order. Indeed, there appears no evidence whatever tending to sustain this last finding. It clearly appears that defendant was at all times between May 12th and June 30th able, ready, willing, and anxious to deliver the lumber, which, however, plaintiff refused to accept. It also conclusively appears that plaintiff not only made default in the payment which he was required to make 30 days after May 12th, but when, on June 30th, demand was made upon him to pay a part of said sum, he refused to do so, notwithstanding which fact he insists that defendant should be compelled to hold the lumber upon an advancing market for a period of more than 6 months, and then, contrary to the terms of the contract, deliver it before receiving payment therefor. Assuming that plaintiff could thus delay delivery until such time, nevertheless the contract clearly obligated him to make the payments at the times stated therein. When, therefore, plaintiff not only suffered the default, but upon demand therefor refused to pay any part of the amount called for by the contract, defendant, while it might have brought an action on the contract for recovery of the sum due, was not bound to pursue such remedy, but with equal right might, as it did, repudiate the contract and refuse to deliver the lumber.

In *California Sugar, etc., Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671, the court, quoting from *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55, said:

"A refusal without sufficient cause by the seller to furnish, or by the buyer to take or pay for, any installment, justifies the repudiation of the contract by the party not in default."

Clearly at the time these payments became due and payable under the terms of the contract defendant was not in default. The case of *Percival v. National Drama Corporation*, 181 Cal. 631, 185 Pac. 972, is authority for the proposition that, while the mere failure of a master to pay wages to a servant does not amount to a discharge, the servant may, at his option, quit the employment and sue for the amount unpaid. The principle announced is applicable to the facts involved in the instant case, and is authority for the proposition that, when plaintiff made default in the payment of the installment due June 12th, defendant, at its option, could, on account of such default, declare the contract terminated. *Jensen v. Goss*, 39 Cal. App. 427, 179 Pac. 225, likewise sustains the proposition that where the buyer makes default in the payment of money agreed to be paid for the purchase of personal property, the seller is justified in repudiating the contract. To the same effect are *Demateis v. Vezu*, 193 Pac. 793, and *United Canneries Co. v. Seelye*, 192 Pac. 341.

[4] Defendant's rights were in no wise prejudiced by the fact that the contract contained no clause stating that time was made the essence thereof.

"In mercantile contracts, such as contracts for the * * * sale of goods and the like, it is generally held that the parties have intended time to be of the essence of the contract." 13 Corpus Juris, 688; *Minaker v. California Canners Co.*, 138 Cal. 239, 71 Pac. 110; *Jensen v. Goss*, supra.

[5] A large part of the record is devoted to what appears to be the fact, that plaintiff desired the lumber and material for a bridge to be constructed for a municipality under proceedings authorized by the Vrooman Act, and conceding that delay in the procedure might have excused plaintiff from accepting the lumber, since, as he says, he had no place to put it, nevertheless we are unable to perceive how such fact could excuse him from making the payments which he agreed to make, and, in default thereof, insist upon defendant carrying the lumber for an indefinite period upon an advancing market, and assume the hazard of the continued default of plaintiff. The enforcement of such a rule would be grossly unjust and inequitable.

We hold there is no evidence in support of the finding that defendant waived plaintiff's covenant to make the payments as provided in the contract; that it clearly appears that plaintiff made default therein; that by reason of such fact, and in the absence of any sufficient excuse for such nonperformance of the obligation on his part, plaintiff is in no position to assert any right upon the contract in this action. Hence we deem it unnecessary to enter upon a discussion of other alleged errors upon which defendant predicates its claim for a reversal.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 117

BRIDGES v. TEFFT et al. (Civ. 3316.)

(District Court of Appeal, Second District, Division 2, California. June 8, 1921.)

1. Corporations ⇨253—Stockholder not liable on judgment against corporation.

A stockholder's liability is separate and independent from that of the corporation, and commences with and is dependent on the original indebtedness, and no new liability of the stockholder on the original obligation is created by a judgment against the corporation.

2. Corporations ⇨268(1)—Complaint against stockholder held to state a cause of action on original debt, though alleging recovery of judgment against corporation.

Though a complaint against a stockholder alleged the recovery of a judgment against the

corporation, which was unpaid, averments therein that the corporation was indebted to plaintiff for a sum deposited by him as part payment on the purchase price of an automobile, which the corporation neglected to deliver within the time agreed on, whereupon plaintiff rescinded the contract and demanded the return of such payment, were sufficient to state a cause of action against such stockholder on the original indebtedness.

3. Sales ⇨117, 391(5)—On failure to deliver automobile as contracted for within time stipulated, purchaser may rescind and recover advance payment.

On the failure of a corporation to deliver an automobile as contracted for within the time agreed on, there accrues to the purchaser the right to rescind the contract, and to recover the money advanced by him on the purchase price.

4. Sales ⇨390—Purchaser of automobile, on rescission of contract for nondelivery within agreed time, may sue in assumpsit for money paid on purchase price.

On the rescission by the purchaser of an automobile of the contract of sale, on the failure of the seller to deliver such a car as was contracted for within the time agreed on, such contract ceases to exist, and the purchaser may sue in indebitatus assumpsit as for money had and received, for which he had received no consideration, and such complaint may be in the form of a common count in assumpsit.

5. Corporations ⇨264—Statute of limitations begins to run against stockholder's liability for corporate debts from inception of corporation's liability.

A stockholder's statutory liability for his proportionate share of the debts of the corporation accrues at the inception of the corporation's liability from which date the three-year statute of limitations (Code Civ. Proc. § 359) commences to run.

6. Corporations ⇨264—Statute of limitations does not run against stockholder's liability for repayment of sum advanced by purchaser of automobile from execution of contract, but only from rescission thereof on nondelivery.

On the rescission by the purchaser of an automobile of the contract of sale, on the failure of the seller to deliver within the time agreed on, such contract is extinguished, and the liability for the return of an advance payment made by such purchaser arises out of an entirely new obligation implied by law, so that, a stockholder's liability for such corporate indebtedness not having been created by the original contract, the statute of limitations (Code Civ. Proc. § 359) did not begin to run against such liability from the date of the execution of such contract, but only from the date of the rescission thereof.

7. Courts ⇨91(2)—Decision of District Court of Appeal as authoritative as that of Supreme Court, when petition to rehear denied by latter.

On denial by the Supreme Court of a petition to hear and determine a cause after judgment of the District Court of Appeal, such de-

cision possesses all the authority of a pronouncement by the Supreme Court itself.

8. Corporations ⚡253—Creditor must prove facts giving rise to stockholder's liability independently of judgment against corporation.

No judgment against a corporation being required as a condition precedent to an action against a stockholder on his statutory liability, which is not secondary, but original and primary, the stockholder not being a surety of the corporation, but a principal debtor, and his liability being distinct and separate from that of the corporation, though it must have its origin in some act of the corporation, the creditor must prove the facts out of which such liability arises, independently of any judgment he may have recovered against the corporation.

9. Appeal and error ⚡1052(8)—Admission of judgment against corporation in action on stockholder's liability not prejudicial, where such liability, independently of judgment, established by evidence.

In an action against a stockholder of a corporation for her proportionate share of an advance payment on the purchase price of an automobile, which the corporation failed to deliver as contracted for and within the time agreed on, whereupon plaintiff rescinded the contract, the admission in evidence of a judgment against the corporation, if erroneous, was not prejudicial to defendant, where, independently of such judgment, the corporation's indebtedness and defendant's liability for her proportionate share thereof, accruing on plaintiff's rescission of the contract and his demand for a return of the advance payment, was fully established by uncontradicted evidence.

10. Trial ⚡33—Defendant's failure to offer evidence contradicting effect of judgment against corporation in action against stockholder held not excused.

Where, in an action against a stockholder of a corporation for her proportionate share of a corporate debt, defendant's counsel stated to the court that he had no testimony to offer, but wanted to be heard on the question of a judgment against the corporation, claimed to have been erroneously admitted in evidence, defendant could not on appeal excuse her failure to offer evidence in her behalf on the ground that certain remarks of the court, when ruling on the admissibility of the judgment and its effect, led her counsel to believe the court had ruled as a finality that no evidence would be received to contradict the judgment as evidence of the corporation's indebtedness; such counsel's language, when announcing that he had no testimony to offer, showing that he regarded the admissibility of the judgment as an open question on which he desired to be heard, so that it was incumbent on defendant to make a formal offer of proof and invite a ruling thereon.

11. Corporations ⚡273—Creditor may recover from stockholder proportionate share of costs awarded him in judgment against corporation.

In an action against a stockholder for her proportionate share of a corporate debt, plaintiff may recover such share of the costs taxed

against the corporation in a judgment theretofore recovered by plaintiff against it, though the action against her was not based on such judgment, but on her original and primary obligation to pay her proportionate share of the original indebtedness; a new liability for costs, for which the corporation was not theretofore liable, accruing against the stockholders on recovery of such judgment against the corporation.

12. Corporations ⚡273 — Judgment against stockholder for interest recovered by plaintiff in action against corporation held erroneous.

In an action against a stockholder for her proportionate share of a corporate debt, a judgment against her was erroneous, in so far as it charged her with a portion of the interest recovered by plaintiff in a prior action against the corporation; defendant being liable only for simple interest on the amount of her proportionate share of such indebtedness from the time same accrued until the entry of the judgment against her, but not for compound interest from the time of the judgment against the corporation to the time of the judgment against her.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by A. S. Bridges against Louis M. Tefft and Ida J. Fisk. Judgment for plaintiff, and defendant Fisk appeals. Modified and affirmed.

Charles B. McCoy, of San Diego, for appellant.

Haines & Haines, of San Diego, for respondent.

FINLAYSON, P. J. In this action against certain stockholders upon their statutory liability, plaintiff seeks to recover from each his or her proportionate share of an alleged indebtedness contracted by the Tefft Motor Car Company, a California corporation. Judgment went for plaintiff, and defendant Ida J. Fisk appeals.

The evidence discloses the following: On July 15, 1915, plaintiff and the corporation entered into a written contract—evidenced by the former's written offer and the latter's written acceptance—whereby plaintiff agreed to purchase of the corporation a certain automobile for \$7,500. The contract provided that the automobile was to conform to certain written specifications indorsed thereon. Plaintiff, at the date of the contract, advanced \$750 on account of the purchase price. The balance was to be paid when the car should be received by the corporation at its garage in San Diego. On March 11, 1916, the corporation delivered an automobile to plaintiff, which, after an inspection, he, on March 13, 1916, redelivered upon the ground that it did not comply with the agreed specifications. About two weeks thereafter, namely, on March 29, 1916, the corporation having failed

to deliver to him a car conforming to the requirements of the contract, plaintiff demanded a return of the \$750 that he had deposited as part payment on the purchase price. The corporation having refused to return his deposit to him, plaintiff brought an action against it in the superior court for San Diego county to recover said sum of \$750. On September 20, 1918, he recovered judgment in that action for the amount sued for, together with interest thereon at the legal rate, and \$28.75 as costs. Ever since January 7, 1915, appellant has been the owner of 985 shares of the corporation's capital stock. At that date, and at all times since, the total of the subscribed capital stock has been 1,000 shares.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action. The complaint, as amended, after alleging facts showing that, at all times since January 7, 1915, the total subscribed capital stock of the Tefft Motor Car Company has been 1,000 shares, and that appellant, during all of that time, has owned 985 shares, avers:

"That on the 29th day of March, 1916, the said corporation became indebted to plaintiff in the sum of \$750 in consideration of said sum of money theretofore deposited by plaintiff with said corporation to apply on the purchase price of a certain Locomobile car which said corporation contracted with plaintiff to build for him and to deliver to him not later than March 13, 1916. That said corporation failed and neglected to deliver a car such as was called for by such contract by March 13, 1916, or at any time, and that on the 29th day of March, 1916, the plaintiff rescinded said contract of purchase and made demand upon said corporation for repayment of said sum of \$750, but that neither said corporation nor any one has repaid any part of said sum to plaintiff, and that the same, with interest from March 20, 1916, remains entirely unpaid. That on the 20th day of September, 1918, the plaintiff recovered judgment against said corporation upon said cause of action * * * for the said sum of \$750 and interest to the date of said judgment in the sum of \$879.75 debt and \$28.75 costs, total, \$908.50, and that the same remains entirely unpaid."

[1] The gist of appellant's objection to the complaint is that it does not state a cause of action upon the original indebtedness, but that, instead, it attempts to state a cause of action upon the judgment against the corporation. If the averments of the complaint justified any such criticism, then unquestionably that pleading would fall short of a statement of a cause of action on appellant's statutory liability as a stockholder; for the stockholder's liability under our statute is a separate and independent one, commencing with and dependent upon the original indebtedness. No new liability on the part of the stockholder upon the original obligation is created by a judgment against the corporation. *Hyman v. Coleman*, 82 Cal. 653, 23 Pac. 62, 16 Am. St. Rep. 178.

[2-4] But we can see no justification for

the claim that the complaint does not state a cause of action upon the original indebtedness. All reference to the judgment might be omitted, and still leave in the complaint averments sufficient to state a cause of action against the defendants as stockholders. That is to say, there would be left the averments that, on March 29, 1916, the corporation became indebted to plaintiff in the sum of \$750; that said sum had been deposited by plaintiff with the corporation as part payment on the purchase price of the automobile; that the corporation failed and neglected to deliver the car within the time agreed upon; and that on March 29, 1916, plaintiff rescinded the contract of purchase and demanded the return of his advance payment. These averments suffice to show that on March 29, 1916, appellant, as a stockholder, became indebted to respondent for her proportionate share of the \$750. For if, as alleged in the complaint, the corporation failed and neglected to deliver an automobile as contracted for, within the time agreed upon, there then accrued to respondent the right to rescind his agreement to purchase. *Mettler v. Vance*, 30 Cal. App. 499, 158 Pac. 1044; *Hallidie v. Sutter St. R. R. Co.*, 63 Cal. 575; *Condley v. Consolidated L. Co.*, 200 Pac. 69; 24 R. C. L. pp. 272, 273, § 551; subdivision 2, § 1689, Civ. Code. Upon such rescission, and not before, respondent was entitled to a return of the money advanced by him on the purchase price. 24 R. C. L. p. 65, § 331. The contract of sale, upon its rescission, ceased to exist, and thereupon respondent became entitled to bring an action of indebitatus assumpsit as for money had and received, namely, money paid to the corporation for which, in view of the terms of the contract, plaintiff as the purchaser had received no consideration. *Lemle v. Barry*, 181 Cal. 1, 183 Pac. 150; *Hayt v. Bentel*, 164 Cal. 685, 686, 130 Pac. 432; *Glock v. Howard, etc., Co.*, 123 Cal. 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *San Diego Const. Co. v. Mannix*, 175 Cal. 553, 554, 166 Pac. 325. And that part of the complaint against appellant which is designed to show that the corporation, upon the rescission of the contract, became indebted to respondent, could be cast in the form of a common count in assumpsit. *Castagnino v. Balletta*, 82 Cal. 250, 258, 23 Pac. 127; *Minor v. Baldrige*, 123 Cal. 187, 55 Pac. 783; *Dubois v. Delaware, etc., Co.*, 4 Wend. (N. Y.) 285.

[5] It is contended that appellant's statutory liability as a stockholder attached as of the date of the execution of the contract of sale, July 15, 1915; and since this action was not commenced until January 3, 1919, or more than 3 years after the execution of the contract, it is claimed that any cause of action against appellant is barred by the statute of limitations—section 359 of the Code of Civil Procedure. If it were true that the liability here sought to be enforced ac-

crued upon the execution of the contract of sale, then unquestionably respondent's cause of action would be barred. For it is the settled doctrine in this state that the stockholder's statutory liability accrues at the inception of the corporation's liability, and that it is from that date that the three-year period within which the stockholders must be sued commences to run. *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 Pac. 939; *Chambers v. Farnham*, 187 Pac. 732.

[6, 7] But appellant is in error in assuming that the liability which is the basis of respondent's right to recover the \$750 had its inception upon the execution of the contract of sale. Any such claim is fully answered by the case of *Kempton v. Floribel L. & I. Co.*, 189 Pac. 478, where it was held that the stockholder's liability in a case such as this is not created by the original contract. It was there held that the original contract is extinguished by the rescission, and that the liability for the return of the advance payment arises out of an entirely new obligation—an obligation to repay money to which the plaintiff becomes entitled under a promise to repay implied by law upon the rescission of the contract of sale. A petition to the Supreme Court to hear and determine that cause after judgment of the District Court of Appeal was denied. The decision, therefore, possesses all the authority of a pronouncement by the Supreme Court itself. See, also, *Taber v. Piedmont Heights Bldg. Co.*, 25 Cal. App. 222, 230, 143 Pac. 319, and *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899.

[8] Appellant assigns as error the action of the trial court in permitting respondent to put in evidence, over appellant's objection, the judgment roll in the action against the corporation. Unless that judgment, in so far as it adjudges that the plaintiff there, the respondent here, recover costs from the corporation, constitutes, as to such costs, an original, separate, and independent liability of the corporation, for which its stockholders are likewise primarily liable on their statutory liability—a question presently to be considered—there is grave doubt as to its admissibility to prove any liability on appellant's part as a stockholder. Under our statute no recovery of a judgment against the corporation is required as a condition precedent to an action against the stockholder on his statutory liability. The stockholder is not a surety of the corporation, but a principal debtor; his obligation is not secondary, but original and primary; and, though his liability must have its origin and inception in some act of the corporation, it is distinct and separate from that of the corporation. The stockholder's liability, with which, after its accrual, the corporation has nothing to do, is strictly a matter between the creditors of

the corporation and the stockholders, not as corporators, but as individuals. For these reasons we doubt if, under a statute such as ours, the corporation has the right or power to represent its stockholders as to this individual, original and primary liability. Though the question was presented to our Supreme Court in *Chambers v. Farnham*, supra, it was not found necessary to determine whether the judgment against the corporation afforded proof against the stockholder in the action upon his statutory liability. The question was, however, directly passed upon in *Ellsworth v. Bradford*, 32 Cal. App. Dec. 50,¹ where it was held that under our statute, creating, as it does, a primary liability on the part of the stockholder, the creditor must prove the facts out of which the stockholder's liability arises, independently of any judgment that he may have recovered against the corporation. See, also, *Trippe v. Huncheson*, 82 Ind. 307, and 14 C. J. pp. 1064, 1065.

[9] However, granting that the judgment against the corporation was inadmissible, the error is not prejudicial. No substantial right of appellant was prejudicially affected; for, independently of the judgment, the indebtedness of the corporation, and appellant's liability for her proportionate share thereof, accruing upon respondent's rescission of the contract of sale and his demand for the return of his \$750, was fully established by uncontradicted evidence, both oral and documentary. For this reason, the error, if the admission of the judgment was error, was entirely harmless, and therefore not ground for reversal. *Mitchell v. Beckman*, 64 Cal. 117, 123, 28 Pac. 110; *McGowan v. McDonald*, 111 Cal. 57, 69-71, 43 Pac. 418, 52 Am. St. Rep. 149; *Borland v. Haven* (C. C.) 37 Fed. 394, 413, 414.

[10] Upon the conclusion of respondent's case in chief, appellant's counsel, addressing the court, said:

"I have no testimony to offer, but I want to be heard upon the question of the judgment."

Appellant now claims that the only reason why she offered no evidence was because certain remarks made by the court when ruling upon the admissibility of the judgment and its effect as evidence led her counsel to believe that the court had definitely ruled, as a finality, that no evidence would be received to contradict the judgment as evidence of the corporation's indebtedness to respondent. There is no merit in this claim. From the language of appellant's counsel, quoted supra, it is quite evident that the rulings of the court upon the admissibility of the judgment and its effect as evidence were not accepted by him as final. Counsel's language shows that, at the very time when formally announcing that he had no testimony to offer,

¹ Superseded by opinion of Supreme Court on hearing. See 199 Pac. 335.

he regarded the admissibility of the judgment as an open question upon which he desired to be heard. We think, therefore, that under these circumstances it was incumbent upon appellant to make a formal offer of proof in the court below and invite a ruling thereon, and that, having neglected to do so, she is not now in a position to excuse her failure to offer any evidence in her behalf. In fact, we have here, not a mere failure to offer evidence, but appellant's affirmative declaration, through her counsel, in open court, that "I have no testimony to offer."

[11] The judgment against the corporation, entered September 20, 1918, was for the total sum of \$980.25, made up of the following amounts: The \$750 sued for; interest on that amount to the date of that judgment, at the legal rate of interest, from March 29, 1916, the date of plaintiff's rescission of the contract; and \$28.35, the costs taxed against the defendant corporation. In the present action, the court gave judgment against appellant in the sum of \$695.30, besides respondent's costs. Appellant, it will be recalled, at all times since and prior to March 29, 1916, has been and is the owner of 985 out of a total subscription of 1,000 shares; and the \$965.30 adjudged against her is $\frac{985}{1000}$ of a sum made up of the amount of the judgment recovered by respondent against the corporation, namely, said sum of \$980.25, plus interest on that amount, at the legal rate of interest, from the date of the judgment against the corporation to the date of the judgment against appellant in this action. In other words, appellant has been charged with a part of the costs that were taxed against the corporation, and also with a part of the interest that entered into and made up the total amount of the judgment against the corporation. Appellant contends that she is not liable for any part of said costs, nor for any part of said interest.

We think that respondent is entitled to recover from appellant her proportionate share of the costs that were taxed against the corporation. It is true that, in so far as appellant's liability for her proportionate share of the original indebtedness of \$750 is concerned, the action against her is not based upon the judgment against the corporation, but upon her original and primary obligation to pay her proportionate share of that original indebtedness. But, when respondent recovered his judgment against the corporation, a new liability for a wholly separate and distinct sum of money accrued against the then existing stockholders, namely, a liability for the costs for which the corporation, upon the recovery of the judgment against it, and not before, became liable as upon a new and original obligation. *Fleeson v. Savage Silver*

Min. Co., 3 Nev. 157, 161-162. As said by the Supreme Court of Michigan in *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557, 18 N. W. 356:

"The liability of the shareholders is commensurate with that of the corporation itself, and extends to the costs * * * on the judgment."

[12] We think, however, that the judgment against appellant is erroneous in so far as it charges her with any portion of the interest that was recovered by respondent in his action against the corporation. Beyond doubt, appellant is liable for simple interest on the \$750, at the rate of 7 per cent. per annum from the date of respondent's rescission of the contract and demand for the return of his deposit to the entry of the judgment in the present action. *Knowles v. Sandercock*, 107 Cal. 629, 640, 641, 40 Pac. 1047; *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 675, 60 Pac. 439, 49 L. R. A. 647. See 19 L. R. A. (N. S.) 428 et seq., note to *Flynn v. American Banking & T. Co.* But the net result of the course pursued by the court below is to charge appellant with compound interest. She is charged with a proportionate share of interest on the sum of \$750 from the date when she became liable for her part of that sum, March 29, 1916, to the date of the entry of the judgment against the corporation on September 20, 1918, and she likewise is charged with interest on $\frac{985}{1000}$ of that judgment from the date thereof to the date of the entry of judgment against her in this action. In other words, she is charged with interest on interest from the date of the judgment against the corporation. This, manifestly, is erroneous. For this reason it will be necessary to direct the trial court so to reduce the amount of the judgment that appellant will be charged with no more than her proportionate share of simple interest on the sum of \$750 from March 29, 1916, to the date of the entry of judgment in this action. This will effect such a comparatively slight change in the amount of the judgment against appellant that we do not think it should be taken into consideration in taxing the costs of this appeal.

What we already have said disposes of every legal principle involved in this appeal, and therefore no other assignment of error requires analysis or discussion. The trial court is directed to modify the judgment to conform to the views expressed herein; i. e., to so modify the judgment that appellant will not be charged with compound interest. As so amended the judgment is affirmed, with costs of this appeal taxed against appellant.

We concur: WORKS, J.; CRAIG, J.

53 Cal. App. 305

ALMQUIST v. GARNER et al. (Civ. 3827.)

(District Court of Appeal, First District, Division 2, California. June 24, 1921.)

1. Adoption ⇐7—Infants ⇐18—Consent of father to adoption proceedings not necessary where he had been deprived of custody.

The juvenile court having acquired jurisdiction of the subject-matter of a minor and the parties when petition was filed asking that the child be declared a dependent child, reciting her father's place of residence was unknown, that he had deserted his family, and that the mother was then confined in the county hospital, such court had jurisdiction to make an order depriving the father of the custody of the child, because he had neglected to provide for her and had abandoned her, such order being made under the Juvenile Court Act, and, after such order, his consent was not necessary to adoption proceedings under Civ. Code, § 224.

2. Infants ⇐19—Order depriving father of custody not subject to collateral attack.

An order of the juvenile court depriving a father of the custody of his child for neglect and failure to provide is not subject to collateral attack.

3. Adoption ⇐16—Rights of adoptive parents proper for consideration in determining father's right to have custody order modified.

Where a father has been deprived by order of the juvenile court of the custody of his child for neglect and failure to provide, and subsequently moves against the adoptive parents of the child to secure the custody of the child, the court cannot consider what modification of its order of custody the juvenile court might make, that being the proper subject of motion in that court, and on which motion the rights of the adoptive parents or of others would be a proper matter for consideration in arriving at the equities of the situation.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Mary Almquist against Guy S. Garner and another. From judgment declaring void an order of adoption, defendants appeal. Reversed.

T. C. Gould, of Los Angeles, for appellants.

L. G. Shelton, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment declaring null and void an order of adoption of the superior court for the county of Los Angeles, by which the defendants adopted as their child Margaret Almquist, who was at that time of the age of about four years. The plaintiff is the mother of the child.

The child was adopted by the defendants in November, 1912. Five years later, in November, 1917, the present action was commenced to annul the order of adoption, upon

the grounds (1) that the father did not consent to the adoption, and no notice was given to him of the adoption proceedings, and (2) that fraud was practiced upon the mother to obtain her consent. The trial court found against the plaintiff on this latter allegation, but annulled the order upon its findings that the written consent of the father of the child had not been obtained, and that the child was not an abandoned child within the provisions of section 224, Civil Code, as it existed at the time of the adoption proceedings; and that the father was never judicially deprived of the custody of the child.

Appellant urges that the facts do not support the finding that the child was not an abandoned child, and, further, that it is only the father himself who can avoid the order because of the want of notice to him of the proceedings by which he was deprived of the custody of his child, which proceedings were relied upon in the adoption proceedings, to make his consent unnecessary. The father is not a party to this action, and appellant contends that, as the written consent of the mother was obtained, and the court has found it was obtained without fraud, she cannot raise the questions growing out of the want of consent of the father of the child.

In the present case, the mother testified that in 1912 she was getting \$20 a month from the county for her children. She was sick, and it was necessary for her to go to a hospital. Her husband had deserted her and her three children, and she did not know where he was. It was at this time that she consented to the adoption of the child.

The record of the proceedings in the juvenile court relative to this child, prior to her attempted adoption by the defendants, was offered in evidence. From this it appears numerous orders were made from time to time declaring this child and her brother and sister dependent children, because their father had deserted them, and their mother was an invalid, and unable to support them, and providing for the payment by the county of certain sums for the support of these children. The Juvenile Court Act (St. 1915, p. 1225) as it read at the time of the proceedings herein, enumerated the conditions under which a child might be found to be a "dependent child" within the meaning of the act. A child under the age of 21 years, whose father had abandoned his family, was declared to be a dependent child. This act provided for the filing of a petition in the juvenile court to have the child declared dependent. A citation was then issued to be served upon the parents, if residing within the county and their places of residence were known. The juvenile court, after having thus acquired jurisdiction, could make such order as was "meet in the premises" for the welfare of the dependent child, but could

not deprive any parent of the custody of his child unless it found the parent to be incapable, or to have failed or neglected to provide proper maintenance, training, and education for said child. At the same time, section 224 of the Civil Code provided that the consent of a parent to the adoption of his child was not necessary where he had been judicially deprived of its custody on account of cruelty or neglect.

The transcript shows that on September 28, 1911, a petition was filed in due form asking that Margaret Almquist be declared a dependent child, and reciting that her father's place of residence was unknown, that he had deserted his family, and that the mother was then confined in the county hospital. On October 4, 1911, the juvenile court found the child to be dependent, and secured monthly payments from the county for her support. From time to time thereafter, other orders were made for the support of the child, and on April, 6, 1912, a second petition was filed in the same proceeding, alleging that the child was then in the custody of the mother, and that the father had abandoned her, and his place of residence was unknown. On April 9, 1912, an order was made in the same proceeding reciting that, "due notice having been given the parents," and testimony having been taken, it was adjudged the child was dependent within the meaning of the Juvenile Court Act, and an award for her support by the county was made.

[1] On November 19, 1912, after the child had been a ward of the court for more than one year, during which time she was supported by the county under orders of the juvenile court, an order was made in the same proceeding depriving the father of the custody of the child because he had neglected to provide for her, and had abandoned her. The court having acquired jurisdiction of the subject-matter, and the parties when the petition was filed, it had jurisdiction to make this order under the Juvenile Court Act. The father having been deprived of the custody of the child by this order on account of his failure to provide for her—a matter which was within the knowledge of the court because of the various orders against the county covering a period of more than one year—his consent was not necessary to the adoption proceedings under section 224, Civil Code.

[2, 3] The order of the juvenile court depriving the father of the custody of his child, for neglect and failure to provide is not subject to collateral attack. Based upon this order, the adoption proceedings were regular without the consent of the father, and should not have been annulled.

What discretion the court might exercise in the matter of modifying its order depriv-

ing the father of the custody of his child, upon a proper showing made by the father as to his present ability and inclinations toward his child, is beyond the scope of the inquiry here. The intervention of the rights of the adoptive parents, or of others, at the time of the application for a modification or change in said order, would be a proper matter for consideration in arriving at the equities of the situation should such a motion be made on the part of the father. Matter of Guardianship of Michels, 170 Cal. 339, at page 344, 149 Pac. 587. At present, there is no showing whatsoever by any person, nor any application for a modification or change in this order depriving the father of the custody of his child. With such order in full force and effect, the consent of the father was unnecessary to the adoption.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 370

WARDROBE v. MILLER et al. (Civ. 2251.)

(District Court of Appeal, Third District,
California. June 30, 1921.)

1. Evidence §568(1)—Conclusion of witness stepfather had received minor into family is not binding.

In an action by a father against the second husband of his divorced wife to recover the reasonable value of the services of plaintiff's minor children, the statements of the witnesses, including the stepfather and the children, that they were received by the stepfather as members of his family, are merely conclusions, which are not binding upon the court.

2. Parent and child §14—Presumption stepfather receives children as parent does not arise from mere temporary relationship.

The presumption created by Civ. Code, § 209, that if a husband receives his wife's children by a former marriage into his family and supports them, he does so as a parent, does not arise where the evidence shows that it was expressly understood between the parties that the arrangement by which the stepsons were taken into the family was a merely temporary one.

3. Parent and child §5(5)—Father can repudiate sons' contract for wages and collect reasonable value of services.

Where an employer made a contract with a minor as to the amount of wages, the father may either adopt the contract and claim what is due under it or may repudiate it and claim the reasonable value of the services rendered.

4. Parent and child §5(1)—Right to wages reciprocal to duty to support.

The right of a father to receive the wages of his minor children is reciprocal to his duty to support them.

5. Pleading ⚡248(4)—Complaint on implied contract can be amended at trial to allege quantum meruit.

A complaint alleging an implied contract of employment and reasonable value of the services rendered can be amended at the trial to allege the performance of services at defendant's special instance and request and the reasonable value thereof, since an amendment changing the complaint from one upon an express contract to one upon quantum meruit does not substitute a new cause of action.

6. Appeal and error ⚡236(2)—Request to set aside submission prerequisite to complaint of amendment at trial.

Defendant cannot complain of an order permitting plaintiff to file an amended complaint after the evidence had closed to conform to the proofs, where he made no request that the submission of the cause be set aside or that he be permitted to offer further pleadings or proof.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Ara Wardrobe against Charles A. Miller and others to recover the reasonable value of services of plaintiff's minor sons. Judgment for the plaintiff against the named defendant and that defendant appeals from the judgment and from the order denying his motion for a new trial. Appeal from the order dismissed, and judgment affirmed.

R. C. Minor and Miller & Channell, all of Stockton, for appellant.

B. M. Bainbridge, of Stockton, for respondent.

FINCH, P. J. Plaintiff sued to recover the reasonable value of the services of his minor sons, Edward and Raymond, aged 19 and 17 years, respectively. Judgment was rendered in favor of the plaintiff against defendant Charles A. Miller, and the latter appeals from the judgment and from the order denying his motion for a new trial. Plaintiff was formerly the husband of defendant Mrs. Charles A. Miller. They were divorced about May 20, 1908. The care, custody, and control of Edward and Raymond and their sister, two years younger than Raymond, were awarded in the decree to the plaintiff herein. The father kept the three children in the Children's Home at Stockton for five years and thereafter until the 23d day of January, 1919, they lived with him and attended the public schools. The boys worked during vacation and at other times for their father and for strangers, the father collecting their wages and supporting them. On January 23, 1919, the plaintiff and his children engaged in a quarrel of such nature that the father and Edward came to blows, whereupon the children left, arriving at the home of defendants late at night, 10 or 12 miles from the plaintiff's residence. Edward testified:

"Father and I came to blows; he was going to hit me; he told me to get out and never come back. I think he said, 'If you go away, you can stay away; go away for good.' I left for good."

The father testified:

"I said, 'If you go, I shall collect your wages.' * * * Don't know what the boys did at the Miller's. I never went to see them nor made any inquiry about them while they were there, although I knew they were there. * * * Don't remember that I told them not to go. The oldest boy said, 'If you collect them (meaning wages), then I will go somewhere else.'"

On arrival of the boys and their sister at the home of the defendants, Mr. Miller testified:

"I told them that they could stay awhile, but that I did not want them there at all. If I would keep them there I would have trouble with their father. They said they would never go back to live with him. I allowed them to stay at the solicitation of my wife, and because they said that if we didn't let them stay there they would leave the country. * * * I never promised to pay them any wages. I told them if they wanted wages they better leave, as I would not pay them anything. I received them into my family and treated them as members of my family. They worked sometimes just as other boys in the neighborhood worked. Helped to haul grain, irrigate, and milk. The boys did not take the places of any laborers that I was bound to have. As to the milking, we would have done it if the boys hadn't been there. Three hired men were on the place when the boys came, two of them doing general work at \$2.25 per day and board—they left after the boys came—and one at \$3 per day and board."

Mr. Miller further testified:

That from March 25th to May 26th they both milked. "Raymond worked about sixteen days in haying, hauling, and irrigating. Edward, after I had taught him the use of the milking machine, which took about two or three days, did the milking from May 26th until he left in August, I assisting him now and then. We did not work hard; on hot days when hauling we would tie the team to the fence, and stay in the shade until we cooled off. I made no attempt to coerce the boys to stay. I never promised to pay them any wages; told them that I didn't want any trouble with their father. If I agreed to pay wages, their father would claim them, and I wanted it understood that if they stayed no wages would be paid."

Mrs. Miller testified:

"At my request Mr. Miller received all three of them into our family, and they were treated in all respects as our own children, and allowed them to stay. We bought their clothes, did their mending and washing, took them to dances, a school entertainment and a movie, Lillian going to school every morning with the oldest Miller child. I gave them money to at-

tend the movies; took them to two or three school entertainments and dances."

Edward testified:

"Mrs. Miller said to me in October, 1918, in her yard, I could come there and get \$2 a day and board. Mr. Miller was near by on the sidewalk. Mr. Miller has never said he would pay me any wages, but 'if your father tries I guess he can collect them.' * * * I got clothes, \$1 in cash, which I saved, got a couple of hair cuts and went to a movie, never went any place, but stayed on the ranch all time; got three pairs of shoes (\$3.50 and \$5.50 per pair), two pairs overalls (\$2.50 and \$2.75 per pair), two suits of underwear, six pairs of socks (50 cents per pair), two work shirts (\$1.50 each); that is all that I can recall."

Raymond testified:

"We spoke about wages one time to Mr. Miller; he said we couldn't collect wages; that our father could. This conversation was when we were making the second cutting around the alfalfa, some time in May, I think. We were sitting at the breakfast table, no hired man there. My brother started to talk. He said we ought to be getting wages. Mr. Miller said he wouldn't pay any wages because father would collect them."

The witness was asked:

"Didn't Mr. Miller receive you, your brother, and sister into his family and treat you just as his own children were?"

The witness replied "Yes."

Some time in August, 1919, Mr. Miller and Edward "had a wrangle," and the latter with his brother and sister returned to their father.

The court found that the stepfather, Charles A. Miller, did not receive the boys into his family and support them; that the food and clothes furnished them were in part consideration of their services; that the services performed by them were not "rendered upon an express or any other understanding" that they were to receive no compensation other than their board and lodging; and that the reasonable value of their services above that of their board and lodging, after deducting credits due Miller on account of clothing, etc., is the sum of \$462, for which sum judgment was rendered.

[1] Appellant contends that the evidence conclusively shows that he received the boys into his family as members thereof, and that therefore recovery can be had only upon proof of an express contract to pay for their services, citing section 209 of the Civil Code. The court was not bound by the conclusion of the witnesses that Miller had received the boys into his family, but it devolved upon the court, from a consideration of all the facts in evidence to determine that question. The arrangement for the stay of the boys at the home of defendants was of a temporary

character and apparently conditional. Miller testified:

"I told them they could stay awhile, but that I did not want them there at all. If I would keep them I would have trouble with their father."

[2] The provisions of section 209, Civil Code, to the effect that, if a husband receives his wife's children by a former marriage "into his family and supports them, it is presumed that he does so as a parent," does not reasonably contemplate a mere temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose some obligation to support. The relation must be similar to that of a natural parent to his children. A pertinent inquiry would be, if one of the boys had become a helpless cripple while he was living with Miller without the latter's fault, whose would have been the obligation to support, the father's or the stepfather's? Under the circumstances disclosed, the answer would seem to be apparent. To enable a stepfather to invoke the provisions of section 209, the obligation to support need not necessarily be such as to continue during the whole of the child's minority, but it should be something more than merely temporary. It is at least doubtful whether section 209 has any application to the demand of a father entitled to the custody of his child for the reasonable value of the minor's services.

[3] "Where an employer made a contract with a minor as to the amount of wages, the father may either adopt the contract and claim whatever is due under it, or repudiate it and claim the reasonable value of the services rendered." 20 R. C. L. 607. It would seem to follow logically that if the minor agreed to render the services without compensation the father might collect the reasonable value thereof.

[4] "The right to a child's services and earnings is reciprocal to the duty to support." Id. 608.

In discussing the father's right to the child's earnings, it is said:

"It is certainly perfect while the period of the child's nurture continues. But if this is all, it can be of little consequence, because the child's labor and services are for that period of little value; nor could compensation be thus afforded for the many years when the child was entirely helpless." Schouler's Domestic Relations (5th Ed.) § 252.

"His right to their [his children's] services, like his right to their custody, rests upon the parental duty of maintenance, and it is said to furnish some compensation to him for his own services rendered to the child." McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749; Barrett v. Riley, 42 Ill. App. 258.

These principles have a direct application to the facts of this case as disclosed by the evidence.

"The plaintiff was not precluded from recovering the wages, either by the fact that the work was done by the son against his express dissent, or by the fact that the defendant had notified him to come and take his son away, and he had neglected to do so." *Smith v. Smith*, 30 Conn. 111.

In this case the plaintiff, Wardrobe, had not waived his right to the earnings of his sons. When they left home he expressly stated that he would collect the wages earned. Whether this statement was communicated to Miller or not does not appear, nor is it material, since the father had done nothing to cause Miller to believe that the former would waive his right, and Miller seems to have understood the contrary, by his own testimony.

[5] The first amended complaint alleged an implied contract of employment and the reasonable value of the services rendered. After the evidence was closed the court permitted the plaintiff to file a second amended complaint which alleged the performance of the services at Miller's "special instance and request" and the reasonable value thereof. This is assigned as error. The first amended complaint was probably sufficient, but whether that be true or not there was no error in permitting the amendment.

"Our courts have held frequently * * * that an amendment which changes the count from one upon an express contract to one upon quantum meruit does not substitute a new cause of action." *Turner & Dahnken v. Bauer*, 28 Cal. App. 312, 152 Pac. 308; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

"An amendment to conform to the proof may always be made, provided the cause of action is not thereby changed." *Koch v. Wilcoxon*, 30 Cal. App. 520, 158 Pac. 1049; *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44.

[6] After an amendment to conform to the proofs, if the defendant makes no request that the submission of the cause be set aside or that he be permitted to offer further pleadings or proofs, he is in no position to complain. *Gartlan v. C. A. Hooper & Co.*, 177 Cal. 422, 170 Pac. 1115.

Appellant urges that the court erred in overruling his demurrer to the second amended complaint and in overruling his objections to certain testimony, on the ground that no express contract was shown. What has already been said disposes of these objections.

The appeal from the order is dismissed, and the judgment affirmed.

We concur: HART, J.; BURNETT, J.

53 Cal. App. 245

BURNS v. JACKSON. (Civ. 2278.)

(District Court of Appeal, Third District, California, June 28, 1921. Hearing Denied by Supreme Court Aug. 25, 1921.)

1. Trial $\S$ 140(1)—Irreconcilable conflict between direct and cross examination of witness insufficient to justify nonsuit.

Though the statement of a mere opinion or conclusion by a witness, in his direct examination, can have no weight as against facts stated by him in cross-examination, which are necessarily opposed to such opinion, an irreconcilable conflict between his direct and cross examination is not of itself sufficient to justify a nonsuit.

2. Trial $\S$ 165 — Evidence must be taken most strongly against defendant on motion for nonsuit.

On a motion for nonsuit, the evidence must be taken most strongly against defendant, and, if an inference could reasonably arise therefrom in favor of plaintiff's contention, the motion must be denied.

3. Appeal and error $\S$ 1097(2), 1195(1)—Law of case stated by appellate court must be adhered to throughout subsequent proceedings.

Where the appellate court has stated a rule or principle of law necessary to a decision, that rule or principle must be adhered to and observed throughout the subsequent progress of the case, both in the lower court and on subsequent appeal, though it may be believed on further consideration that the former decision is erroneous.

4. Appeal and error $\S$ 1213—Where evidence substantially same on second trial, holding of appellate court on former appeal that question was for jury prevents nonsuit.

Where the appellate court, on a prior appeal, held that the evidence was sufficient to submit to the jury the question of the negligence of decedent's employer, and substantially the same evidence was received at the second trial, the law of the case was properly invoked by plaintiff, and a motion for nonsuit should have been overruled.

5. Master and servant $\S$ 301(4) — Servant loaned to another for special service is servant of latter.

One who is the general servant of another may be loaned or hired by his master for some special service, so as to become as to that the servant of a third party, in which case, if he is subject wholly to the direction and control of such third party, the latter, and not the general employer, is the master, so far as that particular service is concerned, and is liable for injuries caused by the negligence of such servant while engaged in the duties pertaining thereto.

6. Pleading $\S$ 376—Defendant's admissions of and failure to deny allegations of complaint held to obviate necessity of proof.

In an action for the death of an employee while riding on a truck, struck by a train at a

crossing owing to the chauffeur's negligence, admissions by defendant, to whom such truck and the service of the chauffeur had been loaned for a special service, for which the truck was being used at the time of the accident, that he was related to the owner of the truck, as alleged in the complaint, his failure to deny other allegations that they worked together and exchanged utilities with each other and were so co-operating at the time in the use of such truck, and his denial, in his answer, that such truck was being operated by the owner at the time of the accident, thus virtually admitting that he himself was in control of the same at such time, obviated the necessity for evidence of such facts; it being unnecessary to prove facts admitted by the pleadings.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by W. F. Burns against George H. Jackson. From a judgment of nonsuit, plaintiff appeals. Reversed.

Martin I. Welsh and W. H. Hatfield, both of Sacramento, for appellant.

W. H. Carlin, of Marysville, and A. H. Hewitt, of Yuba City, for respondent.

BURNETT, J. The appeal is from a judgment of nonsuit. The action was brought originally against five defendants, the Southern Pacific Company, George H. Jackson, Jackson M. Diggs, W. G. McRoberts, and F. G. Prinderville, but on the first trial a nonsuit was granted as to Diggs, Jackson, and McRoberts, the jury exonerated the Southern Pacific Company, and rendered a verdict against Prinderville for the sum of \$2,000. An appeal was taken from said judgment of nonsuit, and it was affirmed by this court as to Diggs and McRoberts, but was reversed as to the defendant George H. Jackson. *Burns v. Southern Pacific Co.*, et al., 185 Pac. 875. In that decision it was said:

"Without setting forth the evidence in detail, it is only necessary to say there was sufficient evidence to take the case to the jury as to the defendant Prinderville being an employee of the defendant Jackson, and also as to the negligence of the defendant Prinderville in his operation and management of the auto truck at the time of the collision."

The motion for nonsuit at the second trial was based upon the contention of an entire lack of evidence that Prinderville was in the employment of Jackson at the time of the accident, which resulted in the death of plaintiff's son. The view of the trial court was that a difference existed in that respect between the first and the second trial, Prinderville having testified at the former that "he was working for Dr. Jackson, was operating the truck under his control," while, the court proceeded to state, "The testimony is to-day he was working for Diggs and under his control." The court continued:

"It wasn't brought out on cross-examination that he was under the pay and employ and control of Diggs; here you have two witnesses, Prinderville states it, and so does McRoberts."

In reply to the suggestion of appellant that "all the intendments are in favor of the plaintiff's side of the case in a motion for nonsuit," the court said:

"When a man says in his testimony 'I was working for Dr. Jackson,' and on cross-examination the facts come out he was working for Tom Smith, you can't take his testimony on direct examination as an inference or as a presumption or as amounting to anything."

[1, 2] No doubt the learned trial judge was right in the last-quoted assertion, if he meant that the statement of a mere opinion or conclusion by a witness in his direct examination could have no weight as against facts stated by him in his cross-examination which are necessarily opposed to such opinion. However, an irreconcilable conflict between the direct and the cross examination of a witness is not of itself sufficient to justify a nonsuit. The rule upon the subject has been well settled, and is fully discussed by this court in the *Estate of Daly*, 15 Cal. App. 329, 114 Pac. 787. It is sufficient to say that on such motion the evidence must be taken most strongly against the defendant, and if an inference could reasonably arise therefrom in favor of plaintiff's contention, the motion must be denied. But a consideration of the question of fact involved in said proposition may be deferred until after an inquiry as to the contention of appellant that the trial court, by virtue of the "law of the case," was under legal compulsion to deny the motion for nonsuit.

[3, 4] The doctrine is well understood, and the parties herein are in accord that where the appellate court has in its opinion stated a rule or principle of law necessary to a decision, that rule or principle must be adhered to and observed throughout the subsequent progress of the case, both in the lower court and upon subsequent appeal, although it may be believed upon further consideration that the former decision in that particular is erroneous. *Westerfield v. New York L. Ins. Co.*, 157 Cal. 339, 107 Pac. 699. By the former decision herein it was held that the evidence against respondent was sufficient to be submitted to the jury. If substantially the same evidence appears in this record, said decision, of course, is controlling. It would make no difference if additional evidence was received that might be favorable to respondent. The test is, Was substantially the same evidence favorable to appellant received at the second as at the first trial? As to this, it may be said that respondent has not pointed out any difference, and we would be justified in concluding from his omission that no difference

exists. It is true that he quotes quite freely from the testimony at each trial, but he does not specify the variance upon which he relies. However, we have examined the testimony of the two witnesses, Prinderville and McRoberts, claimed by appellant to be sufficient to show prima facie that the former at the time of the accident was under the exclusive control and direction of Dr. Jackson, and we find no such divergence as to make inapplicable the "law of the case." At the first trial Prinderville testified:

"On the 27th day of June, 1917, I was employed by Jackson as a driver of his truck. We were hauling empty lug boxes at the time of the accident. We were engaged in hauling fruit from Dr. Jackson's ranch to Oswald Station, and hauling empties back. *I was acting under the direction of Dr. George H. Jackson that day.* Defendant McRoberts was superintending the hauling of the fruit. * * * I received pay for my work performed for that week from Jackson Diggs. He paid me for all of the week. I did not receive any money from Mr. McRoberts or Dr. Jackson."

On the second trial his testimony upon this point appeared as follows:

"Q. What business were you engaged in on the 27th day of June, 1917? A. Driving a truck. Q. For whom were you driving the truck? A. Jackson Diggs. * * * Q. What did you do in the afternoon? A. Went out to the orchard, got a load of apricots, took them to Oswald, and put them in a car. Q. Who sent you to get the fruit in the orchard? A. Mr. McRoberts. Q. In what orchard was it you got the fruit? A. You mean who owned it? Q. Yes, sir. A. Dr. Jackson, I believe. Q. What did Mr. McRoberts direct you to do? A. Go to the orchard and get a load of the fruit that were there boxed. Q. Whom were you working for that afternoon? A. *I presume I was working under Dr. Jackson.* Q. *You were subject to his orders that afternoon?* A. Yes, sir. * * * Q. You were paid for this work by Jackson Diggs, of course. A. Yes, sir. Q. And not paid anything at all by Dr. Jackson? A. No, sir."

At the former hearing McRoberts testified:

"I am a fruit grower and superintendent for defendant Dr. Jackson. That was my business on the 27th day of June, 1917. I was acquainted with Emmans Franklin Burns in his lifetime. He was working for Dr. Jackson, and I was superintending the work."

At this trial he testified to the same thing, but added that Mr. Prinderville hauled some fruit for Dr. Jackson that day, and that he probably told Mr. Prinderville that "we had a load of fruit to take down to Oswald." He also related what occurred after they left the Jackson place, but this is of no consequence. It is true that in the cross-examination he testified that Mr. Prinderville was in the "employ of Jackson Diggs," and that he had full control of the truck, "right to stop it, or go ahead or back up as he pleased,"

but, as we understand, it was never contended by appellant that Prinderville was not in the general employ of Diggs, or that the chauffeur was not permitted to use his own judgment as to the manipulation and operation of the machine.

As we read the record, there was substantial evidence at the former trial in support of the theory that, while Prinderville was in the general employ of Diggs, yet at the time of the accident he was in the service of respondent for a special purpose, and subject to the exclusive control and direction of the latter in the accomplishment of that purpose; that it was so held in the former decision; that substantially the same evidence tending to prove that condition was received at this trial; and we conclude that the "law of the case" was properly invoked by appellant.

[5] What we have said sufficiently expresses our view, also that regardless of the former decision, it would be a fair inference from the showing made at the last trial that the relation of employer and employee as to this particular service existed between Prinderville and Dr. Jackson. It is indeed a very reasonable conclusion that Mr. Diggs, a son-in-law of Dr. Jackson, loaned or hired to the latter the truck, and also its driver for this particular work, and thereby made Prinderville subject to the control and direction of respondent. That a person may be in the general employment of one and in the special employment of another so as to make the latter responsible for the negligence of the employee is a proposition that cannot be disputed. In 20 Am. & Eng. Ency. of Law, 178 (2d Ed.) it is said:

"The doctrine respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of some neglect or wrong, at the time of and in respect to the very transaction out of which the injury arose; hence the fact that the party to whose wrongful or negligent act the injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master so far as that particular act is concerned, and responsible therefor. It is accordingly well settled that one who is the general servant of another may be loaned or hired by the master for some special service so as to become as to that service the servant of such third party; and, where a general servant is so loaned or hired to another, and as regards the particular service for which he is so loaned or hired is subject wholly to the direction and control of that other, the latter, and not the general employer, is the master so far as the particular service is concerned and liable for injuries caused by the negligence and wrongful act of the servant while engaged in the duties pertaining to such service."

Indeed this view as to the special service of Prinderville seems quite recently to have

been entertained by the learned counsel for respondent. In their reply on behalf of Diggs and McRoberts to a petition of plaintiff in the Supreme Court for a hearing after said decision in this court, they declared:

"The fact is, however, that Diggs and Jackson were operating neighboring ranches, and they did what farmers very frequently do, that is, they swapped work occasionally, one would send over and get the teams and wagons and outfit of the other, and when he finished using them would send them back, the owner of the outfit having nothing to do with, nor in fact knowing anything at all about, where his outfit was during the time it was away."

Of course, it is not surprising that counsel in representing Diggs should seek to shift to Jackson the responsibility for the accident, nor are they to be censured for changing their view of the situation when they represent the latter, but it is quite fair to assume that they would not have taken their original position without reasonable ground for it, or at least believing such ground existed.

[6] Moreover, when a fact is admitted by the pleadings, it is, of course, not necessary to prove it. Plaintiff in his verified complaint alleged:

"That defendant Jackson is the grandfather of the defendant Jackson M. Diggs, and they work together and exchange utilities with each other, and were so co-operating at said date in the use of said auto truck."

The defendant Jackson expressly admitted that he was the grandfather of Diggs, and did not deny the other part of the allegation. Therein was set forth the basic fact of the liability of respondent for the negligence of Prinderville, and it obviated the necessity of evidence to that extent.

Again, respondent in his answer declares as follows:

"Defendant admits that on the 27th day of June, 1917, certain fruit, to wit, apricots, was being hauled from the farm of this defendant to Oswald Station, on the line of the defendant Southern Pacific Company, in said Sutter county, and that such fruit was being transported by this defendant from his said farm to said station along and over a public highway of said Sutter county, but he denies that said auto truck was on said date operated by the defendant Jackson M. Diggs."

The foregoing is virtually an admission that he, and not Mr. Diggs, was in control of the auto truck on that day. At any rate, it is plain from the evidence that it was operated either by him or by Diggs, and his denial that it was operated by the latter, together with his averment that "such fruit was being transported by this defendant," should have some weight in the determina-

tion of the question whether there was a case for the jury on this vital point.

We feel satisfied that the court was in error in granting the motion, and the judgment is reversed.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 325

ALBERT v. MCKAY & CO. (Civ. 3816.)

(District Court of Appeal, First District, Division 2, California. June 27, 1921. Hearing Denied by Supreme Court Aug. 26, 1921.)

1. Evidence ⇨587—Rule as to sufficiency of circumstantial evidence stated.

Where plaintiff's case rests on circumstantial evidence, the circumstances must not only be consistent with his theory, but, when weighed with the opposing evidence, must have more convincing force substantiating the theory contended for, from which theory it results that the greater probability is in favor of the party upon whom the burden rests.

2. Master and servant ⇨278(17)—Negligence in starting machinery held not shown by circumstances.

In an action for the death of an employee, the fact that his watch was broken in the accident causing his death did not tend to show that machinery was put in motion after he was in a dangerous situation, as claimed by plaintiff.

3. Master and servant ⇨243(1)—Injury to servant violating orders not actionable.

Where an employee, killed while changing the location of shafts, had no duty to repair the shafts, and had been expressly ordered not to make changes in them, the master is not responsible.

4. Master and servant ⇨89(1)—Injury to servant away from place of duty not actionable.

Where a saw filer, killed by machinery, was employed on a floor other than the one where he was injured, and had no business to be in a place where he was injured, the master is not responsible.

5. Master and servant ⇨265(5)—Presumption of negligence not raised by accident.

There being no statute creating such a presumption, there was no presumption that an employer was negligent because of the dropping of a tightener and the starting of a shaft, whereby an employee was injured.

6. Trial ⇨194(19)—Instruction as to inferring negligence held to usurp jury's function.

An instruction, in action for injuries to servant, that from certain circumstances, if proved, and in the absence of explanation by defendant, the law presumes defendant was negligent, was erroneous, as usurping the jury's function, if the word "presumed" meant "infer," since the inference of negligence is a matter for the jury.

7. Appeal and error 1064(2)—Instruction stating there was a presumption of negligence held prejudicial.

In an action for the death of an employee, where there was no eyewitness to the accident, an instruction erroneously stating that under certain circumstances the law presumed defendant was negligent, and the burden was cast on him to show that the starting of a shaft was not due to his negligence, was prejudicial.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Ella W. Albert, as administratrix of the estate of Frank H. Albert, deceased, against McKay & Co. From a judgment for plaintiff, defendant appeals. Reversed.

Cooley, Crowley & Lachmund and Clarence Coonan, all of San Francisco, and Pierce H. Ryan, of Eureka, for appellant.

Puter & Quinn, of Eureka, for respondent.

STURTEVANT, J. This is the second appeal in the above-entitled action. The first appeal was heard and determined in the Supreme Court. 174 Cal. 451, 163 Pac. 666. The facts of the case are set forth in that decision. The first count in the complaint was dismissed, a nonsuit was granted as to the third count, and the judgment, from which this appeal was taken, rests on the second count referred to in that opinion.

The theory on which the second count was framed was that the deceased, Frank H. Albert, had commenced his work when the machinery was not in operation, and that when he had placed himself in a position of danger that the machinery was started in motion, and that a set screw (from which decedent had removed the guard) caught in his clothes and revolved his body against the wooden beams, and thus caused his death. No one witnessed the accident. To prove her theory of the case the plaintiff caused to be constructed in the courtroom a model built to scale, showing the exact dimensions of the space in which the body of the deceased was afterwards found. She also introduced expert testimony showing what would be the effect produced if, when the machinery was idle, the human form of a man of the size of the deceased should be inserted between the timbers and the idle shaft, and that thereafter the machinery should be set in motion. She also introduced in evidence the broken watch, which it was claimed was running and in good order the night before the accident, and was so broken that the hands could not move at all when it was taken from the body of the decedent after the accident, and which showed that it was broken at 26 minutes past 7. Having introduced this testimony, the respondent contends that it would have been suicidal for the deceased, while the machinery was in operation, to inject his body in the space where his body was after-

wards found. She also argues that the broken watch shows that the deceased met his death at 26 minutes after 7, and she also argues that there are other circumstances which show that her theory, as stated in her pleading, is sustained by the evidence—that is, by indirect evidence.

The appellant takes the position that the plaintiff was not entitled to recovery because (1) the machinery was in full operation before and at the time the decedent commenced his work; (2) that the decedent had been expressly forbidden to do the work which he was proceeding to do at the time of the accident; and (3) that the trial court committed error in giving to the jury certain improper instructions. We think that the appellant is supported by the record as to each one of these contentions, and we shall address ourselves to each of these contentions in the order stated.

[1, 2] 1. It may be conceded, as the plaintiff argues, that the evidence in the case may be claimed to show that the decedent could have been killed in the manner in which the plaintiff contends for. However, this contention rests on circumstantial evidence, if at all. Resting on circumstantial evidence, the plaintiff's case is not sufficient merely because the circumstances proved are consistent with the plaintiff's theory; but the circumstances must show, when weighed with the evidence opposed to them, that the circumstances relied on have more convincing force, substantiating the theory contended for, and from which theory it results that the greater probability is in favor of the party upon whom the burden rests. *Wilbur v. Emergency Hospital Assn.*, 27 Cal. App. 751, 759, 151 Pac. 155; *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 366, 64 Pac. 480; *Union Investment Co. v. S. F. Gas, etc., Co.*, 168 Cal. 58, 62, 141 Pac. 807. But the evidence does not measure up to such requirements. The fact, if it be a fact, that the watch was broken in the accident, does not at all tend to show when the machinery was put in motion. Conceding that it would have been a very dangerous act for the decedent to have inserted his body in the space where he was killed, there is nothing to show that he did so; but, on the other hand, he may have been working near the shaft, his clothes may have caught on the set-screw, and his body may have been drawn into the space where the body was later found.

[3] 2. The uncontradicted testimony of Mr. Cotter, the superintendent, was to the effect that he did not know until after the accident that the decedent was doing the work which consisted of making certain changes in the location of some of the shafts, and, furthermore, that he had expressly forbidden the decedent to make the changes. There is other testimony in the record tending to corroborate Mr. Cotter in the foregoing testi-

mony. There is no evidence whatever in the record tending to contradict him. In the case of *Andrews, etc., v. Valley Ice Co.*, 167 Cal. 11, at page 21, 138 Pac. 699, 703, the Supreme Court quoted with approval Thompson on Negligence, § 5396, as follows:

"The rule is the same in the case where a servant brings an injury upon himself in consequence of violating special or particular orders which he has received in a given juncture; he cannot make his own fault in violating such orders the ground of recovering damages for the injury which he thus brings upon himself."

[4] Closely allied to this same point, but not necessarily a part thereof, the uncontradicted testimony is that the decedent was employed as a saw filer, and that his duties were to be performed on the floor immediately above where the accident occurred. It is also to the effect that he had no duties whatever to perform on the floor where the accident occurred. In the case of *Jacobson v. Northwestern Pacific R. R. Co.*, 175 Cal. 468, 472, 166 Pac. 3, 5, the court said:

"In the case at bar, no facts appear which tend to show any obligation of defendant to deceased which it failed to discharge. Indeed, the testimony of the contractor's foreman to the effect that in the course of the work of installing the runway they had no occasion to go upon or use the platform, and that Jacobson's act in going upon it was not due to any order expressly given, nor to anything connected with the work in which he was engaged in doing, is not controverted. Having, as stated, for his own convenience and without invitation on the part of the defendant, intruded upon a place of danger, in which position as to defendant he was, if not a trespasser, at least a licensee, as to whom defendant owed no duty for the violation of which it is liable, the injury suffered must be deemed to have resulted solely from his own negligence."

There was not, therefore, any evidence tending to support the allegation of plaintiff's complaint, which is as follows:

"* * * That on the said 10th day of March, 1913, the said Frank H. Albert approached said shaft while in the performance of his said duties. * * *"

But that allegation was the gravamen of plaintiff's cause of action.

[5-7] 3. The plaintiff, on the trial of the case, requested, and the judge gave, an instruction attempting to apply to the facts of this case the doctrine of *res ipsa loquitur*. The appellant contends that that doctrine has no application to the facts of this case. The instruction complained of is No. 8. It is very long and contains several paragraphs. After assembling certain facts the instruction proceeds:

"* * * And from such circumstances, if they have been proved, and in the absence of any explanation from the defendant the law presumes that the defendant was negligent, and

the burden is then cast upon the defendant to show that the dropping of the tightener and starting the shaft to revolve, was not due to any negligence of the defendant."

In such paragraphs the trial court used the word "presumption" nine times. Of course, there is no such presumption. If there is any such presumption, one can turn to the particular statute and read it; but every one must concede that such presumption has never been written into our statutes. If by the word "presume" the court meant "infer," then the court was usurping the function of the jury and was instructing on a question of fact, for it rested with the jury to infer negligence or not to infer negligence. These propositions have been adverted to by the Supreme Court in a long line of cases. See *People v. Walden*, 51 Cal. 588, and the long discussion on the subject contained in *Davis v. Hearst*, 160 Cal. 143, 176-177, 116 Pac. 530. The instruction was erroneous, and, as there was no eyewitness to the accident which caused the death of the decedent, the instruction complained of must have been highly prejudicial.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

53 Cal. App. 436

DELL v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (Civ. 3656.)

(District Court of Appeal, Second District, Division 1, California. July 7, 1921.)

1. Divorce $\S$ 165(4). — Valid interlocutory judgment cannot be set aside on motion, unless made within time fixed by statute.

A court has no power to set aside or vacate on motion an interlocutory judgment for divorce not void on its face, unless the motion is made within the time fixed by Code Civ. Proc. § 473.

2. Divorce $\S$ 165(4). — No jurisdiction to vacate interlocutory judgment after lapsed year because of subsequent resumption of marital relations.

While the court in a divorce action has the inherent power to refuse to enter a final decree, where, on a condonation of the offense on which an interlocutory judgment was based, the parties resumed marital relations, it does not follow that the court, after the lapse of a year, has jurisdiction to vacate the interlocutory judgment, the integrity of which, in so far as it determines the facts properly involved therein, is unaffected by subsequent relations of the parties.

3. Prohibition $\S$ 3(5). — Writ of prohibition will issue where petitioner would be subjected to other than usual expense of trial and appeal therefrom.

While a writ of prohibition will not ordinarily issue where there is a plain, speedy, and

adequate remedy in the ordinary course of law, and an order setting aside an interlocutory judgment for divorce, since made after judgment, would be the subject of an appeal, such writ will issue where petitioner, though entitled to a reversal of the order on appeal, could be compelled to supply his wife with the necessary means to enable her to resist the appeal and to pay her suit money and costs asked for in a futile prosecution of a second action instituted by her for divorce, as to all of which the law makes no provision for reimbursement, so that the appeal would not afford him an adequate remedy.

Petition for writ of prohibition by George L. Dell against the Superior Court of the County of San Diego, State of California, and Hon. C. N. Andrews, Judge presiding therein. Alternative writ made permanent.

Charles B. DeLong, of San Diego, for petitioner.

W. J. Mossholder, of San Diego, for respondent.

SHAW, J. Upon filing the petition herein an alternative writ of prohibition was issued, in response to which the respondent has made return, from which and the petition it appears that on June 9, 1919, Eva D. Dell obtained an interlocutory judgment for divorce against George L. Dell, petitioner herein, as to the validity of which judgment no question is made. Thereafter the parties effected a reconciliation, and in December, 1919, resumed their marital relations which, except for temporary interruptions, continued to April 28, 1921, when they again separated and Eva D. Dell instituted another action for divorce against her husband, wherein she asked for an order requiring him, as defendant therein, to pay certain moneys as attorney's fees, alimony, and costs. About the same time, by a motion made in the first action based upon the ground that subsequent to the rendition of the interlocutory judgment therein the parties had resumed their relations as husband and wife, she applied to the court, asking it to annul and vacate the interlocutory judgment, which motion the court threatens to and will, unless restrained, grant.

[1] As stated, the regularity and validity of the judgment is not questioned, and the application to so annul it was not made until nearly two years after its rendition. The law seems to be well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face, unless the motion is made within the time fixed by section 473 of the Code of Civil Procedure. *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *People v. Temple*, 103 Cal. 447, 37 Pac. 414. The judgment entered on June 9, 1919, constituted a valid interlocutory judgment, declaring plaintiff entitled to a divorce. "As such it was subject to be vacated on appeal,

or on motion for new trial, or by proceedings under section 473 of the Code of Civil Procedure. The time for all these proceedings having expired, and no such proceeding to vacate it having been instituted" until nearly two years after its rendition, the court is without jurisdiction by any proceeding in the case to vacate the judgment. *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897. To the same effect is *Suttman v. Superior Court*, 174 Cal. 243, 162 Pac. 1032.

[2] While the court in a divorce action, as held in *Olson v. Superior Court*, 175 Cal. 250, 105 Pac. 706, 1 A. L. R. 1589, has the inherent power to refuse to enter a final decree dissolving the bonds of matrimony where it is made to appear that upon a condonation of the offense upon which the interlocutory judgment is based the parties resumed marital relations, it does not follow from such fact that the court, after the lapse of a year, has jurisdiction to vacate an interlocutory judgment the integrity of which, in so far as it determines the facts properly involved therein, is unaffected by subsequent relations of the parties. The facts having been judicially determined by a final judgment, it can only be set aside by a proceeding in the nature of a direct attack thereon. The question involved in the *Olson Case* was the right to a writ of mandate, compelling the trial court to enter a final judgment where it appeared the parties had within a year effected a reconciliation and resumed marital relations. It cannot be deemed an authority in support of respondent's contention.

[3] Conceding the court is without jurisdiction to grant the motion, respondent insists that petitioner's remedy for such unwarranted action, if had, is by an appeal. While it is true that a writ of prohibition will not ordinarily issue where there is a plain, speedy, and adequate remedy in the ordinary course of law (*Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765), and conceding that the order if made would, since made after judgment, be the subject of an appeal, nevertheless there are exceptional cases where an appeal is not an adequate remedy, among which are those where in obtaining a reversal of the unwarranted ruling of the court the aggrieved party would be subjected to other than the usual expense of a trial and appeal, where, due to the nature of the case, no recovery could be had therefor. *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70; *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225. While petitioner would upon an appeal be entitled to a reversal of the order, he could, by order of court, be compelled to supply his wife with the necessary means to enable her to resist the appeal; and likewise, under an order of court, compelled to pay his wife suit money and costs asked for in a futile prosecution

of the second action instituted by her for divorce, as to all of which the law makes no provision for reimbursement.

The trial court is without jurisdiction to entertain the motion or make the order therein applied for, and under the circumstances, conceding that petitioner might appeal therefrom, it would not afford him an adequate remedy for the unwarranted action.

The alternative writ of prohibition heretofore granted is made permanent.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 404

ROBINSON v. ORDER OF RAILWAY EMPLOYEES. (Civ. 3872.)

(District Court of Appeal, First District, Division 1, California. July 5, 1921. Rehearing Denied Aug. 4, 1921. Hearing Denied by Supreme Court Sept. 1, 1921.)

Insurance — 618—Action on accident policy may be brought where insured was killed; "obligation or liability arises."

Within Const. art. 12, § 16, providing that a corporation may be sued "where the obligation or liability arises," action by the beneficiary of an accident policy may be brought in the county where insured was killed.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Alta Robinson against the Order of Railway Employees. From an order denying change of venue, defendant appeals. Affirmed.

Hartley F. Peart, of San Francisco, and Puter & Quinn, of Eureka, for appellant.

J. J. Cairns and J. Logan Beamer, both of Eureka, for respondent.

RICHARDS, J. This is an appeal by the defendant from an order denying its application for a change of the place of trial of this action from the county of Humboldt to the city and county of San Francisco. The action is one instituted by the plaintiff, as the mother of one Stanley Robinson, to recover upon a policy of accident insurance issued by the defendant to the latter and in which the plaintiff was named as beneficiary, the said Stanley Robinson having met accidental and violent injuries causing his death in the county of Humboldt on June 3, 1919, in which county both deceased and his mother, the plaintiff herein, resided at the time of his death. The defendant is a California corporation having its principle place of business in the city and county of San Francisco. The contract of accident insurance between the defendant and the deceased was made, executed, and delivered in said city and coun-

ty of San Francisco, and the payments of the premiums due and to become due thereon were to be made there. The appellant insists that under the provisions of the state Constitution with respect to the place of trial of actions against corporations it was entitled to have its motion for a change of the place of trial to the city and county of San Francisco granted. Said provision of the Constitution reads as follows:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county in which the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Const. art. 12, § 16.

It requires no citation of authority to support the appellant's contention that it would have been entitled to a change of venue to the place where the contract of insurance between itself and the deceased son of the plaintiff was made and was to be performed, namely, the principal place of business of the defendant corporation; but this contention does not entirely cover the terms of the foregoing section of the Constitution relating to the place of trial of actions against domestic corporations, since that section further provides that such corporations may be sued "in the county where * * * the obligation or liability arises or the breach occurs." It is the contention of the respondent herein that, aside from the fact that the contract between the defendant and the deceased was made and was to be performed in the city and county of San Francisco, the obligation or liability thereon arose and the breach thereof occurred in the county of Humboldt, wherein both the plaintiff and the deceased resided at the time of the latter's death. We are referred to no decision of the courts of this state wherein the direct question presented upon this appeal has been sufficiently touched upon or decided to be regarded as an authority herein; but the courts of other states seem to have quite uniformly held that the place where the holder of a policy of accident insurance is injured or killed is the place where the cause of action arises, and hence where under the statutes of those several jurisdictions an action may properly be commenced and tried. *Rippstein v. St. Louis Mut. Life Ins. Co.*, 57 Mo. 86; *Bruil v. N. W. Mut. Relief Ass'n*, 72 Wis. 430, 39 N. W. 529; *Attorney General v. Equitable Acc. Ins. Ass'n*, 175 Mass. 196, 55 N. E. 890; *Hildebrand v. United Artisans*, 46 Or. 134, 79 Pac. 347, 114 Am. St. Rep. 852; *Bankers' Life, etc., v. Shelton*, 84 Mo. App. 634; *Roberts v. Nat. Assur. Co.*, 201 Mo. App. 239, 212 S. W. 391; *Ins. Co. of North America v. McLimans*, 28 Neb. 653, 44 N. W. 991. In 11 Ency. of Pl. & Pr. 384, it is stated:

"Where statutes provide that an insurance company may be sued within the county in which the cause of action or some part of it arose, it is generally held that an action on a policy of life insurance is maintainable in the county where the insured resided and died."

It is true that in most of the foregoing cases the phrase "in which the cause of action arose" is used; while in the section of the Constitution above quoted the phrase "in which the obligation or liability arises" is employed. We see no real distinction between these two phrases, since the term "cause of action" can only be held to refer as to its inception to the obligation or liability from which it springs. In the case at bar there was no existing obligation or liability to the plaintiff as the decedent's beneficiary until his death, which occurred, as we have seen, in Humboldt county, where this action was properly begun.

Order affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

A. A. Moore and Stanley Moore, both of San Francisco, and L. R. Weinmann, of Alameda, for appellants.

Adams & Adams, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the sureties on a contractor's bond from a judgment in favor of a materialman.

The decision of the superior court was based on the case of General Electric Co. v. American Bonding Co. of Baltimore, 180 Cal. 675, 182 Pac. 444. After a very careful examination of the record and briefs filed in the instant case, we believe it is not distinguishable from the General Electric Company case, *supra*; but, on the contrary, we are of the opinion that the aforementioned case is directly in point under the facts of the present case.

The judgment is therefore affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

54 Cal. App. 101

PEOPLE v. PARKER. (Cr. 949.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1921.)

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

William H. Parker was convicted of "pimping," and he appeals. Affirmed.

L. Gonsalves and Victor A. Dunn, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LANGDON, P. J. Defendant was convicted by a jury of the offense designated "pimping" in an act approved February 8, 1911, and found in Statutes of 1911 at page 10. He moved for a new trial, which motion was denied, as was also his motion for probation, after the filing of the report of the probation officer thereon. From the judgment of the court rendered herein the defendant appeals.

The appeal is based solely upon the claim of insufficiency of the evidence to justify the verdict. No useful purpose would be served by a review of the evidence in this opinion. The evidence is ample to support the verdict, and we think no other verdict could have been reached by the jury.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 800

W. P. FULLER & CO. v. CHATHAM et al.
(Civ. 3812.)

(District Court of Appeal, First District, Division 2, California. July 20, 1921. Hearing Denied by Supreme Court Sept. 17, 1921.)

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by W. P. Fuller & Co., a corporation, against William Chatham and F. E. Knowles. Judgment for plaintiff, and defendants appeal. Affirmed.

purchaser for the land, defendant would attempt to do so, and the parties should each receive one-third of the commission or profits of making the sale, etc.

6. Brokers ⇨66 — Broker cannot repudiate agreement to share commissions.

Where the owner of land employed a broker to sell, who took in a second broker under an arrangement providing that if another broker was taken in the commissions were to be divided three ways, so that the original broker found the land, while the second broker found the third, who found a purchaser, after consummation of the joint project, such third broker cannot repudiate his contract and deprive the other brokers of their just proportion of the fruits of the enterprise.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. E. West and others against the Visalia Abstract Company, wherein J. Goree intervened. Judgment for plaintiffs, and intervener appeals. Judgment affirmed.

Everts & Ewing and Gallaher & Simpson, all of Fresno, for appellant.

E. I. Feemster and D. E. Perkins, both of Visalia, for respondents.

BURNETT, J. The record justifies this statement of facts: Messrs. Gibson, Quinn, and Snell were the owners of a certain tract of land in Tulare county. Mr. Gibson agreed with one J. W. Fewel that if the latter would find a purchaser for the land that the owners would sell it for \$65,000 cash, and Fewel could retain all above that sum that the purchaser might pay for the land. Fewel at once entered into a verbal agreement with one J. E. West that if the latter would assist the former in finding a purchaser they would divide the profits or commissions equally, and, if desirable, they would obtain the assistance of a third party, and in that event they would divide the commissions equally among the three in case of sale. West then approached intervener, John Goree, and told him of this tract of land and of the terms upon which it could be purchased, and stated that if he would find a purchaser they would divide the profits or commissions equally; that is, that Fewel, West, and Goree would each receive one-third thereof. West told Goree that Fewel only had a verbal agreement with the owners of the land, but that on account of the close personal and business relations between Mr. Gibson and Mr. Fewel he had no doubt that the owners would carry out their agreement. Goree agreed to the proposition, and promised to aid in the sale of the land upon the terms proposed.

Within a day or two thereafter, and at the express personal direction of West and Fewel, Mr. Goree took an intending purchaser to Mr. Gibson at Visalia. Mr. Gibson, Mr. Goree, and said purchaser visited the land, and then went to see Mr. Quinn at Exeter.

53 Cal. App. 467

WEST et al. v. VISALIA ABSTRACT CO. (GOREE, Intervener). (Civ. 2274.)

(District Court of Appeal, Third District, California. July 11, 1921. Hearing Denied by Supreme Court Sept. 8, 1921.)

1. Contracts ⇨108(2)—Brokers' agreement for division of commission not illegal.

An agreement between realty brokers acting for the seller for division of the commission earned on a sale is not illegal, or against public policy.

2. Brokers ⇨66—Agreement for division of commission need not be in writing.

A contract between realty brokers for division of a commission earned on the sale of realty need not be in writing.

3. Appeal and error ⇨1010(1)—Appellate court must uphold finding substantially supported.

An appellate court must uphold the finding of the trial court, if there be any substantial evidence in its favor, whatever may be the showing in opposition.

4. Brokers ⇨86(8)—Evidence held sufficient to sustain finding as to owners' agreement.

Evidence held sufficient to sustain the court's finding that the owners of the land verbally agreed with plaintiff that if he could find a purchaser at a given price he might retain as his commission all sums paid by the purchaser over the price.

5. Brokers ⇨86(1)—Evidence in action for share of commission sufficient to support finding.

In an action between brokers for a share of a commission earned on a sale, evidence held sufficient to sustain a finding that plaintiff and defendant brokers made an agreement whereby, in consideration of such plaintiff broker and another broker permitting defendant to find a

This purchaser could not pay the full purchase price, but only about \$15,000 in cash, and the balance to be in certain installments. The owners therefore fixed the purchase price at \$72,000, upon which they were to pay a commission of 5 per cent., and on these terms the sale was effected. Immediately thereafter West saw Goree, and made inquiry about the deal, at which time the latter stated to the former that he had been unable to close it upon the original basis, and that he was compelled to accept a commission of a little more than \$1,900, and that by reason thereof each would receive a little more than \$600. Later on Fewel and West discovered that the commissions amounted to \$3,600, and, Goree having declined to recognize the claim of plaintiffs according to the contract, and a dispute having thus arisen as to the manner in which the commissions were to be divided, \$2,000 of which was immediately payable, the owners of the property paid said sum to the Visalia Abstract Company with instructions to pay the same to the persons entitled thereto. Thereupon, plaintiffs commenced this action against said company to obtain the commissions, and Goree filed a complaint in intervention claiming that he was entitled to the whole thereof. At the time of the trial, the Visalia Abstract Company paid the \$2,000 into court, to be disposed of as directed by the judgment in this action.

[1] There appears to be nothing illegal or against public policy in such contract. No good reason has been suggested why it may not be enforced. It is to be observed that the transaction involves an agreement between brokers for the division of a commission, and does not relate to the payment of a commission by the owners. The owners, for whom the services were performed, have indeed paid the money into court, and are only concerned in being protected against any duplicate claim.

[2] We do not understand that any objection is made to the validity of the contract on the ground that it was not in writing. In fact, appellant declares in his closing brief:

"We have no quarrel with the authorities cited by counsel in relation to contracts between brokers for a division of commissions earned upon the sale of real estate. There is no law that requires such a contract, or any memorandum thereof, to be in writing. It is also true that where such a contract is carried out and performed, and commission is paid to one of the parties to the contract by the vendor of the land, it is immaterial whether or not there had existed a contract in writing between the vendor and the agent selling the land."

Appellant, though, contends that these principles are not applicable to the situation herein, and he particularizes as follows:

[3, 4] 1. There is no support for this finding of the court:

"That about the month of February, 1919, J. F. Gibson, A. W. Quinn, and E. C. Snell, being

then the owners of a certain tract of land in the county of Tulare, state of California, did verbally agree with plaintiff, J. W. Fewel, that, if he could and would find a purchaser for said land at a price to net to them the sum of \$65,000 cash, said J. W. Fewel might retain as his commission and compensation all sums which said purchaser would pay for said land over and above said sum of \$65,000."

In his contention as to this point, appellant ignores the rule that requires an appellate court to uphold a finding of the trial court, if there be any substantial evidence in its favor, whatever may be the showing in opposition. The very testimony quoted by appellant justifies the finding. J. W. Fewel testified:

"Why, I don't remember as to the dates, but it was some week or two weeks before the sale was consummated I had a conversation with Mr. Gibson in the office relative to this land, and I suggested to him that if he would make a price on it I thought I might find a buyer, so, after some preliminary conversation, we agreed that they would take \$65,000 net and allow me to make whatever commission I could. * * * I might further state that he was to allow me a few days to carry on the proposition, and there was no specified time."

We must, of course, give full credit to the foregoing testimony, and its significance is easily understood. It is true that Fewel seems to have dealt with Gibson alone, but there is no contention that he was not authorized to represent the other owners.

Fewel is indeed corroborated by Gibson, who, testifying in reference to this conversation, said:

"Well, we talked about the selling of this place, and I told Mr. Fewel that he could sell it for \$65,000 in cash, net.

"Q. Was anything said about his retaining anything in excess of that in case he found a purchaser? A. Well, I suppose he was going to make whatever he made over that. I don't know whether we had any conversation about that or not. Of course, he would not sell the land for nothing."

As stated by the learned trial judge:

"If he gave him a price, if he sold it for more and got the money, he would have the excess, I suppose that would follow naturally."

True, Mr. Quinn testified that the agreement was that it should be sold to Mr. Fewel for \$65,000, and that "not to my knowledge" was anything said that, if he did not buy it himself, and should sell it to another, he should have the surplus.

It would seem to make little difference whether the agreement was to sell it to Fewel, or to any purchaser whom he might secure, but, at any rate, the finding is amply supported if we regard Quinn's testimony as adverse.

[5] 2. The same claim is made as to this finding:

(200 P.)

"That thereupon said J. E. West and intervenor, John Goree, entered into an agreement whereby, in consideration of said Fewel and said West permitting said Goree to find a purchaser for said land, said Goree would attempt to find a purchaser therefor, and in the event that such purchaser was found by said Goree to purchase said land, then said Fewel, West, and Goree should each receive one-third of the commission or profits of making said sale."

It may be admitted that the agreement between the parties was not expressed in the identical language of the finding, but it is a fair inference from their conversation that such was their understanding and their engagement.

In reference to his conversation with Mr. Goree, Mr. West testified:

"I told him of this land, and that we had it for \$65,000 net, and that I and Mr. Fewel were to have all over \$65,000 that we sold it for, and if he cared to have—to help us sell it, we would give him one-third of the commission."

Referring to another conversation with Goree, he said:

"I told him that we were to make all over \$65,000 that we sold the land for, and that would be divided three ways equally between him and Mr. Fewel and myself. He said he did not generally work on a split commission, or something to that effect, but he said that looks as though it is easy to sell, and I am willing to work. * * * Later in that afternoon I met Mr. Fewel on the street in passing through, and I told him our arrangement with Mr. Goree. That Mr. Goree would go down next day with his party, and also the other parties that I had on, and after we had talked a little bit I saw Mr. Goree across the street, and I went over and took him to Mr. Fewel and introduced him. Mr. Fewel asked me if I would be down there with him, and I said I could not be; in fact, I asked Mr. Fewel to go, and he said he could not go, and Mr. Fewel told him to go direct to Mr. Gibson and he would get all the information he needed, any help."

If the trial court believed the foregoing testimony—and obviously it did—it could reach no other conclusion than is contained in said finding. It may be that Goree did not say categorically that he accepted said terms, but they were proposed, and he said he was willing to work, and he immediately acted upon them by securing a purchaser. Of course, an agreement to the terms of a proposed contract may be evidenced and confirmed by conduct, as well as by verbal expression.

True, Mr. Goree differs somewhat in his recital of what took place, but we are not concerned with any conflict. We may add that, beyond question, he accepted and acted upon the situation as presented by Fewel and West, and there is evidence that, after the sale was made, he recognized this obligation under the agreement with them to divide the commissions earned into three parts, although at the same time misrepresenting to

West the amount of commission actually earned. Respondent calls attention to the fact that this testimony is undisputed.

3. Appellant criticizes another finding, to the extent that it declares the owners of the property agreed "to pay a commission to the person or persons entitled thereto," the contention being that they agreed to pay it to John Goree. However, it is manifest that this is entirely immaterial. They could not preclude plaintiffs from asserting their claim to their proportion by an agreement that they would pay it to appellant. The fact is, though, that it is a fair inference from the testimony of Mr. Gibson, one of the owners, that they considered plaintiffs to be interested in the commissions and made the agreement accordingly.

4. Appellant makes the point that the evidence does not support the finding that the owners paid \$2,000, the portion of the commissions which were due, to the abstract company, in escrow, to be paid to the persons entitled to receive said commissions. This portion of the finding is utterly immaterial, since it is admitted that the money at the trial was paid into court to abide the judgment. Moreover, Mr. Gibson testified:

"All this money went in together, into the escrow fund, and we retained this amount to pay who should have that commission when it was decided on who should have it; and it has laid and laid there all this time."

Thus is apparent how little fault can be found with said finding, even if it be deemed important.

5. The only question that could seemingly invite real controversy arises from the fact that the sale was made upon terms somewhat different from those negotiated by Fewel, and the claim that the owners repudiated or terminated the agreement with said plaintiff prior to the actual sale. Mr. Quinn testified that, when Mr. Goree produced the purchaser—

"We stated that we had offered that place for \$65,000, and the proposition that he had was on a contract with a small payment down, and, of course, the other offer we had made of \$65,000 did not include any commission. So we outlined the proposition of \$72,000 for the property. We were to pay Mr. Goree 5 per cent. commission upon that purchase price, and the terms as stated in the contract."

He also testified that Mr. Gibson stated that—

"The offer we had given Mr. Fewel to buy it at \$65,000 cash was off, and that we need pay no more attention to that."

As to the facts, it is to be observed that the parties considered the terms of the sale equivalent to those submitted to Fewel. The variance, at any rate, in that respect is too slight to be of vital importance.

It may be said, also, that it is a fair inference from other testimony that Gibson

knew that Goree was acting under an agreement with plaintiffs, and in pursuance of said original agreement, and that Gibson had this in view when he made said declaration to Quinn. Indeed, though not positive about it, he was under conviction that Goree told him who had sent him to negotiate for the property. Anyhow, he understood it from his conversation with plaintiffs. Naturally he would inform the other owners, and, upon the theory that Goree and Gibson were honest and honorable men, we must assume that the real situation was understood.

[6] Moreover, appellant has unduly magnified the minor circumstances of the case. The essential fact is that there was a joint venture by these three parties upon an agreement to divide equally the profits. It is sententiously stated by respondent as follows:

"Mr. Fewel held the keystone position in the whole transaction from the beginning. It was he who had the knowledge that the land was for sale, and who had the primary right to purchase it. It is not shown that any one else knew that the land was on the market. In order to find a purchaser promptly he took in West under an arrangement that provided that if another broker was taken in then the commissions were to be divided three ways, or one-third each. Then we see that Fewel found the land, West found a broker who could find a purchaser, and Goree found the purchaser."

Manifestly, they all contributed to the result, and after the consummation of their joint project, it is too late for appellant to repudiate his contract and seek to deprive respondents of their just proportion of the fruits of the enterprise.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 294

BUTTERS et al. v. CITY OF OAKLAND et al.
(Civ. 3782.)

(District Court of Appeal, First District, Division 1, California. June 22, 1921. Hearing Denied by Supreme Court Aug. 19, 1921.)

1. Municipal corporations ⚡266—**Grade of streets under one act and improvement under another held proper.**

It was proper to adopt an ordinance under Change of Grade Act of 1909, purporting to change grades of a street, and then to cause the improvement of such street to be made to such changed grade under Improvement Act of 1911; the first act making no provision either for damages or the doing of improvement work on streets.

2. Municipal corporations ⚡112(2)—**Ordinance held not to embrace more than one subject.**

An ordinance of the city of Oakland relating to change of grade of certain streets in the

same neighborhood, and incidentally giving an official name to one of the streets, was not invalid as embracing more than one subject in its title, contrary to Oakland City Charter, § 46, subd. 4.

3. Statutes ⚡105(1)—**Liberal construction of provisions relating to titles to acts.**

Provisions of Constitution and laws relating to the subject-matter and titles of acts should be construed liberally, so as to permit matters which are germane to the main purpose of the enactment to be included in it.

4. Municipal corporations ⚡340—**Noncollusive affidavit of contractor held unnecessary for street improvement.**

Where Oakland city council adopted the Street Improvement Act of 1911 as the general law under which a street improvement should be made, the terms of such general law were controlling in the premises, and the provision of the city charter (article 19, § 126) requiring a noncollusive affidavit on the part of a contractor did not apply, in view of article 14, § 15, subd. 46, of such charter.

5. Municipal corporations ⚡488, 489(7)—**Complaint of informalities in bid not available to prevent assessment, in absence of filing of notice with city council.**

Where city adopted Street Improvement Act of 1911 as the general law under which improvement was to be made, informalities in contractor's bid for the work, such as a failure to accompany it with a noncollusive affidavit, could not be complained of, where no notice in writing regarding such defect was filed with the clerk of the council as required by section 16.

6. Municipal corporations ⚡439—**Assessment for street improvement held not void.**

In an action to restrain assessment for street improvements under Street Improvement Act of 1911, assessment held not void because property was not shown to have been benefited.

On Hearing in Supreme Court.

7. Eminent domain ⚡167(3)—**Property owner entitled to hearing in court on change of grade of street.**

Establishing official grade of street under Change of Grade Act of 1909, without instituting any proceeding to ascertain and provide for the payment of damages caused by the raising or lowering of the level of the street by the change of grade, and proceeding to improve the street under Street Improvement Act of 1911 and reducing it to the official grade, would have the effect, if nothing further occurred, of changing the grade without compensation, and principles of justice would not allow such a proceeding without the test of an examination in the court.

8. Municipal corporations ⚡488, 489(5)—**Restraint of performance of contract, and not collection of assessment, proper remedy.**

Where city changed grade of street without making provision for payment of damages, the remedy of the property owner was not to enjoin the collection of the assessment levied to pay the cost of the work, but to enjoin the per-

formance of the contract prior to the work having been done until damages were paid, in case the result of such work would cause damage to the abutting property, constituting no defense against the collection of the assessment.

9. Eminent domain — 101(1)—Liable for damage to abutting property by changes in street.

A city is liable for damage caused to abutting property by excavation or fills in a street in front thereof.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Charles Butters and others against the City of Oakland and others. Judgment for defendants, and plaintiffs appeal. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

C. Irving Wright and F. Eldred Boland, both of San Francisco, and L. D. Manning, of Oakland, for appellants.

H. L. Hagan, City Atty., and John J. Earle, Asst. City Atty., both of Oakland, for respondent city of Oakland.

Johnson & Shaw, of Oakland (R. M. F. Soto, of San Francisco, of counsel), for respondent Marsh Bros. & Gardiner, Inc.

RICHARDS, J. The plaintiffs in this action sought to enjoin the recordation of a certain assessment for street improvements in the city of Oakland done under the district plan provided for by the terms of the Improvement Act of 1911. St. 1911, p. 730. The same assessment was before the Supreme Court in the case of Rockridge Place v. City of Oakland, 178 Cal. 58, 172 Pac. 1110, in which case the facts were quite fully stated and a number of the points discussed on this appeal were decided. It will be only necessary therefore to refer to such of the facts of the case as may be germane to the legal questions presented for the first time upon this appeal.

[1] Somewhat more than one year prior to the adoption by the council of the city of Oakland of the resolution of intention by which the proceedings under review upon this appeal were initiated the said council adopted an ordinance under the so-called Change of Grade Act of 1909 (St. 1909, p. 1018), purporting to change certain grades on Broadway, which at the point along its route affected by the present proceeding was at that time unimproved in the sense that it had not previously been graded or paved. While this change of grade act of 1909 prescribes a detailed procedure for accomplishing the change or modification of the grades of public streets after notice and an opportunity to protest and have a hearing thereon upon the part of abutting owners, it contains no provision for the assessment or

award of damages arising out of such change of grade, and this probably for the reason that the change or modification of the grade of the street affected thereby is merely a record or paper change out of which in itself no particular damage to abutting property owners could arise. The appellant herein, however, seems to complain that the council of Oakland saw fit to change the grade of Broadway and then to cause the improvement of said street to be made to such changed grade under another and different act, viz. the Improvement Act of 1911.

We fail to appreciate the force of this contention, since the change of grade of 1909 made no provision either for damages, or for the doing of improvement work upon streets, the grades of which had thus been changed of record. Whatever improvements were thereafter to be done upon such street must therefore necessarily be initiated and carried forward under some other street improvement act; and we can see no reason why the council was not at liberty to select the Improvement Act of 1911 as the act under which the improvement in question was to be accomplished, or wherein the plaintiffs had any ground of complaint at the action of the council in the selection of said act in making such street improvement.

The appellant, and in this same connection, urges that the ordinance of the council under which the change of grade of Broadway was accomplished was invalid for the reason that it embraced more than one subject in its title, contrary to the provisions of section 46, subdivision 4, of the Oakland Charter.

[2, 3] We do not find this objection to be well founded. The general subject of the ordinance in question was that of the change of grade of certain streets in the same neighborhood; and the fact that there were several of these streets affected by the proposed change of grade, or that in the course of making the change it became necessary incidentally to give the official name of Patton street to one of said streets, did not render the ordinance void as embracing more than one subject. It is a well-established rule that the provisions of Constitutions and laws relating to the subject-matter and titles of acts should be construed liberally so as to permit of matters which are germane to the main purpose of the enactment to be included in it. 36 Cyc. p. 1017; Cooley's Constitutional Limitations (7th Ed.) p. 204.

[4, 5] The next contention of the appellants is that the contract for the street work in payment for which the assessment in question was levied, and about to be recorded, was void for the reason that the bid of the contractor was not accompanied by his affidavit, that his bid was genuine and not sham or collusive, required by the terms of section 126 of article 19 of the Oakland

Charter. This section of the charter, however, is a portion of the general article therein entitled "Public Work and Supplies," and is not a portion of those other parts or provisions in said charter having special reference to street work. When these are referred to they are found to contain the following provision:

"Whenever in the judgment of the council the cost and expense of any of the foregoing (street improvements) should be paid by special assessment on private property, the general laws of the State of California in force at the time of the improvement shall govern and control, and all procedure shall be in conformity thereto." Charter, subd. 46, § 15, art. 14.

The Street Improvement Act of 1911, expressly adopted by the Oakland council as the general law under which the improvement in question was to be made, does not contain any requirement as to a noncollusive affidavit on the part of the contractor; and we are of the opinion that the terms of said general law are controlling in the premises, and that the provision of said charter relied upon by the appellants does not apply to street work undertaken under this general law. The case of *Barber v. Costa*, 171 Cal. 138, 152 Pac. 296, cited by the appellants in support of their contention, shows when examined a material difference between the terms of the charter of San Jose and those of the charter of Oakland in respect to this particular matter, since by the terms of the former charter its provisions are expressly made controlling over the general law in case of a conflict between the two; while on the other hand the charter of Oakland gives the entire control over this class of street improvements to the general law.

In addition it may be said that even if it were to be conceded that the objection which the appellant now urges to the contractor's bid was originally a good and valid objection thereto, it was such an objection as would be waived by the property owner through his failure to avail himself of the provisions of section 16 of the Improvement Act in question by filing with the clerk of the council a notice in writing stating in what respect the acts and proceedings thus far taken were irregular, defective, erroneous, or faulty. Having thus failed to avail himself of this special remedy the property owner cannot, after the contractor has expended his time and money in the improvement of the street in front of his property, be heard to complain of informalities in his bid for the work. *Lent v. Tillson*, 72 Cal. 405, 14 Pac. 71; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

The next several contentions of the appellants have reference to questions which were considered and decided adversely to the ap-

pellants' position in the case of *Rockridge Place v. City of Oakland*, supra, and hence a restatement or reconsideration of those matters is deemed unnecessary.

[6] The case of *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197, relied upon by the appellants as supporting their contention that the assessment was void because this property was not shown to have been benefited, has been distinguished from cases identical with the case at bar by both the supreme and appellate tribunals, the basis of distinction being that that case was a proceeding in eminent domain while these are street assessment cases. *Cutting v. Vaughn*, 187 Pac. 19; *Hutchinson v. Coughlin Co.*, 184 Pac. 435. We think the distinction therein drawn has application to the facts of the case at bar.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7-9] The petition for a rehearing in this court is denied. The record indicates that the City of Oakland, after establishing the official grade of the street and without instituting any proceeding to ascertain and provide for the payment of the damages caused by the raising or lowering of the level of the street by the change of grade, proceeded to improve the street under the Street Improvement Act of 1911, and reduced it to the official grade. The effect would be, if nothing further occurred, that the change of grade would actually take place without previous compensation to the owners for the damages caused thereby, if any. If this closed the case so far as the right to damages was concerned we do not think the principles of justice would allow such a proceeding without the test of an examination in the courts. But the remedy of the property owners in such a case is not to enjoin the collection of the assessment levied to pay the cost of the work, but to enjoin the performance of the contract prior to the work having been done until damages are paid, in case the result of such work would cause damage to the abutting property. It constitutes no defense against the collection of the assessment. That the city is liable for damages caused to the abutting property by excavation or fills in a street in front thereof, see *Eachus v. Los Angeles*, 130 Cal. 493, 62 Pac. 829, 80 Am.St.Rep. 147; *Eachus v. Los Angeles, etc., Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am.St.Rep. 149; *Reardon v. San Francisco*, 66 Cal. 506, 6 Pac. 317, 56 Am.St.Rep. 109.

All concur, excepting ANGELLOTTI, C. J., absent.

53 Cal. App. 410

KASHIKI v. CALIFORNIA GROWERS & SHIPPERS, INC. (Civ. 3426.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1921.)

1. Account — Evidence held to prove that defendant had made a double charge against plaintiff in a certain amount.

In an action for an accounting between plaintiff, engaged in the growing of crops, and the defendant, engaged in the marketing thereof, evidence held to justify the court in finding that the defendant, who had kept the accounts of the transactions between the parties in its books, had made a double charge against the plaintiff in a certain amount.

2. Contracts — Parol modification of written contract, wholly unexecuted on both sides, did not impair integrity of writing.

Parol modification of a written contract, where wholly unexecuted on both sides, did not operate to impair the integrity of the original writing.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by F. U. Kashiki against the California Growers & Shippers, Incorporated. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

H. L. Welch and Jas. W. Glassford, both of El Centro, for appellant.

Hickcox & Crenshaw and Frederick J. Trude, all of El Centro, for respondent.

WORKS, J. This is an action for an accounting under the operations of the parties pursuant to two contracts between them. The contracts had to do with the growing and marketing of melons and lettuce; plaintiff contracting as a grower of such products and defendant as a concern engaged in marketing them. The accounts of the transactions between the parties were kept in the books of defendant. Plaintiff had judgment for \$2,254.60, and defendant appeals.

An item of \$1,000, included in the amount for which judgment was rendered, was allowed respondent upon the theory that appellant had made a double charge against him, in that amount, on its books. Appellant contends that there was no sufficient evidence of the double charge, and that the trial court erred in allowing the item. The point must be resolved almost wholly upon the testimony of the president of appellant, who was the only witness sworn in the case. Both parties argue the question upon the basis of that testimony, pointing, in support of their respective claims, to various statements made by the president. Appellant, it is true, refers to the books as having been introduced in evidence, but reproduces in its

brief no entries from them which bear on this question, the appeal being under the alternative method, nor is it argued, nor does appellant say it was objected at the trial, that statements made by the witness as to entries appearing in the books were not the best evidence. After this preface, let us examine the testimony. The record shows the following, at one place:

"Mr. Hickcox (counsel for respondent): * * * His books show that \$1,000 both ways. In the statement he has given us, he has charged us with that \$1,000 twice. Their books show that—

"The Witness: Here is a charge we have charged against Mr. Kashiki, \$1,010.43. He borrowed that money on our note, with the interest, which he paid, and we charged it against him. There is another \$1,000 charged against him, and that was the only \$1,000. When we borrowed money for him, we charged it against him, and when he paid it, we charged this amount also against him.

"Q. By the Court: This is where you paid the bank the note? A. Yes, sir; when the \$1,000 was borrowed, it was entered on the books, and that is the statement Mr. Hickcox alleges. This was where we paid the note to the bank, and we charged him. If that is the case, this \$1,000 would not show here. It would be a double entry and an error of the bookkeeper."

The witness continued for a few lines upon other matters, and then came back to the questioned item, thus:

"We have that entry, but we cannot find a voucher for the \$1,000. It might have been at the time we paid that \$1,000 we took from the bank and paid it, we entered it against Mr. Kashiki, and when we took up that note we entered another \$1,000 against him. I cannot state that positively."

A page further on the record shows this:

"The Court: If that money was borrowed and charged to him and when the note was taken up and paid it was charged to him, that is a duplicate charge.

"A. The only difficulty is I cannot see exactly—there is \$1,000 entered here that Mr. Kashiki claims he hasn't received. Whether the \$1,000 was actually given to Mr. Kashiki and when he got the money from the bank and they entered it against him and made a double charge of 1010.43, I cannot state, although I think the statement of Mr. Hickcox is correct. Personally, I think he is correct.

"The Court: It looks reasonable that that could happen.

"A. Before any judgment is entered for the full amount, I request the court to have a few days to have the bookkeeper go over it. I said I would go over the books with the court and Mr. Hickcox, and then submit it for final settlement.

"The Court: We want to get this matter concluded. As I understand Mr. Hickcox's contention, the amount is \$2,254.60.

"Mr. Hickcox: Yes sir, and that amount is practically agreed upon so far as any amount

is agreed upon, but Mr. Glassford thinks he has a matter that should offset that."

Mr. Glassford then questioned the witness about the matter referred to by Mr. Hickcox, which was wholly apart from the question of the disputed item of \$1,000.

[1] It is evident from the extracts we have made from the record that the issue as to the double charge was tried in an informal manner, and in an endeavor to reach a settlement of the question in a good-natured way. It is shown by the briefs that before the president of appellant took the witness stand the parties went over the books in an attempt to compose their differences amicably. According to one of the briefs, this process occupied nearly a day. This circumstance explains the informal manner in which the witness was examined, and it explains, especially, the last three statements included in our excerpt from the record, one by the witness, one by the court, and one by Mr. Hickcox. Upon the situation thus disclosed, as a background, it is to be observed that the witness finally stated, "Personally, I think he [Mr. Hickcox] is correct;" that it plainly appears that the trial judge had the books under his eye during the testimony, an opportunity which is denied us; that the request of the witness for further time to go over the books was not followed by counsel with any demand for a continuance for that purpose; and that counsel made no attempt to challenge the final statement of Mr. Hickcox, but immediately went on with an examination into the question which the latter had suggested as involving a possible offset against the stated total of \$2,254.60. Further, when the witness was under examination as to the alleged offset, he said:

"Mr. Kashiki owes us money which brings our indebtedness from \$2,250 considerably down. * * *"

Then the following transpired:

"Q. If it hadn't been for this arrangement [involving the claimed offset] * * * you then admit you would have owed him \$2,250? * * * A. Yes, sir; if that is the way I understand it."

Under all these circumstances the court was amply justified in allowing the item of \$1,000.

The remaining point in the case arises upon the matter which has been mentioned as a possible offset, which offset was not allowed by the trial court. A contract between the parties, referred to as the contract of 1918, provided that appellant was to advance to respondent 25 cents per crate for picking and hauling lettuce, and was to charge him not to exceed 50 cents per crate for packing. The president of the appellant testified:

"Later, Mr. Kashiki said, 'I will throw in my hauling and picking this lettuce, and you throw in your packing charges, which would make a difference from \$500 to \$1,000.' I said, 'Kashiki, I will let you do it, provided we carry on our business for 1920,' and when that statement was made, that was our understanding, but afterward Mr. Kashiki refused to do business with us, and revoked the contract."

The reference to "that statement" will be better understood from an earlier portion of the testimony of the witness, where he said:

"He [Kashiki] came to the office and received his statement on the basis he submitted to us, and he later repudiated the contract for the 1920 crop, and on that basis we have gone back to the status of the former contract. I consented to his changing it for the reason that we would carry on business in 1920. We didn't do any business in 1920, and I think the language and understanding of the contract of 1918 should prevail."

[2] In their brief counsel for appellant claim the offset on the ground that there was a failure of consideration for the modification of the written contract, in that respondent "repudiated his agreement, and failed and refused to market any of his products of 1920 through the defendant company," but we do not see how such a question can arise. To say that the consideration failed is to say that the alteration of the written contract was complete, but it really never was consummated. The attempt to make the change was by parol, and the parol arrangement was wholly unexecuted on both sides. It therefore never operated, under the law, to impair the integrity of the original writing. The true situation was better expressed by the witness, arguing from the stand, than in the contention of counsel that there was a failure of consideration under a consummated agreement. The witness said, "I think the language and understanding of the contract of 1918 should prevail." The situation, as it appears to us, is this: So far as the present question is concerned the action is for an accounting under the written contract of 1918. There is nothing in the pleadings on either side upon which to base a claim that the writing had been altered by a subsequent parol agreement. At the trial, as part of his evidence in the accounting, respondent relied upon a written statement furnished him by appellant, from which charges for packing lettuce had been omitted, although they would have been proper under the contract. The witness was called upon to explain the omission, and it seems to us that his explanation was complete and full, in the absence of contradictory evidence. The case must be retried, but it will be retried as to this one issue alone, which course will involve an ascer-

tainment of the amount of the charges for packing, that amount to be subject to the deduction of any sum due respondent under the contract of 1918 for picking and hauling the lettuce. The amount thus resulting will be deducted in turn from \$2,254.60, the amount of the present judgment, and a new judgment be rendered for respondent accordingly.

Judgment reversed, and cause remanded for a new trial in accordance with this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

53 Cal. App. 402

MAURICE v. LEHNHARDT. (Civ. 3775.)

(District Court of Appeal, First District, Division 1, California. July 2, 1921.)

Master and servant $\Rightarrow$ 80(10)—Evidence held to show salary checks satisfied all claims.

In an action by an employé to recover from his employer a sum as due for extra services rendered, evidence held to support the trial court's findings that defendant employer by the weekly salary checks given plaintiff employé had fully paid and satisfied all claims and demands which plaintiff employé had against her.

Appeal from Superior Court, Alameda County; Fred Wood, Judge.

Action by J. J. Maurice against Hattie Lehnhardt, etc. From judgment for defendant, plaintiff appeals. Affirmed.

Howard K. James, of Oakland, for appellant.

Richard M. Lyman, Jr., and Vance McClymonds, both of Oakland, for respondent.

KERRIGAN, J. This action was brought to recover the sum of \$347.46, claimed to be due plaintiff from defendant for services rendered, including a certain sum due as interest upon an account stated. Judgment went for defendant and plaintiff appeals.

It appears from the evidence that plaintiff was employed by defendant to determine the factory cost of certain products manufactured by her in the candy business. The alleged claim grew out of services performed by plaintiff on Sundays, which services plaintiff testified were outside of his regular employment, and for which plaintiff's manager had promised him he would be paid. The services covered a period of some two years, during which time plaintiff had received and accepted a salary check of \$46.03 each, and every week he was em-

ployed by defendant, attached to which was a slip stating that the amount of the check was for salary for the particular week for which it was given. These checks, 118 in number, were received by the plaintiff during the course of his employment without any objection as to the sufficiency or correctness of the amount. Upon the severance of their relation of employment plaintiff for the first time demanded payment for 38 days' services covering the several or various Sundays intervening during the course of his employment, claiming that the amount received by him as a weekly salary was for a 6-day period only, and that the same did not include payment for the services he rendered on Sundays. The demand for payment of these extra services was made by letter, in which plaintiff stated to defendant, among other things, that he had worked Sundays for the reason that he thought it would be a benefit to the house as well as to his own future advancement, and that he knew it was not the desire of defendant to have any one labor for her without compensation.

Under these facts it was defendant's contention below and is here that the evidence shows plaintiff to have been employed at a fixed salary, and, having accepted a salary check each week for his services without objection as to the sufficiency of the amount, that his act in so doing must be regarded as a deliberate admission that the rate of compensation paid was correct, and that the demand for extra services was an afterthought, and only made when plaintiff had ceased to be in the employ of defendant. In other words, defendant claims that the demand came too late, for the reason it deprived defendant of her option to terminate the employment had she known of plaintiff's intention to make the demand involved.

From the evidence the trial court found in substance that the defendant had fully paid and satisfied all claims and demands which plaintiff had against her, and specially found that plaintiff had received from defendant during the course of his employment a weekly salary check in the sum of \$46.03 as payment in full for seven days' services, and that such checks were received by plaintiff in full satisfaction for his services without any objection on his part as to the sufficiency thereof.

We are of opinion that aside from any question of estoppel the findings are supported by the evidence.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 425

MOHN v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY. (Civ. 3664.)

(District Court of Appeal, Second District, Division 1, California. July 7, 1921.)

1. Appeal and error —464—Where bond has only two sureties, each must qualify in double the amount of the judgment.

Under section 942, Code Civ. Proc., providing that in order to stay a money judgment on appeal bond must be executed by two or more sureties in double the amount of the judgment, and section 1057, providing that the sureties must accompany the bond with an affidavit that they are each worth the sum specified in the bond, but where the amount of the bond exceeds \$3,000, and there are more than two sureties, they may state that they are severally worth less amounts, if whole amount is equivalent to that of two sufficient sureties, on an appeal from a judgment for \$100,000, if there are but two sureties, each must qualify in the sum of \$200,000.

2. Appeal and error —464—Bond held not to comply with statutes as to qualification of sureties.

Under section 1057, Code Civ. Proc., providing that in giving a bond of more than \$3,000 on appeal, where there are more than two sureties, the affidavit filed with the bond may state they are severally worth less than the amount of the bond, if the whole amount is equivalent to that of two sufficient sureties, on an appeal from a judgment for \$100,000, where one surety was worth \$220,000, and the other five together were worth \$180,000, the bond was not the equivalent of two sufficient sureties.

3. Appeal and error —467—Stay of execution on judgment can be had only on compliance with statutes.

Although an appeal bond is given in good faith and is ample to secure payment of a judgment, since stay of execution of judgment on appeal is a matter of statutory regulation, it can only be had on a compliance with the Code, and in absence of such compliance a court cannot stay the issuing of execution.

Petition by Irene M. Mohn for a peremptory writ of mandate to the Superior Court of California, in the County of San Diego, requiring it to make an order directing the clerk thereof to issue execution. Writ granted.

Wright & McKee, Charles C. Crouch, and Hugh A. Sanders, all of San Diego, for petitioner.

A. J. Morganstern and Iverson L. Harris, both of San Diego, for respondent.

SHAW, J. This is an application by petition made upon notice for a peremptory writ of mandate commanding respondent, the superior court of San Diego county, to make an order directing the clerk thereof to issue a writ of execution upon a judgment

for \$100,000, rendered by said court on March 17, 1921, in favor of petitioner and against Katherine Tingley, from which judgment the latter has appealed.

For the purpose of staying execution of the judgment, Katherine Tingley, defendant in the action, executed an undertaking in the sum of \$200,000, upon which the sureties thereon qualified as follows:

Willard Smith for.....	\$ 6,000
Abbott Clark for.....	27,000
Orange Clark for.....	27,000
Hyman Lischner for.....	40,000
Dinah W. Morris for.....	80,000
Elizabeth C. Spalding for.....	220,000

Making a total of.....\$400,000

Upon the justification so had, the court held the undertaking sufficient to stay execution upon the judgment, and denied the petitioner's motion for an order requiring the clerk to issue an execution thereon.

[1] Section 942, Code of Civil Procedure, provides that in order to stay a money judgment from which an appeal is taken, a written undertaking must be executed on the part of the appellant by two or more sureties in double the amount named in the judgment. By section 1057, Code of Civil Procedure, the sureties are required to accompany the undertaking with an affidavit to the effect that they are each worth the sum specified in the undertaking; provided, however, that when the amount specified in the undertaking exceeds \$3,000, and there are more than two sureties thereon, they may state in their affidavit that they are severally worth amounts less than the amount specified in the undertaking, if the whole amount is equivalent to that of two sufficient sureties. In the instant case and under these provisions, in order to constitute sufficient sureties, if but two, each must have qualified in the sum of \$200,000, specified in the undertaking, thus affording as security for the payment of the judgment two sureties, each of whom would, subject to the conditions of the undertaking, be obligated to pay the judgment.

[2] The undertaking in question is not its equivalent. There are six sureties, the affidavits of five of whom show they are severally worth amounts less than that specified in the undertaking, the aggregate of which sums, to wit, \$180,000, is less than that required of one sufficient surety. The affidavit of the other surety, Elizabeth C. Spalding, shows that she is worth \$220,000; that is, \$20,000 more than the amount specified in the undertaking. While the total for which these sureties qualify is equivalent to that which would be required if there were but two sureties, nevertheless it is not the equivalent of two sufficient sureties, each of whom is obligated in the sum of \$200,000.

In other words, it is equivalent to one sufficient surety who qualifies for \$220,000 and another surety who qualifies for \$180,000 only. An undertaking in the sum of \$200,000, executed by 11 persons, 1 of whom justifies for \$399,990 and the others in the sum of \$1 each, would be the equivalent in amount of that required from two sureties, but instead of two, each of whom is obligated in the sum specified in the undertaking, there would be but one qualifying in double the amount so specified; hence but one sufficient surety. The provision of the statute allowing sureties, where more than two, to qualify for less than the amount specified in the undertaking, is significant, and must be construed in accordance with the plain import of the language used. It cannot be construed as authorizing a stay upon an undertaking executed by more than two sureties in the sum required, where, in order to constitute an amount equivalent to two sufficient sureties, one of them states he is worth more than the amount therein specified and the total for which the others qualify is less.

[3] A stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation, and can only be had upon a substantial compliance with the provisions of the Code. While, in our opinion, the undertaking in question was given in good faith and is ample to secure the payment of the judgment, nevertheless, in the absence of such compliance, courts have no discretion in the exercise of which they can stay the issuance of the execution.

It is ordered that a peremptory writ of mandate issue to the superior court of San Diego county, respondent herein, returnable in 10 days from the service thereof, commanding it to make an order requiring the clerk of said court to issue an execution upon the judgment as prayed for.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 452

DALLAS et al. v. DE YOE. (Civ. 2312.)

(District Court of Appeal, Third District, California. July 8, 1921.)

1. Appeal and error ⚡1001(1)—Verdict supported by evidence not disturbed.

Where there was evidence that defendant caught his right foot between the foot brake and the accelerator and lost control of an automobile, which ran backward more than 60 feet and killed a person, and that there were three ways of stopping the automobile within a few feet, verdict for plaintiff will not be disturbed.

2. Pleading ⚡364(3)—Refusal to strike out qualifying adverbs on motion held not error.

The refusal of motion to strike out the words "negligently, carelessly, recklessly, sud-

denly, abruptly," etc., as irrelevant, redundant, and immaterial, in the allegation that the defendant, without warning to pedestrians and without due regard to the safety of pedestrians, unlawfully backed his automobile across the street, thereby causing the death of a person, is not error, since defendant cannot suffer prejudice from an unnecessary multiplicity of adverbs in the complaint.

3. Municipal corporations ⚡706(1)—Allegations of negligence in operation of automobile held not demurrable, as not disclosing acts or omissions.

A demurrer to a complaint, alleging that defendant negligently, carelessly, recklessly, suddenly, abruptly, and without warning to pedestrians backed his automobile across a street and over a sidewalk, thereby causing a death, on the ground that the complaint did not disclose the acts or omissions constituting negligence, was properly overruled.

4. Municipal corporations ⚡706(8) — Issues submitted by instructions embraced in general allegations of negligence in action for negligence of automobile driver.

Under general allegations of negligence, instructions covering the question of the defendant's knowledge and skill in managing an automobile, as to whether he became confused in operating the automobile, and to the effect that the jury might consider defendant's familiarity and knowledge of the appliances for controlling the automobile in determining negligence, held authorized.

5. Evidence ⚡589—Jury, in passing on defendant's experience in managing automobile, not bound by his statements.

In an action for a pedestrian's death, in passing on defendant's experience in managing an automobile, and as to whether he became confused, the jury was not bound to accept his statements as conclusive, but may consider his acts and omissions at the time of the accident.

6. Municipal corporations ⚡706(8) — Proper for court to state the law as to all conclusions which might be legitimately drawn from the evidence.

Where it devolved on a jury to decide whether injuries were due to unavoidable accident, to defendant's inexperience, to his lack of familiarity with control devices on an automobile, or to his confusion, it was proper to state the law as to all conclusions which might be legitimately drawn from the evidence.

7. Death ⚡99(4)—Damages held not excessive.

Under Code Civ. Proc. § 377, providing that in case of death such damages may be awarded as under all the circumstances may be just, an award of \$11,875 for the death of a woman 51 years of age, who left a husband and three children, aged 20, 19, and 14 years of age, held not excessive.

8. Death ⚡77—Mortality tables not essential.

In an action for death, mortality tables, showing the expectancy of life of the deceased, are admissible, but not essential.

9. Evidence ⇨58(1) — Normal health is presumed.

In the absence of evidence to the contrary, it is presumed that a person is in average normal health.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Robert L. Dallas, individually and as guardian ad litem of his minor children, against N. E. De Yoe. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. J. Carlson, and L. J. Maddux, both of Modesto, for appellant.

R. R. Fowler, of Turlock, and James L. Crittenden, of Modesto, for respondents.

FINCH, P. J. The plaintiffs recovered judgment against the defendant in the sum of \$11,875 as damages for the death of Martha R. Dallas, the wife of plaintiff Robert R. Dallas and mother of the other plaintiffs. The defendant appeals from the judgment.

The undisputed facts are that the defendant was in his automobile, a Hudson Super-Six, on the east side of Tenth street in the city of Modesto, facing north, immediately preceding the time of the injury of which complaint is made. Other automobiles were parked diagonally across the center line of the street. The defendant threw the control lever into reverse and commenced to back his car for the purpose of gaining clearance to pass another machine in front. From some cause, as to the exact nature of which conflicting inferences may be drawn from the evidence, the powerful machine at once got beyond the defendant's control, the engine "roaring like an airplane," and the automobile, speeding backwards in a semicircle to the west, passed partly through a vacant parking space, struck a Ford and threw it out of its path, and continued on its course over the curbstone and onto the sidewalk, where it was brought to a standstill by striking a pier near the entrance to the Modesto Theater on the west side of the street; the machine then facing the southeast. The engine was running with such force that after the automobile had been stopped by the pier the wheels continued to spin in reverse until the ignition was disconnected by defendant's son, who arrived upon the scene immediately after the injury. Mrs. Dallas, who happened to be walking along the sidewalk near the pier mentioned, was struck by the automobile with such force that she died within a few minutes thereafter.

[1] The defendant denies negligence, and contends that the death of Mrs. Dallas was due to an unavoidable accident, and that there is no evidence to support the verdict and judgment. This court is called upon to decide, not whether negligence was proven by a preponderance of the evidence, but whether

there was sufficient evidence to support the implied finding of the jury. In order to determine this question it will not be necessary to review the entire evidence, because the jury might logically have inferred that the defendant was negligent from a consideration of his own testimony. He testified that he had owned and run the Hudson for more than a year, and a Cadillac for six years before the purchase of the Hudson; that at the time of the accident his right foot became fastened between the foot brake and the accelerator in such manner that he could not extricate it; that he attempted unsuccessfully to throw the control lever into neutral, and at some stage of his course put on the emergency brake; that he could not use the foot brake on account of the position of his right foot; that his left foot was free, and he thought he tried to disengage the clutch with it; and that he did not disconnect the ignition. At first the defendant said his right foot was caught between the accelerator and the clutch pedal, but he finally said he was quite sure it was between the accelerator and the foot brake, and, of course, the jury would be justified in so finding. The accelerator is located between the foot brake and the clutch pedal; the foot brake being to the right. There was testimony to the effect that it is not probable the defendant's foot could have been caught in the manner described by him; that the car had traveled not less than 60 feet before striking the pier; that if the ignition had been disconnected, or the clutch disengaged, the machine would have stopped within a few feet. There are at least three usual methods of stopping an automobile: disengaging the clutch, putting on the brakes, and disconnecting the ignition. The jury was justified in finding that of these three methods the defendant adopted the least effective, that of using the emergency brake. Whether the defendant was negligent, under all the circumstances disclosed, in omitting to use the more effective means, is a question upon which the finding of the jury is conclusive on appeal.

[2,3] The appellant assigns the overruling of his demurrer to the amended complaint as error. The complaint alleged that the defendant "did negligently, carelessly, recklessly, suddenly, abruptly, and without warning of any kind to any person or persons or pedestrians then and there walking or being upon said sidewalk or upon said street or highway, * * * and without due or any regard to the safety of said persons or said pedestrians at the time and place last aforesaid, unlawfully back" his automobile in the manner and with the result in this opinion stated. It is urged that the complaint does not disclose what acts or omissions constituted the alleged negligence. The case of *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663,

furnishes a complete answer to the objections made. The defendant moved to strike out the words "negligently," "carelessly," "recklessly," "suddenly," "abruptly," and other similar words and phrases, on the ground that they are "irrelevant, redundant, and immaterial." There was no error in denying the motion. The plaintiffs may have used an unnecessary multiplicity of adverbs, but the defendant could suffer no prejudice therefrom.

[4] The appellant complains of certain instructions given by the court. The jurors were instructed that, if they found that the injuries "were caused solely by the defendant on account of his lack of knowledge, skill, or experience in the management, control, or operation of said automobile, and that an ordinarily prudent, careful, cautious, and skillful man, * * * in the due exercise of reasonable care, caution, and skill, could have avoided such injuries, then you are instructed that defendant's lack of knowledge, skill, or experience in the operation and driving of said automobile constitutes and is, under such circumstances, negligence on his part." By instruction No. 20 the court stated that if the defendant became so confused that he omitted to make proper use of the appliances for the control of the automobile, and that an "ordinarily prudent and careful man, in the exercise of ordinary prudence and care," would have controlled the machine and avoided the accident, then the failure of the defendant to control the same was negligence on his part. By instruction No. 21 the jurors were told that they were entitled to consider, in arriving at their verdict, "the familiarity or knowledge of the defendant with the appliances for the control and operation of his automobile, and his experience and skill, or lack thereof, in the management or control of said automobile." The objection is made that there was neither issue nor proof to which the foregoing instructions were applicable. There is no doubt but that the issues submitted by the instructions were embraced within the general allegations of negligence.

[5, 6] In determining the defendant's experience, and whether or not he was familiar with the appliances for the control of his automobile, and whether he was confused in the use of them, the jurors were not bound to accept his statements as conclusive; but they had a right to consider all of his acts and omissions at the time of the tragedy. He failed to throw out the clutch or push the switch button. When asked if he did not know that he could stop the machine by pushing in the switch button, he replied that he knew it would stop the engine; that he did not push the button because "that wasn't the way I had been accustomed to stopping my car." It devolved upon the jury to determine

whether the injuries inflicted were due to an unavoidable accident, to the defendant's inexperience, to his lack of familiarity with the control appliances, or to his confusion. Since the court could not know what the jury would find to be the cause, it was proper to state the law applicable to all conclusions which might legitimately be drawn from the evidence. It is not contended that the instructions did not accurately state the law as an abstract proposition, but that there was no evidence upon which to predicate them. As to the correctness of the instructions the following cases are in point: *Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Brown v. Des Moines Steam Bottling Works*, 174 Iowa, 715, 156 N. W. 829, 1 A. L. R. 835.

[7] Lastly, it is contended that the damages awarded are excessive. At the time of her death Mrs. Dallas was 51 years of age. Her daughters were 20 and 19 respectively, and her son was 14. The evidence shows that the deceased was an educated woman, devoted to her husband and children; that she assisted and advised her husband in his business affairs, and was the main guide in the education and training of the children. Section 377, Code of Civil Procedure, provides that in cases of this character "such damages may be given as under all the circumstances of the case may be just." This statutory rule is the only measure of damages in such cases. *Bond v. United Railroads*, 159 Cal. 276, 113 Pac. 369, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. "The statute does not fix the period of minority as a limit beyond which the jury cannot go in estimating the probable pecuniary loss." In *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063, decided in 1895, in a somewhat similar case, where the deceased wife and mother was 35 years of age and her children were aged 12 and 11 years respectively, a verdict of \$14,000 was upheld. The purchasing power of money is much less now than in 1895, and this court cannot say that the award was excessive.

[8, 9] Appellant urges that there was no evidence as to the expectancy of life of Mrs. Dallas or as to the condition of her health. Mortality tables are admissible in such cases, but not essential. 17 C. J. 1366. It is presumed that a person is in average normal health, in the absence of evidence to the contrary. *Rowley v. London & Northwestern Railway Company*, L. R. 8 Exch. 221; *Harris v. Ogden Steam Laundry Co.*, 39 Utah, 436, 117 Pac. 700, Ann. Cas. 1913E, 101; 10 R. C. L. 879.

The judgment appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

53 Cal. App. 288

SHEBLEY v. PETERS et al. (Civ. 2310.)

(District Court of Appeal, Third District, California, June 20, 1921. Hearing Denied by Supreme Court Aug. 19, 1921.)

1. Trial ⚡81—Objection implied from objection to preceding question.

In an action for damages for death, an objection to the question, "Except as you stated, were you at the time of his death dependent upon him for support?" will be implied as being made to a question following it, "That is true, also, with the children as with you?" both being answered in the affirmative.

2. Appeal and error ⚡1048(1)—Harmless to ask superfluous question.

It is not prejudicial error to ask simply an unnecessary and superfluous question, such as an inquiry concerning a fact admitted by the pleadings.

3. Appeal and error ⚡1032(1)—Appellant must affirmatively show error.

In order to obtain a reversal, an appellant must affirmatively show that the error upon which he relies was prejudicial; injury not being presumed from error.

4. Appeal and error ⚡1032(2)—Prejudice from evidence not shown, in absence of evidence or instructions.

Under Const. art. 6, § 4½, it cannot be said that prejudice resulted from admission of certain evidence, where appellant did not bring up the evidence received at the trial or the instructions of the court.

5. Appeal and error ⚡907(1)—All intendments in favor of judgment, where evidence and instructions are not in record.

Where the evidence and instructions are not in the record, all intendments are in favor of the judgment, and it must be assumed that the evidence showed without any conflict that plaintiff was entitled to recover the full amount of a verdict in his favor, and that defendant proposed an instruction for the jury to entirely disregard evidence erroneously admitted, and that the court gave it.

On Hearing in Supreme Court.**6. Death ⚡95(1)—Measure of damages.**

The measure of damages for the wrongful death of husband and father is the pecuniary loss suffered because of the death.

7. Death ⚡69—Evidence as to dependency inadmissible.

In an action for death of husband and father, evidence to show that wife and children were dependent upon the decedent for support was inadmissible, since the amount of damage would be precisely the same, whether or not they were dependent upon him, being entitled to demand it of him in accordance with his station in life.

8. Husband and wife ⚡4—Parent and child ⚡3(1)—Wife and children entitled to demand support.

Wife and children are entitled to demand of husband and father support in accordance

with his station in life, even if they are not dependent upon him and have ample means of their own.

9. Death ⚡67—Evidence of ability to earn money admissible.

In an action for wrongful death of husband and father, evidence of deceased's ability to earn money is admissible to show the quality of the support wife and children are entitled to.

10. Death ⚡58(2)—Presumed that father and husband supported wife and children.

In an action for death of husband and father, the presumption is that the wife and children got the support from him that they were entitled to.

11. Appeal and error ⚡1170(7)—No reversal, in absence of miscarriage of justice.

Under Const. art. 6, § 4½, Supreme Court should not reverse a case for any error in the admission of evidence, unless from the whole case it is of the opinion that the result of the error was a miscarriage of justice.

12. Appeal and error ⚡1170(7)—Admission of evidence not shown to be ground for reversal.

In an action for damages for wrongful death of husband and father, erroneous admission of evidence to the effect that wife and children were dependent upon the deceased for their support *held* not shown to be prejudicial error, under Const. art. 6, § 4½.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Inez Shebley, as administratrix of F. A. Shebley, deceased, against W. C. Peters and others. Judgment for plaintiff, and defendant G. A. Reichman appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

Taylor & Tebbe, of Yreka, and C. E. Johnson, of Los Angeles, for appellant.

J. W. Preston, of San Francisco, H. R. Raynes, of Yreka, and Sullivan, Sullivan & Roche, of San Francisco, for respondent.

BURNETT, J. The action was for damages for the death of F. A. Shebley, occurring while he was a passenger in an auto stage run and operated by appellant between Yreka and Ft. Jones in Siskiyou county. At the trial the case was dismissed as to all the defendants except appellant. The claim was based upon alleged negligence of the driver in the operation of the machine and the failure of the owner to keep said auto in proper condition and repair. Defendants denied any negligence and claimed the accident was occasioned by a latent defect in a wheel of the machine, which no degree of care could have avoided. The cause was tried before a jury and a verdict rendered in favor of plaintiff for the sum of \$16,500, and the appeal is from the judgment following said verdict. Appellant states:

"This appeal is based entirely upon errors in law committed by the court in the trial of said cause by permitting plaintiff over the objections of appellant to introduce evidence showing the poverty of the widow and children of plaintiff's intestate."

[1] The question to which the objection was made is as follows: "Except as you stated, were you at the time of his death dependent upon him for support?" The objection was general in its nature, and it was overruled by the court. The answer was in the affirmative, and it was followed by this question: "That is true, also, with the children as with you?" To this the witness answered: "Yes, sir." While there was no objection made to this latter question, it would be implied from the objection to the preceding similar question.

Appellant relies in support of his objection upon the decision of the Supreme Court in *Shea v. Potrero & Bay R. R. Co.*, 44 Cal. 415; *Malone v. Hawley*, 46 Cal. 409; *Mahoney v. San Francisco & San Mateo Railway Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Green v. S. P. Co.*, 122 Cal. 563, 55 Pac. 577; *Story v. Green*, 164 Cal. 768, 130 Pac. 870, Ann. Cas. 1914B, 961; *Steinberger v. California Electric, etc., Co.*, 176 Cal. 386, 168 Pac. 570. It is not necessary to review these decisions, but it is sufficient to say that, in each, the inquiry which was condemned related directly to the poverty of the plaintiff or the affluence of the defendant, and was made obviously for the purpose of exciting the sympathy or prejudice of the jury. Herein it is the claim of respondent that the inquiry was proper because—

"It related to the relationship between widow and deceased and between children and deceased, and, besides, it referred to the relationship at the time of the death of the deceased, and not at the time of the trial."

Plaintiff avows that the purpose of the questions was to show that the family were living happily together and that they were supported by the wages of the deceased. Such inquiry would be, of course, entirely proper. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 757, 136 Pac. 523.

The questions might have been phrased more accurately to reach that objective, and may have been open to criticism for indefiniteness; but appellant made no such objection, contenting himself with the statement that the question was "incompetent, immaterial, and irrelevant." The questions, indeed, may reasonably be considered as signifying: "Were you and your children supported by your deceased husband?" In fact, since plaintiff relied upon the loss of support by deceased as an important element of the damages caused by his death, it was manifestly important for the jury to know to

what extent the surviving members of the family had been dependent upon that support, in order that this element of damage might be properly appraised.

[2] In this connection it may be said that the questions were unnecessary, for the reason that the plaintiff alleged and the answer admitted the following:

"At the time of his death said F. A. Shebley was, and for a long time prior thereto had been, using his entire earnings in the support and maintenance of his wife, his children, and himself."

This implies that they were necessary for that purpose and that the family were dependent upon them. Of course, it could not be prejudicial to ask simply an unnecessary and superfluous question, as to inquire of a witness concerning a fact that was admitted by the pleadings. *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972.

[3] But, assuming that the court committed error in overruling the objection to the question, it would be entirely improper for an appellate court to reverse the judgment. This follows from the consideration that an appellant must affirmatively show that the error upon which he relies was prejudicial. *Myers v. Canepa*, 37 Cal. App. 556, 174 Pac. 903, 906; *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713. In other words, the rule now is that injury is no longer presumed from error. *Vallejo R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

[4] How can it be said that prejudice has been shown, when the appellant has not brought up the evidence received at the trial or the instructions of the court? Indeed, as pointed out in the last-mentioned citation, it is the duty of an appellate court, under section 4½ of article 6 of the Constitution, to determine from an examination of the evidence that an error complained of "has resulted in a miscarriage of justice" before it is authorized to reverse a judgment, unless the nature of the error be such as necessarily result in prejudice. Manifestly, the error herein, if it be error at all, is not of such nature as necessarily result in prejudice.

[5] Since all the intendments are in favor of the judgment we must assume that the evidence showed without any conflict that plaintiff was entitled to recover the full amount of the verdict. We must go further, upon the theory that the ruling complained of was erroneous, and assume that the defendant proposed an instruction, and the court gave it, for the jury to entirely disregard such evidence. The case is the same in legal contemplation as though such a record were before us. Such being the situation, it can hardly be seriously contended that it is shown that the ruling complained of in relation to a question, the propriety of which might be open to controversy, result-

ed in a miscarriage of justice or prejudice to the substantial rights of appellant. To the contrary it must be held that no prejudice has been shown, and it would be in opposition to precedent and in violation of the established principle of appellate practice for this court to reverse the judgment.

For further discussion of this rule by which appellate courts must be governed in the consideration of supposed errors, we may refer to *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *Jameson v. Tully*, 178 Cal. 380, 173 Pac. 577; *Reid v. Superior Court*, 186 Pac. 634.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. We are not satisfied with the treatment by the District Court of Appeal of the question whether or not, in an action for damages on behalf of a widow and children for an injury causing the death of the husband and father, evidence is admissible to show that the widow and children were dependent upon the decedent for support.

[6-11] It is well settled that in such an action the pecuniary loss suffered because of the death is the measure of the damages. The admissibility of evidence to show that they were dependent upon the decedent for support depends upon the question whether that fact does or does not enhance their loss. We think it is clear that such evidence is not admissible, and that this is so because their loss is the same, regardless of their dependence upon him for support. They were entitled to demand of him a support in accordance with his station in life. Such support it is the right of every wife and minor child to receive from the husband and father, even if they are not dependent upon him at all, but have ample means of their own. It is that support of which they have been deprived by his death, and it is compensation for that loss that they are entitled to have by the verdict. The amount would be precisely the same if they were not dependent upon him as if they were; it is that support which he may be able to give them suitable to his station in life. Hence evidence of his ability to earn money may be admissible to show the quality of the support he should give them, but evidence that they have no means of their own and that they are dependent upon him for their support is not admissible, because it is immaterial, and because it is likely to be injurious on the question of damages, from the fact that it tends to arouse a sympathy which has no place in the estimation of the pecuniary loss. Perhaps the defendant in such a case may

have the right to prove that the deceased could earn but little or nothing, in order to reduce the damages; but the plaintiffs may not prove their dependence upon him in any case, for they are entitled to support from him in any event, even if they do not get it. The presumption, in the absence of proof, is that they did get the support they were entitled to, and evidence is not necessary from the plaintiffs to prove that fact.

[12] But this evidence could be of no effect in the case, except on the subject of damages. We are satisfied with the second proposition of the opinion of the District Court of Appeal, to the effect that, even if the admission of the evidence was erroneous, the record does not show that it caused a miscarriage of justice. There is abundant evidence to support the finding on the question of the amount of damages, without resort to the sympathy that might have been aroused by the evidence objected to. Under the Constitution we should not reverse a case for any error in the admission of evidence, unless from the whole case we shall be of the opinion that the result of the error was a miscarriage of justice. Const. art. 6, § 4½. An examination of the evidence in this case does not produce that opinion in our minds. Consequently there should be no reversal.

It is ordered that the petition for a rehearing in this court be denied.

All concur, except ANGELLOTTI, C. J., absent.

53 Cal. App. 423

SNYDER V. UNITED PROPERTIES CO. OF CALIFORNIA. (Civ. 3721.)

(District Court of Appeal, First District, Division 2, California. July 7, 1921.)

I. Limitation of actions § 178—Complaint based on written agreement to deliver bonds held sufficient to show action not barred.

Complaint filed September 14, 1914, alleging the defendant's breach of its written agreements denominated "bond certificates" issued between September 28, 1911, and August 5, 1912, to deliver bonds to be secured by a deed of trust to be dated January 1, 1911, "when the said bonds may be certified, issued, and ready for delivery" and alleging demand upon defendant on September 24, 1913, that it issue, certify, and deliver to plaintiff the agreements called for by each certificate, and that such demand was refused, and pleading facts sufficient to show that a reasonable time had expired from the date of each certificate to the commencement of the action to enable the defendants to certify and deliver the bonds, held sufficient to show the action not barred by the statute of limitations as against contention that it did not clearly appear therefrom when the breach occurred.

2. Pleading ⚡433(9)—Insufficiency of complaint to show claim, not barred by statute of limitations, held harmless in view of finding.

Insufficiency of complaint to clearly show when the breach occurred, and therefore when the statute of limitations began to run, was harmless where the defendant specifically pleaded various statutes of limitations and trial court found against it on such issue.

3. Contracts ⚡346(2)—Denial of allegations as to legal effect of instrument held to raise issue as to execution where complaint did not expressly allege execution.

Where complaint did not specifically allege the execution by defendant of a contract, but did allege its legal effect, and indorsement and assignment by original promisee to the plaintiff, and where the defendant specifically denied such allegations, the due execution of the certificate was in issue, notwithstanding defendant's failure to specifically deny its execution, since it was not incumbent upon defendant to expressly deny its execution, inasmuch as the complaint did not expressly plead the execution.

4. Trial ⚡105(4)—Failure to object to introduction of instruments waived question of genuineness of corporate officers' signatures and due execution.

In action against a corporation for breach of its agreement to deliver bonds designated "bond certificate," the corporation, by failing to object to the introduction of the certificate, waived the point of the genuineness of the signatures thereto of the officers of the corporation and the due execution by them.

5. Corporations ⚡432(4)—Corporate seal prima facie evidence of authority of officers to execute instrument.

The presence of corporate seal on an instrument was prima facie evidence of the authority of the officers to execute the instruments on behalf of the corporation.

6. Bills and notes ⚡496(2)—Possession by promisee at time of assignment to plaintiff presumptive evidence of ownership in promisee at time of assignment.

In action against a corporation on its bond certificates by original promisee's assignee, the possession of the certificates by the promisee at the time of assignment to plaintiff, and his act in assigning them, was presumptive evidence of delivery to him and of his ownership of certificates at the time he made the assignment, under Code Civ. Proc. § 1963, subd. 12.

7. Contracts ⚡324(2)—Holder of bond certificate by which corporation agreed to deliver mortgage bonds could sue for breach of agreement on its failure to deliver bonds without enforcing lien.

Holder of bond certificate by which corporation agreed to deliver bonds to be secured by a mortgage, was not, on corporation's failure to deliver the bonds, required to first establish an equitable lien, and to bring foreclosure suit under Code Civ. Proc. § 726, but could sue the corporation for breach of its agreement.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by A. J. Snyder against the United Properties Company of California, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. Henshall, of San Francisco, for appellant.

Nusbaumer & Bingham, of Oakland, for respondent.

NOURSE, J. Plaintiff recovered judgment against defendant for \$52,000, and interest for breach of a written agreement on the part of the defendant to deliver a certain number of its bonds secured by a first mortgage or deed of trust upon its properties. The complaint set forth six separate causes of action, each based upon a separate written agreement designated "bond certificate," and reciting that the United Properties Company of California would, upon surrender of the certificate, deliver to the purchaser or order a certain number of its first mortgage and collateral trust bonds of the denomination of \$1,000 each, "to be issued under and secured by the deed of trust in preparation dated January 1, 1911, made by said the United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified, issued, and ready for delivery." It was alleged further that plaintiff acquired each of these bond certificates or obligations of the defendant for a valuable consideration, and that they were assigned to him for a valuable consideration by the original promisee thereof. The bond certificate was then set out in the complaint in *hæc verba*, followed by allegations to the effect that the defendant "did then and there and thereby" promise and agree to deliver to the promisee, in said writing named, the bonds specified in the complaint. The answer denied on information and belief that plaintiff had acquired the paper for a valuable consideration, and specifically denied those portions of the complaint which may be referred to as the allegations pleading the legal effect of the writing which is the basis of the suit. On the trial plaintiff offered evidence to prove his possession of the certificates, the assignment to him, the amount of both principal and interest unpaid, and the genuineness of the signature of the promisee subscribed to the assignment. The certificates were then offered and received in evidence without any proof of their execution, but without objection by defendant, and the plaintiff rested. No evidence was offered by the defendant, and the court thereupon rendered judgment in favor of the plaintiff as above stated, findings of fact and conclusions of law having first been waived.

On this appeal defendant presents two grounds for reversal: (1) That the complaint does not state a cause of action; (2)

that there is no evidence to sustain the allegation of the promise and agreement on which the complaint is based, and no evidence to sustain the finding that said allegation or any part thereof is true.

[1, 2] As to the point first raised, it is argued that the complaint is insufficient, in that it does not clearly appear therefrom when the breach occurred, and that consequently it cannot be determined when the cause of action arose, and when the statute of limitations began to run. The contract called for the delivery of bonds as and when they may be certified and ready for delivery. Sufficient facts are pleaded to show that a reasonable time had expired from the date of each certificate to the commencement of the action to enable the defendants to certify and deliver the bonds. The earliest date of issuance of any of the certificates in suit was September 28, 1911, and the latest date was August 5, 1912. Each certificate recited that the bonds were to be secured by a deed of trust to be dated January 1, 1911. It is alleged that demand was made upon the defendant on December 24, 1913, that it issue, certify, and deliver to plaintiff the bonds called for by each certificate, and that this demand was refused. It does not appear when the complaint was filed, but the appeal is based upon an amended complaint which was filed September 14, 1914. The action is well within the period of any statute of limitations. Though the objections to the complaint in this respect might be available when raised by a special demurrer on the ground of uncertainty, they are not such as would require a holding that the complaint did not state a cause of action. Manifestly the appellant suffered no injury from the form of these allegations, because it specifically pleaded various statutes of limitations, and the trial court found against it on that issue.

[3] (2) The complaint did not specifically allege the execution of the written agreement. It did allege that on a certain date respondent, for a valuable consideration, acquired the written promise and obligation of the United Properties Company, which said promise was then set forth in *hæc verba*. It then alleged the indorsement and assignment to plaintiff by the promisee named therein, and plaintiff's ownership of the writing. The execution of the agreement by the United Properties Company can be inferred only by those allegations of the complaint to the effect that the corporation did then and there and thereby promise and agree to deliver the bonds specified therein, and then and there and thereby agreed that said bonds should and would be secured by a first mortgage or first trust deed upon all the properties of the United Properties Company. The answer denied, for lack of information and belief, the allegations of the

complaint relating to plaintiff's acquisition of the paper for a valuable consideration, and specifically denied all the allegations as to what the defendant promised and agreed to do. As the complaint did not expressly plead the execution of the agreement, it was not incumbent upon the defendant to expressly deny its execution. The plaintiff having elected to plead the legal effect of the writing, and thereby place his own interpretation on what the defendant promised to do, and the defendant having specifically denied all these allegations, whatever inference is to be indulged in to support the complaint as pleading the due execution of the written instrument must with like force be indulged in to support the denials in the answer. *Higgins v. Graham*, 143 Cal. 131, 133, 76 Pac. 398.

[4-6] The answer must, therefore, be taken as sufficient to put in issue the due execution of the instrument, and, such being the case, it was incumbent upon plaintiff to make his proof. In this connection plaintiff offered proof of his purchase of all the certificates for a consideration, of his possession of the same, and of the genuineness of the assignment on the back of each by the promisee named on the face. The certificates themselves were then offered and received in evidence without objection. By failing to object to the introduction of the instruments defendant waived the point of the genuineness of the signatures thereto of the officers of the corporation, and the due execution by them. *Shain v. Sullivan*, 106 Cal. 208, 211, 39 Pac. 606. The presence of the corporate seal was *prima facie* evidence of the authority of the officers to execute the instruments on behalf of the corporation. *Chandler v. Hart*, 161 Cal. 405, 420, 119 Pac. 516, Ann. Cas. 1913B, 1094. The possession of the certificates by the promisee at the time of his assignment to plaintiff and his act in assigning them was presumptive evidence of delivery to him (*Shain v. Sullivan*, *supra*), and of his ownership of the certificates at the time he made the assignment to plaintiff. Code Civ. Proc. § 1963, subd. 12; *Bickerdike v. State*, 144 Cal. 698, 701, 78 Pac. 277. The direct evidence taken with the presumptions was sufficient to support the finding that the certificates had been duly executed and delivered and assigned to plaintiff.

[7] Appellant suggests, but declines to argue, the proposition that—

"It would appear as if the promise alleged was secured by a certain mortgage lien on certain property, and in consequence the plaintiff is prohibited from bringing the present action by section 726, Code of Civil Procedure."

The answer to this proposition is that no mortgage lien was ever created. Plaintiff did not sue to establish an equitable lien, but, relying upon his contract, sued for dam-

ages for its breach. He might have asked that a lien be declared to aid in enforcing the judgment (*Beckwith v. Sheldon*, 168 Cal. 742, 747, 145 Pac. 97, Ann. Cas. 1916A, 963; *Beal v. United Properties Co.*, 189 Pac. 346), but he was not required to do so. It is only a debt which is secured by a mortgage on real or personal property which must be enforced under the provisions of section 726, Code of Civil Procedure. The fact that a debtor has agreed to execute a mortgage to secure the debt does not require the creditor to first establish an equitable lien and sue under that section. He may stand upon his contract and sue for its breach.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 798

LOWELL v. UNITED PROPERTIES CO. OF CALIFORNIA. (Civ. 3722.)

(District Court of Appeal, First District, Division 2, California. July 7, 1921.)

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Cedelia M. Lowell against the United Properties Company of California, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. Henshall, of San Francisco, for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

NOURSE, J. Plaintiff recovered judgment for \$10,000 and interest against the defendant for breach of its contract to deliver certain bonds to plaintiff in accordance with certain written agreements designated as bond certificates issued to plaintiff's assignor. The facts of the case are identical with those considered in *Snyder v. United Properties Co. of California*, 200 Pac. 366, this day decided, and by stipulation of counsel this appeal has been submitted upon the same set of briefs.

For the reasons given in the opinion in that case, the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 434

KNABBE v. UNITED PROPERTIES CO. OF CALIFORNIA. (Civ. 3820.)

(District Court of Appeal, First District, Division 2, California. July 7, 1921.)

1. Limitation of actions § 178—Complaint charging breach of defendant to deliver bonds held sufficient to show action commenced within period of limitations.

Complaint filed July 12, 1915, alleging that defendant corporation, by its bond certificates,

agreed to deliver to the plaintiff bonds when certified, issued, and ready for delivery, that more than three years elapsed after the certificate was made and delivered to him before plaintiff demanded delivery and issuance of the bond, that such period was a reasonable time for defendant to certify, issue, and deliver bonds, that last payment of interest was on January 1, 1913, and that demand was made on July 9, 1915, held sufficient to show that the action was commenced within the period of limitations, as against contention it did not appear in the complaint when the breach occurred, or when statute of limitations began to run.

2. Pleading § 433(9)—Inaccuracies in complaint held harmless in view of finding.

Inaccuracies in complaint relating to time when breach occurred held harmless where the trial court found, after trial, that the action was not barred by limitations.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by D. Knabbe against the United Properties Company of California, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. Henshall, of San Francisco, for appellant.

Chas. E. Snook and T. P. Wittsches, both of Oakland, for respondent.

NOURSE, J. Plaintiff recovered judgment against defendant for \$20,000 and interest, for breach of a written agreement on the part of the defendant to deliver a certain number of its bonds secured by a first mortgage or deed of trust on its properties. The complaint set forth eight separate causes of action, each based upon a separate written agreement designated "bond certificate," and reciting that the United Properties Company would, upon surrender of the certificate, deliver to the purchaser or order a certain number of its first mortgage and collateral trust bonds of the denomination of \$1,000 each—

"to be issued under and secured by the deed of trust in preparation dated January 1, 1911, made by said the United Properties Company of California, and to be delivered hereunder as and when the said bond may be certified, issued, and ready for delivery."

It was further alleged that on certain days between February 2, 1912, and July 9, 1915, the certificates which were made the basis of each separate cause of action, were executed by defendant and delivered to the plaintiff; that certain installments of interest were paid thereon; and that, prior to the commencement of the action—July 12, 1915—demand was made upon the defendant that it comply with the terms of the contract, which it refused to do. The bond certificates were then set out in the complaint in *hæc verba*, followed by an allegation of the dam-

age suffered by plaintiff through defendant's failure to meet the terms of the agreement. The defendant denied the execution of the writings, alleging in that behalf that, though the certificates were issued by officers of the corporation, and contained the corporate seal, their issuance was not authorized by the board of directors or by the stockholders. After the trial the court found in accordance with the allegations of the complaint, and, upon the defendant's special defense relating to the execution of the certificates, found that the board of directors of the corporation did authorize the issuance of the certificates, that the stockholders of said corporation did not authorize the board of directors to issue the certificates referred to, but that they did, on December 5, 1911, ratify and confirm all acts of the board of directors. The court also found that plaintiff's causes of action were not barred by any of the statutes of limitations pleaded by defendant.

[1, 2] On this appeal plaintiff urges but one ground for reversal, and that is that the complaint does not state a cause of action. In this connection it is argued that the complaint is insufficient, in that it does not appear therefrom when the breach occurred, and that consequently it cannot be determined when the cause of action arose and when the statute of limitations began to run. The contract called for the delivery of the bonds as and when they may be certified and ready for delivery. It was recited in each certificate that the bonds were to be secured by a deed of trust dated January 1, 1911. The complaint alleged that more than three years elapsed after the certificate was made and delivered to him before plaintiff demanded the issuance and delivery of the bonds. It also alleged that this period was a reasonable time for defendant to certify, issue, and deliver the bonds. The last payment of interest was on January 1, 1913, the demand was made on July 9, 1915, and the complaint was filed July 12, 1915. Hence the action was commenced well within the period of any statute of limitations applicable to the case. Furthermore, the trial court found after trial that the action was not barred. Thus any inaccuracies in the complaint were without injury to defendant.

Appellant suggests that it would appear as if the promises alleged were secured by a certain mortgage lien on certain property, and that therefore plaintiff's only remedy was an action to foreclose the mortgage lien under section 726, Code of Civil Procedure. The same point was raised in *Snyder v. United Properties Co. of California*, 200 Pac. 366, this day filed, and was decided adversely to appellant's contention.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 799

EGENBERGER v. UNITED PROPERTIES CO. of CALIFORNIA. (Civ. 3849.)

(District Court of Appeal, First District, Division 2, California. July 7, 1921.)

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Carolina Egenberger against the United Properties Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. Henshall, of San Francisco, for appellant.

Chas. E. Snook and T. P. Wittschen, both of Oakland, for respondent.

NOURSE, J. Plaintiff recovered judgment for \$47,000 and interest against the defendant, for breach of its contract to deliver certain bonds. The facts of the case are similar to those considered in *Knabbe v. United Properties Co. of California*, 200 Pac. 369, this day decided, and by stipulation of counsel this appeal has been submitted upon the same set of briefs.

For the reasons given in the opinion in that case, the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 407

CITY OF PASADENA v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3514.)

(District Court of Appeal, Second District, Division 1, California. July 5, 1921. Hearing Denied by Supreme Court Sept. 1, 1921.)

1. Master and servant — 373—Injury in scuffle with foreman held not compensable; "course of employment."

Where claimant was injured in the scuffle with a subforeman who was acting outside his authority in attempting to discharge claimant, the injury did not arise out of the employment, so as to warrant an award of compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant — 417(9)—Court's decision in compensation case not deferred because similar cases are pending.

Although the employer consents, the decision in a compensation case will not be delayed because of the possibility that the Supreme Court in pending cases may reach a conclusion on a proposition involved more favorable to compensation claimant than heretofore announced by it.

Application for Certiorari to Review an Order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Albert Peele for compensation for injuries, opposed by the City of Pasadena,

(200 P.)

employer. Compensation was awarded by the Industrial Accident Commission, and the City brings certiorari. Award annulled.

James H. Howard, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

JAMES, J. Petitioner herein brings this proceeding for the purpose of having reviewed the evidence taken before, and an award made by, the Industrial Accident Commission. The contention urged in support of petition is that the accident which caused the injuries of the complainant did not arise out of the employment in which claimant was at the time engaged. The facts are succinctly stated in the findings of the Commission, from which we here quote:

"Applicant was one of a small group or gang of high school students hoeing weeds under hire of defendant city during vacation, under immediate direction of one Frank Wood, a student of about the same age as applicant; that said Wood did not have authority to discharge or discipline any member of the gang, and applicant so understood; that said Wood, under pretense of such authority, purported to discharge applicant for some alleged breach of rules, and attempted to take away from applicant the latter's hoe, Wood being entirely the aggressor; that applicant resisted, and in the ensuing scuffle he sustained injury to his left ankle; that it is claimed on behalf of Wood that his motives in so acting were those of playfulness and in the spirit of a joke, but the evidence is insufficient to establish that such were his motives, and this Commission finds the applicant was unaware of such playful intent, and believed that Wood was improperly attempting to exercise his authority as subforeman, and that if there had been such intent it had ceased to operate by the time the scuffle had reached the stage in which, and by reason of which, applicant sustained said injury."

The amount of the award entered pursuant to the findings was \$106.81. The above findings as to the facts were fully supported by the testimony given before the Commission. It is made to appear that the attack upon the claimant by the subforeman was wholly unjustifiable. The cause of the difference between the two boys arose because Wood assumed to have authority to do something which the claimant knew he had no right to do, to wit, to discharge the claimant from the work. These conditions being established, the act of Wood was no different, legally considered, than would have been the act of any of the other fellow employees working with the claimant.

[1] The decision here must be controlled, we think, by the decision of the Supreme Court in *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212. In the course of a

quite exhaustive discussion to be found in the opinion, the court there said:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. * * * It arises out of the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury."

That was a case where an employee was injured while attending strictly to his work by reason of the playful act of a fellow employee who "tickled" him when he was about to descend a stair carrying a load. It was held that there could be no compensation awarded for the resulting injury. And we gather from what is said by the court in that decision that the conclusion would have been the same even though the employee at fault had acted maliciously and with the intent to cause the injury to his fellow worker. The only limitation indicated upon this holding seems to be that the employer will be held liable in a case such as that last noted, only when he has knowledge of the fact that some of his employees are maliciously inclined and apt to do injury to their fellow workers. We do not find that the case is helped any by the general statements made in *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398. In that case a foreman was injured while engaged in what was held to be the rightful discharge of his duty through the resistance of an employee working under him, and whom he had attempted to discharge. See, also, *Kimbol v. Industrial Accident Commission*, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312. Counsel for respondent represents in his brief that there are several cases pending before the Supreme Court in which the Commission is seeking to secure a modification of the rule as laid down in the *Coronado Case*, and requests that decision herein be deferred until such cases have been decided.

[2] While the petitioner is agreeable to such a course, we do not feel that a decision in this case should be delayed upon a statement of the possibility merely that our Supreme Court may hereafter reach a conclusion on the proposition involved more favorable to respondent than that heretofore announced by it. Furthermore, there is available to respondent the right to file a petition for rehearing with the Supreme Court and so secure a speedy review of the question here considered.

The award as entered by the respondent Commission is annulled.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 449

FALKENBERG v. GIACOMAZZI.
(Civ. 3844.)

(District Court of Appeal, First District, Division 2, California. July 8, 1921.)

1. Brokers ⚡56(2)—Enough that owner was informed by another that broker had found the purchaser.

It is not a prerequisite to recovery of commission by a broker that he should have given the owner notice that he had found a purchaser, but it is enough that the purchaser, who was referred by the broker to the owner relative to reduction of price, which the broker had told him he had no authority to make, told the owner that the broker had shown the property to him.

2. Brokers ⚡56(3)—When having exclusive contract, broker entitled to commission on sale by owner to broker's client.

A broker having an exclusive contract of sale cannot be deprived of his commission by the owner consummating the sale to the broker's client within the period covered by broker's contract.

3. Evidence ⚡471(24)—Question held to call for mere conclusion of witness.

Question to purchaser in action for broker's commission, whether the fact that the broker showed him the place after he knew it was for sale had any bearing on his buying it, or anything to do with closing the deal, calls for the mere conclusion of the witness.

Appeal from Superior Court, Monterey County; Pat. R. Parker, Judge.

Action by R. C. Falkenberg against Elvezio G. Giacomazzi. Judgment for plaintiff, and defendant appeals. Affirmed.

Hugh R. Osburn, of King City, for appellant.

David J. Aaron, of San Francisco, and C. F. Lacey, of Salinas, for respondent.

NOURSE, J. Defendant appeals from a judgment rendered against him and in favor of plaintiff for \$600 as a real estate broker's commission, on the ground that the evidence is insufficient to support the judgment.

The contract between plaintiff and defendant gave plaintiff the exclusive right of sale for a period of 30 days from date (March 17, 1920), and thereafter until 10 days' written notice of cancellation; \$15,000 was the selling price named therein, and it provided for payment to plaintiff for services rendered in securing a buyer of 5 per cent. commission on the above-mentioned sale price, "or any less price that may hereafter be agreed upon." April 28, 1920, defendant notified plaintiff that the contract was canceled. But the court found that the "plaintiff had prior to the giving of said notice secured said F. V. Ferrari as a purchaser of said real property"; also "that plaintiff was instrumental in

obtaining said F. V. Ferrari as a purchaser of the real property referred to in said count, and that said purchaser was secured by the plaintiff pursuant to and within the time limited by the contract referred to." Defendant personally sold the property to Ferrari on the day notice of cancellation was given.

The only question for determination on this appeal is whether plaintiff was instrumental in making the sale. Defendant challenges the findings that he was, claiming the evidence does not show that plaintiff was the procuring or inducing cause of the sale. He also claims that the court erred in its ruling on certain questions asked by defendant to show whether the moving cause of the sale was plaintiff's act in showing the property to Ferrari or the latter's prior knowledge that it was for sale.

On April 16, 1920, plaintiff took Ferrari to see the ranch, and the two went all over it and examined it thoroughly. Ferrari objected to the price, and plaintiff told him to go and see defendant, and he might sell for a cheaper price than that named in the contract. Ferrari did talk to defendant a few days later, and on a number of subsequent occasions, and made an offer of \$12,000 for the land. They finally agreed upon \$12,700 for the land and all the personal property thereon, including the crops; the trial court finding that \$12,000 was paid for the land and \$700 for the personal property. Ferrari then gave defendant his check for \$1,000 on the purchase price, and defendant gave him a receipt therefor. Ferrari testified that this receipt provided that, if plaintiff herein should claim a commission, defendant reserved the right to call the deal off; that after this action was commenced defendant asked him for this receipt, which he kept, and gave him an entirely different one, omitting all mention of plaintiff. This was denied by defendant. On May 12, 1920, the deed was executed and the balance of the purchase price paid. Plaintiff did not go with Ferrari to see defendant, nor personally inform him that he had sent Ferrari, until after the sale. Ferrari, however, testified that he told defendant that plaintiff had taken him to see the property, but that he had not signed any agreement with him. Ferrari knew the property was for sale, and had himself gone to see it about six weeks previous to his visit with plaintiff. Referring to this visit, and in reply to a question by defendant whether he went to see defendant by reason of his prior knowledge that the place was for sale, or the fact that plaintiff showed him the property, Ferrari testified:

"I was there once and went a little around the house, not much, because I didn't have much interest on the place. That day I was there with Ray Falkenberg, we went all over the

place, and then we looked it over, and figured up a little how much come out an acre for it, and then I see what was on the place."

[1] Defendant argues that notice to him of the finding of a purchaser was a prerequisite to plaintiff's right to recover commission and that plaintiff had failed to give such notice. This point is without merit. The evidence shows that defendant knew plaintiff had shown the property to Ferrari; the latter testifying that he so informed defendant. Neither is there any merit in the argument that plaintiff had abandoned the attempt to sell to Ferrari. The evidence is that he referred Ferrari to defendant for the purpose of enabling them to come to an agreement on the price; he having stated that he was without authority to reduce the contract price.

[2] The contract gave plaintiff the exclusive right to sell within the time specified, and the sale was made within that time. The facts in this case differentiate it from those cases relied on by defendant, in which the sale was made after the contract had expired, or in which the sale was made by the owner during the contract period entirely independent of and without any assistance from the broker. A broker having an exclusive contract of sale, as here, cannot be deprived of his commission by the owner himself consummating the sale to the broker's client.

[3] The trial court properly sustained plaintiff's objection to questions, asked Ferrari by defendant, whether the fact that plaintiff showed him the place after he knew it was for sale had any bearing on his buying the place, or had anything to do with closing the deal. The question called for the mere conclusion of the witness.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 415

INYO COUNTY v. HESS et al. (Civ. 3600.)

(District Court of Appeal, Second District, Division 1, California. July 5, 1921. Hearing Denied by Supreme Court Sept. 1, 1921.)

1. Telegraphs and telephones ⚡10(4)—Private individual not entitled to use county highways for telephone lines without grant from supervisors.

Civ. Code, § 536, as amended in 1905 (St. 1905, p. 492), authorizing "telegraph or telephone corporations" to use the public highways is not applicable to private individuals, and a private individual, in order to use county highways for construction of telephone lines, must first obtain a grant of such right from the board of supervisors of the county, under Pol. Code, § 4041, subd. 35, and the Broughton Act.

2. Telegraphs and telephones ⚡10(4)—Corporation acquiring telephone system of private individual constructed under grant from supervisors under Broughton Act may construct lines over highways 'unrestricted by such act or grant.

A corporation, having acquired telephone system constructed on county highways by a private individual under a grant from the board of supervisors of a county under the Broughton Act, could thereafter, under Civ. Code, § 536, as amended by St. 1905, p. 492, construct its lines upon the county highways without the restrictions of the Broughton Act, or the grant by the board of supervisors to such individual.

3. Telegraphs and telephones ⚡4—Statute permitting telephone corporations to use highways 'not repealed by Broughton Act.

The enactment of the Broughton Act prescribing conditions on which a franchise to construct intrastate telephone lines along public highways may be granted did not repeal by implication the 1905 amendment (St. 1905, p. 492) to Civ. Code, § 536, permitting telephone corporations to construct lines along the public highways, since such amendment was enacted only a few days prior to the enactment of the Broughton Act, and since there is no repugnancy between the amendment and the act.

4. Statutes ⚡158—Repeals by implication not favored.

Repeals by implication are not favored, and in the absence of express terms courts will not indulge in the presumption that the Legislature intended by a later act to repeal the former one if by a fair and reasonable construction effect can be given to both, particularly where the effect of such repeal is to impair a settled prerogative of the government.

5. Telegraphs and telephones ⚡10(10)—Corporation acquiring lines constructed by private individual under franchise granted under Broughton Act from county is not required to pay county percentage of receipts; "construct."

A telephone corporation, having acquired telephone lines constructed by a private individual under a grant from the county board of supervisors under the Broughton Act, requiring such individual to pay the county 2 per cent. of the gross annual receipts, was not required to pay the county such 2 per cent. of the gross annual receipts, since under Civ. Code, § 536, as amended by St. 1905, p. 492, it had the right to "construct" telephone lines along and upon public highways, which right was not restricted to construction of new lines, but included the right to use the highways for lines constructed by such individual under such grant from the board of supervisors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Construct—Construction.]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by the County of Inyo against Fred M. Hess and others. Judgment for plaintiff, and defendants appeal. Reversed.

Isaac B. Potter, Newman Jones and Henry W. Coll, all of Riverside (John R. Dixon, of Riverside, of counsel), for appellants.

Jess Hession, Dist. Atty., of Independence, Richard S. Miner, of Independence, and W. B. Mathews, of Los Angeles, for respondent.

SHAW, J. In this action the county of Inyo, as plaintiff, sought the recovery of 2 per cent. of the gross annual receipts derived from the operation of a telephone system during the years mentioned in the complaint for the franchise or privilege of using the county highways over which to construct and operate telephone and telegraph wires. From a judgment in favor of plaintiff, defendants have appealed.

The decision of the case involves the interpretation and application of the so-called Broughton Act (St. 1905, p. 777), under and pursuant to which it is claimed a telephone franchise was granted to defendant Hess by plaintiff to construct telephone lines over the public highways of Inyo county, and in connection therewith the rights of the corporations as assignees under section 536, Civil Code.

In the absence of findings, which were waived, and omitting matters not pertinent to the decision, under our view of the case, the material facts are as follows: On April 21, 1906, the board of supervisors of Inyo county, after full compliance with the provisions of the Broughton Act, by ordinance No. 95 duly adopted, granted to Hess as the highest bidder therefor a franchise to construct a telephone system over all the public roads and highways in said county, which ordinance, in accordance with the provisions of the Broughton Act, provided that the privilege so granted should be fully exercised within three years from the date of the grant, and that no work or construction in extending said lines or system of telegraph or telephone poles should be permitted after the lapse of three years from said date, to wit: April 21, 1906. Among other obligations imposed upon Hess as grantee of the franchise was one requiring that he and his assigns should, commencing at the expiration of five years from the making of the grant, pay to the county 2 per cent. of the gross annual receipts arising from the use and operation of the franchise. The three years within which Hess was to exercise the privilege granted expired on April 21, 1909, prior to which time he, under the franchise so granted, constructed his telephone lines over some 40 odd miles of public highway, connected with which and as a part of the system was some 19 miles constructed over government lands and private rights of way, making a total of about 60 miles which Hess owned and had in operation on April 21, 1909, at which time, under the provisions of the franchise granted, his privilege to extend the line over additional highways terminated.

On June 30, 1909, and prior to the expiration of five years from date of the grant, when the 2 per cent. tax attached, he sold, transferred, and assigned all of his rights in and to the franchise and telephone system to the Inyo Telephone Company, a corporation, which company, on March 5, 1912, sold and transferred the same to the Interstate Telegraph Company, a corporation, both of which corporations were entitled to do a telephone business in the state of California. Notwithstanding the time for constructing the system expired on April 21, 1909, both of said corporations, without further grant than that so made to Hess, continued the construction of lines of telephone in extending the system, to which they added 176 miles, some 50 miles of which were constructed over the public highways, the balance being over government lands and private rights of way. On November 9, 1915, in compliance with a demand from plaintiff, Hess, as vice president and general manager of the Interstate Telegraph Company, which then owned and operated the entire system, filed with the county clerk separate statements purporting to be for the gross income, less that derived from interstate business, arising from the operation of the telephone system for each of the five years immediately following April 21, 1911, which statements, duly verified, and varying only in amounts and the year for which each was made, were in form as follows:

"Interstate Telegraph Company. Gross Receipts in Inyo County, exclusive of interstate business, April 21, 1911, to April 20, 1912, \$14,088.22."

The amounts as stated for the other years, in order were: For the second year, \$20,897.28; for the third year, \$18,993.48; for the fourth year, \$20,498.37; and for the fifth year, \$20,150.77—each of which sums was made the subject of a separate cause of action. While these statements were exclusive of income derived from interstate business which the assignee of Hess conducted over the system and lines with which it was connected, they did include income derived from the operation of the telephone system in the incorporated town of Bishop, which latter income, upon defendants showing the amount thereof, was by the court deducted from the gross income as shown by defendants' statements, and judgment rendered for each year upon the amount stated, less the Bishop revenue. It thus appears that the entire system of telephone lines, excluding the municipal line in the town of Bishop and a certain line acquired by the Interstate Company from the Nevada-California Power Company, the use of which enabled defendants to conduct an interstate business by transmitting messages from points in California to points in the state of Nevada, con-

sisted of about 240 miles in length, 60 miles of which, mostly over highways, were constructed by Hess prior to the time specified in the grant within which his right to erect telephone poles in the highways terminated, and approximately 180 miles constructed by his successors after the termination of his right to extend the lines under his franchise.

While the judgment rendered excluded any percentage upon income derived from interstate business and income derived from the operation of the plant in the town of Bishop, it was computed not only upon income derived from the operation of the 60 miles of line constructed by Hess under the terms of his franchise, but also upon income derived from the 180 miles of line constructed by the Inyo Telephone Company and the Interstate Telegraph Company after the time when the rights of Hess to occupy the highways with poles in new construction had, under the terms of the franchise, ceased and terminated, and, in so far as the public roads were used therefor, without right so to do, other than as such right is granted by section 536, Civil Code.

[1] Excepting the legislative grant made in 1872 by section 536, authorizing telegraph companies to use the public highways for the purpose therein specified, and which right was, by an amendment of the section approved March 20, 1905, extended to telephone companies as well, the power to grant franchises to use public highways for secondary purposes appears to have been generally delegated to the local subdivisions of the state, subject to certain restrictions. Assuming that section 536 is not affected by the provisions of the Broughton Act, and that, in accordance with the plain import of the language used, it grants to both telegraph and telephone corporations the right to construct lines of telegraph and telephone by means of poles for supporting insulators, wires, and other necessary fixtures thereof over and along the public roads, such right is restricted to corporations only, and cannot be construed as a grant to individuals. *City of San Diego v. Kerckhoff*, 193 Pac. 801; *Western Union Tel. Co. v. Hopkins*, 160 Cal. 122, 116 Pac. 557. They have no right to appropriate the use of the highways for such secondary purposes save and except upon a grant of the privilege so to do made by the legislative body of the local subdivision concerned, which in this case was the board of supervisors of Inyo county. Its authority to make the grant is found in section 4041, Political Code, subdivision 35 of which provides that such boards, subject to such limitations and restrictions as are prescribed by law, shall have power—

“to grant franchises along and over the public roads and highways for all lawful purposes, upon such terms and conditions and restrictions as in their judgment may be necessary and proper.”

While the Broughton Act does not purport to either grant or authorize the granting of such franchises, it does in express terms place restrictions upon the exercise of the power so delegated to boards of supervisors. *Sunset Tel. & Tel. Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796; *Oro Electric Corp. v. R. R. Commission*, 169 Cal. 466, 147 Pac. 118. The provision thereof is that—

“Every franchise or privilege to erect or lay telegraph or telephone wires, * * * upon any public * * * highway * * * proposed to be granted by boards of supervisors * * * of any county * * * within this state, except * * * telegraph or telephone lines doing an interstate business, * * * shall be granted upon the conditions in this act provided, and not otherwise.”

Hence, since the franchise to Hess as a private individual was granted by the board of supervisors, whose right so to do is in express terms made subject to the provisions of the Broughton Act, it must follow that that part of the telephone line in question constructed by him over highways prior to the time fixed in the grant for the termination of such right, less the income derived therefrom during the first five years of such period, is subject to the payment of 2 per cent. per annum upon the gross income, arising from the use of the right so granted, unless its acquisition by the telephone corporations so vested with the rights specified in section 536, under which they, and not Hess, the individual, operated the lines, exempted them from the payment.

A municipal telephone line, from its nature and the service rendered, is never complete. To meet the demands of the public it must be, and in fact is, constantly extended by adding new lines, using streets and highways therefor. Hence, if the grantee of such privilege is restricted to three years within which to construct the same, it would seem that no authority existed for making such extensions after the expiration of such time. Notwithstanding such result, and construing the provision in accordance with the plain import of the language used, it would seem clear that, since, as provided in the franchise granted to Hess, his right to extend the lines by erecting poles in the highways had terminated when he transferred the telephone system and franchise to the Inyo Telephone Company, such company by the purported transfer acquired no right to make extensions of the system under and by virtue of the franchise granted to Hess. In other words, it acquired no right from Hess under which it was authorized to erect telephone poles and wires over the portions of the highway which he had not occupied within the three-year period specified in ordinance No. 95.

Conceding the correctness of the proposition stated, and expressly disclaiming any right to occupy the highways under and by

virtue of the Act of Congress of July 24, 1866, appellants, as telephone corporations, insist that under the legislative grant made by said section 536 they were at all the times mentioned entitled not only to construct and maintain their telephone lines along and upon any public road or highway, free of any restrictions imposed by the Broughton Act, but entitled to acquire and operate the Hess lines likewise free from such restrictions. This section in its present form, except that it did not apply to telephone companies, was adopted in 1872, and when acted upon by a telegraph company it constituted a grant of the right as therein stated. *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557. As originally adopted, however, it did not include telephone companies (*Davis v. Pacific Telephone & Tel. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698), and hence it did not constitute a grant to corporations engaged in such business. On March 20, 1905 (St. 1905 (p. 492) the section was amended so that it applied to telephone corporations equally with telegraph corporations. The section as amended, however, did not become operative until 60 days after its passage. Two days later, to wit, on March 22, 1905, the Broughton Act, imposing conditions in the granting of franchises, was adopted, with the provision that it should take effect immediately. Excepting telegraph and telephone lines doing an interstate business, and the provision that every franchise or privilege granted by boards of supervisors to erect telephone wires along and upon the public highways should be granted upon the conditions specified therein and not otherwise, it provides that all acts or parts of acts in conflict therewith are repealed, save and except certain acts therein specified, among which section 536, Civil Code, is not mentioned. Hence the question presented is whether section 536 (which, if valid, designates telephone and telegraph corporations solely and alone as subjects of legislative grant, free and independent from any action on the part of the board of supervisors) conflicts with the Broughton Act, the provisions of which by the language employed appear to be limited to franchises and privileges the granting of which is confided to—

"boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state."

The question arose in the case of *City of Pomona v. Sunset Telephone & Tel. Co.*, decided by the Supreme Court of the United States (224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788), wherein Justice Holmes, of that court, in discussing the question, said:

"It [the telephone company] contends that this act [the Broughton act] establishes conditions only for counties, cities and towns, and does not qualify the grant from the state in the

amended section 536. The appellant [City of Pomona], on the other hand, argues that the franchise act repealed section 536, so far as it affects this case, except as to telephone [companies] doing an interstate business. In view of the frame of the act as a whole, of a general repealing clause at the end, naming certain exceptions of which section 536 is not one, and of the fact that the grant of such franchises seems generally to have been left to the local subdivisions concerned, * * * we construe the words quoted as of general application, and are of opinion that they cannot be supposed to have had the narrow operation that would be left to them if there were in force a grant from the state of almost universal scope. Until the state court shall decide otherwise we must take section 536 to have been repealed, subject to the exception contained in the later act. * * *

[2, 3] Notwithstanding this high authority to the contrary, we are forced to the conclusion that the provisions of the Broughton Act are not in conflict with section 536, Civil Code, and hence the legislative grant therein made is not subject to the restrictions and limitations contained in the Broughton Act, and which, according to the plain import of the language used therein, are applicable solely to franchises granted under delegation of power to the legislative bodies of local subdivisions of the state directly concerned, which, as we have seen, appears to have been the legislative policy pursued in granting rights in the public highways for all secondary uses other than to corporations for telephone and telegraph lines (and perhaps to railroad corporations), as to which, for reasons satisfactory to the Legislature, it, instead of delegating to local legislative bodies the power to act in such matters, has itself, by section 536, tendered to all such corporations a franchise to use the highways for their lines, an acceptance of which is signified by their act in constructing the same over the highways so offered.

[4] Repeals by implication are not favored, and in the absence of express terms courts will not indulge in the presumption that the Legislature intended by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both. This is particularly true where the effect of such repeal is to impair a settled prerogative of the government, as, in the instant case, the state's control of its highways. The two acts in question were adopted at about the same time, and it would seem improbable that the Legislature would on one day amend section 536, under which for more than 30 years telegraph corporations had been accorded the right to use the highways over which to construct their lines, the sole purpose of the amendment being to give telephone corporations like rights, and the next day or day following pass a repealing act. On the contrary, the Legislature must be deemed to have recognized the fact that section 536

constituted a legislative grant, not to private individuals, but limited in its operation to telegraph and telephone corporations only; that the right of individuals to construct telephone and telegraph lines over the highways and the right to use the highways by either individuals or corporations for all secondary purposes other than by corporations for telegraph and telephone lines, could be acquired only by action of the local legislative bodies to which the power of granting such privileges was delegated, and that as to grants of franchises made in the exercise of such power it was intended they should be subject to the conditions prescribed in the Broughton Act.

Since the act thus in terms limits its operation to those franchises only which boards of supervisors and other minor legislative bodies are authorized to grant, it cannot, without violating well-recognized principles of interpretation, be construed as applicable to the statutory grant made directly by the Legislature, and which without any action on the part of boards of supervisors authorized such corporations to occupy the highways. In our opinion, there is no repugnance between the act and section 536. Upon a fair and reasonable construction both can be given effect, and hence our conclusion is that, in constructing their lines of telephone over the public highways of Inyo county after the date of the transfer made by Hess to the Inyo Telephone Company, the corporations named acted under the right so to do granted by section 536, unrestricted by the provisions of the Broughton Act or any of the conditions contained in ordinance No. 95 granting the franchise to Hess.

[5] Were the Hess lines, as operated by the corporations as part of the telephone system, subject to the payment of the 2 per cent. tax? We think not. The grant to Hess was "over, along, and upon any or all public highways in the county of Inyo," and in accordance with the act it was made subject to the provision that the grantee and his assigns should, during the term thereof, pay to the county 2 per cent. of the gross annual receipts arising from the use, operation, and possession thereof. It cannot be said, however, that this imposed upon him the duty of constructing telephone lines upon all the highways of the county, and, while the grant was for a term of 25 years, it cannot be construed as requiring him to operate the lines so constructed for any given period. So long, however, as he or his assigns, if other than a telephone corporation, operated them, the gross revenue derived from such operation was subject to the payment of the 2 per cent. arising from such operation. As we have seen, the right of the corporations to use the highways existed independently of the Hess franchise, and under the assignment thereof they took nothing other than what

they already had, namely, the right to occupy the highways with poles and lines of wire constructed by them. This right, in our opinion, implies the right to use the highways for the lines constructed by Hess, and which they acquired by purchase. While the accepted meaning of the word "construct" is to assemble or build, it should, as used in section 536, be construed to apply to lines in place and purchased by such corporations. The operation of the lines by the corporations was not under the Hess franchise, but under an existing and superior right granted the corporations by section 536. As operated by the corporations, there was no gross revenue arising from the use, operation, and possession of the Hess franchise. Their right to use the highways in operating such lines was not impaired by the fact that Hess, by a naked assignment, transferred the franchise to them. We perceive no difference between the case as stated and one where an individual without a franchise wrongfully occupies highways in constructing a telephone line which, as built, he transfers to a telephone corporation having the right under its legislative grant to operate it.

Our conclusions are: First, that a private individual has no right to use county highways over which to construct a telephone line, save and except upon a grant of such right made by the board of supervisors in the exercise of the power vested in it by subdivision 35 of section 4041, Political Code, and under and pursuant to the restrictive provisions of the Broughton Act; second, that so long as he and his assigns operate the line under such franchise, and after five years from the date of the grant, it, in the absence of a transfer thereof to a telephone corporation, is subject to the annual payment of the 2 per cent. tax upon the gross receipts arising from the use of the franchise; third, that under and by virtue of the provisions of section 536, Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and unrestricted by the provisions of the Broughton Act, and that their right so to do applies not only to lines constructed by them, but to lines in place which they acquire by purchase from private individuals, constructed under franchises granted by boards of supervisors.

If we are correct in these conclusions, it follows therefrom that the judgment must be reversed, and the action, as disclosed by this record dismissed; hence it is unnecessary to discuss other grounds upon which appellants base their claim for a reversal.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 397

CLOUGH v. W. H. HEALY CO. (Civ. 3863.)

(District Court of Appeal, First District, Division 1, California. July 1, 1921. Hearing Denied by Supreme Court Aug. 29, 1921.)

1. Easements — 61(2)—Mandatory injunction may issue for protection of easement.

A court of equity will, in a proper case, award a mandatory injunction for the protection and preservation of an easement, will enjoin a threatened interference, and will require a defendant to repair an injury already done, or to remove an obstruction already erected; but each case is determined according to the particular circumstances, and it rests in the sound discretion of the court whether or not a mandatory injunction will issue.

2. Easements — 61(2)—Right to mandatory injunction to protect must be clear.

To entitle a complainant to a mandatory injunction for the protection and preservation of an easement, the right must be clear, and there must be a material interference with the right of the owner of the easement, and damages sustained must be more than merely nominal, and the court will consider the expense which would be occasioned to the defendant if the writ be granted as against the inconvenience to be suffered by the complainant; and where the removal of the interference or obstruction would bring no actual advantage, or the expense entailed thereby would be entirely disproportionate to the benefit resulting the complainant will be relegated to his legal remedy.

3. Easements — 61(2)—Landowner held not entitled to mandatory injunction for the preservation of easement.

In a suit to preserve and protect an easement, *held* that plaintiff was not entitled to a mandatory injunction.

On Hearing in Supreme Court.

4. Judgment — 743(2) — Decision denying mandatory injunction held not to foreclose plaintiff's right of easement.

A judgment denying a mandatory injunction to restrain interference with an easement and to compel removal of an obstruction *held* not to foreclose plaintiff's rights as to the strip of land in question.

Lawlor, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by George A. Clough against the W. H. Healy Company. Judgment for plaintiff, and defendant appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

Tobin & Tobin and George Clough, all of San Francisco, for appellant.

Edwin T. Cooper and H. K. Eells, both of San Francisco, for respondent.

KERRIGAN, J. This is an action to quiet title and for a mandatory injunction restraining interference with an easement. Judgment went for the defendant, from which plaintiff prosecutes this appeal.

F. Dudley Tait owned a parcel of land at the southeast corner of Hyde and Francisco streets in San Francisco, having a frontage on each of the streets named of 97½ feet. On the 7th day of May, 1914, Tait sold to the plaintiff the easterly 35 feet on Francisco street and granted to him in the same deed as an appurtenance to the lot sold an easement of light, air, and right of way 3 feet wide across the 62½ feet of the lot retained by Tait at the extreme rear thereof. The entire lot at that time was unimproved, and in its natural condition, and the easterly end of the 3-foot strip where it connected with the parcel conveyed to Clough was approximately 6 or 7 feet higher in elevation than the sidewalk on Hyde street. In the month of December, 1914, and during Clough's absence from San Francisco, and without his knowledge or consent, Tait, in connection with the construction of a residence upon the portion of the lot retained by him, excavated it in its entirety, including the 3-foot strip, and paved with concrete all of his lot up to said strip, so that the back yard of Tait was several feet lower than the adjacent land in the rear, and Tait accordingly constructed a concrete retaining wall on the rear 14 inches of the 3-foot strip, and at the same time constructed at the extreme western end of said strip a concrete retaining wall, leaving therein, however, an arched gateway about 3 feet wide and did also construct and erect across said gateway upon said strip an iron gate.

Immediately upon discovering the changes thus made, and in January, 1915, Clough demanded that Tait remove the obstructions from the 3-foot strip and restore it to its original condition. Thereafter, in September, 1915, Clough and Tait entered into a written agreement, which was recorded, and which, after reciting the facts as above stated, provided that Tait was to be permitted to maintain said obstruction upon condition that Tait should not permit certain trees and shrubbery which he had planted upon said strip to grow to such height as to interfere with Clough's easement of light and air; that he also would allow Clough a free, continuous, and unobstructed passage way over the rear portion of said back yard, and that he would not maintain in said yard any nuisance. Upon the breach, however, of any of the foregoing covenants, "or upon demand," said agreement provided that Tait should restore said strip to its original condition and elevation. The new right of way was to be approximately 3 feet wide, and was situated immediately adjoining and alongside

said strip; in other words, Clough's right of way was shifted 3 feet north. There was also a provision in said agreement that the occupation by Tait of said original 3-foot strip by the erection thereon of said retaining wall and the planting of said trees and shrubbery should under no circumstances be construed as adverse to the original rights of Clough, but, in the event of Clough being restored to his former right of way, his right to the substituted way should terminate.

In June, 1917, defendant W. H. Healy Company, with actual and constructive notice of plaintiff's rights in the original 3-foot strip, purchased the Tait lot, and thereafter and before the commencement of this action, plaintiff demanded of the defendant the restoration of said strip of land to its original condition, which being refused he commenced this action to quiet title to said easement, and to compel the defendant to remove the obstruction and restore the easement to its condition at the time of the grant thereof to plaintiff. In addition to the facts above stated defendant testified that to remove the 14-inch wall at the south of his lot and to fill in the 3-foot strip with soil in order to restore the easement to its original condition would cost \$1,500.

The trial court made findings, among others, to the effect that the plaintiff had not suffered and would not suffer great or irreparable, or any, injury from the obstruction of the right of way originally granted; that the defendant has not violated in any manner the contract with plaintiff as to the use of the substituted right of way; that to restore the original right of way to its condition at the time of the conveyance to plaintiff "would be very costly, and would be a material and positive damage and detriment to both the lands of plaintiff and defendant," and that it would furnish to plaintiff no better or more convenient right of way than the one now enjoyed by him, and "would be useless and unjust and inequitable and unreasonable, and highly burdensome to this defendant, and without any benefit or value, profit or convenience to plaintiff whatsoever."

[1, 2] A court of equity will, in a proper case, award a mandatory injunction for the protection and preservation of an easement; will enjoin a threatened interference, and require a defendant to repair an injury already done or to remove an obstruction already erected. Mandatory injunctions have been awarded directing that a closed or obstructed way be cleared and opened for the owner; but it is not in every case of a permanent obstruction that such relief will be granted. Each case is determined according to the particular circumstances; and it rests in the sound discretion of the court whether or not a mandatory injunction will

issue. To entitle the complainant to equitable relief the right must be clear, and an injunction of the character here in question will be denied when the obstruction does not constitute a material interference with the right of the owner of the easement, or where the damage sustained by him is merely nominal. The court will consider the expense which would be occasioned to the defendant if the writ be granted, as against the inconvenience to be suffered by the complainant if it be refused; and where the removal of the obstruction would bring no actual advantage, or the expense entailed thereby would be entirely disproportionate to the benefit resulting, the complainant will be relegated to his legal remedy for the vindication of his right. 19 C. J. 996, § 258.

[3] In the case at bar there was no willful or deliberate invasion of the plaintiff's right of way, nor was there any breach of the agreement respecting it after its change of location. The plaintiff has suffered no damage, and it is not even claimed that the substituted right of way is less convenient, or that the right and privilege in the one is superior in any way to the other. Moreover, it appears, and the court in effect found, that the relief sought would result in no substantial benefit to the plaintiff if granted, but that it would impose an unreasonably burdensome task on the defendant if he were compelled to accede to the demand of the plaintiff.

In the case of *Bochterle v. Saunders*, 36 R. I. 39, 88 Atl. 803, 806, it was held that, where the owner of a house admitted its encroachment for 13 inches upon a right of way 33 feet wide, and agreed to remove the encroachment, which would require an expenditure of \$300 to remove the house back or of \$100 to cut off the projecting part, which would reduce the dining room to a size rendering it useless, or exceedingly inconvenient for its intended purpose, and which would bring complainant no practical advantage, a court of equity, in view of the disproportion between the outlay and the benefit to the complainant, would refuse to compel performance of the agreement, but would leave the complainant to his remedy at law.

The circumstances of the present case were not such, in the opinion of the trial judge, as to warrant the granting of the remedy invoked, and we cannot say that he abused a sound legal discretion in arriving at his conclusion.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM, The application for a hearing in this court after decision by the

District Court of Appeal of the First Appellate District Division 1, is denied.

[4] We do not construe the judgment in this case as foreclosing plaintiff's rights as to the original strip in the event of any breach of the supplemental agreement, and are of opinion that, under the terms of such agreement, in connection with said judgment, such rights are fully preserved.

All concur, except that LAWLOR, J., dissents from order denying petition for hearing.

53 Cal. App. 440

SINCERNEY v. CITY OF LOS ANGELES
et al. (Civ. 3605.)

(District Court of Appeal, Second District, Division 1, California. July 7, 1921. Hearing Denied by Supreme Court Sept. 1, 1921.)

1. Railroads ⚡75(3)—Use of street without municipal consent a trespass.

A railroad company's use of a city street without the city's consent required by Civ. Code, § 470, constitutes a trespass.

2. Electricity ⚡19(2)—City, sued for injuries to railroad brakeman, struck by pole near track, need not allege plaintiff was trespasser on street, or that company was using same without franchise.

In an action for injuries to a railroad brakeman, while climbing the side of a moving box car, by coming in contact with a pole erected by the city near the tracks on street, over the line of which the car projected, it was not necessary that defendants plead that plaintiff was a trespasser on the street, or that the railroad company was using the street without a franchise, defendants, under their denial of negligence and damage, as well as under their plea of contributory negligence, being entitled to prove any fact which would make good such defenses.

3. Negligence ⚡32(1)—Licensee cannot complain of unsafe condition of premises.

Under Civ. Code, § 1714, liability for negligence arises where one person causes an injury to another by his want of ordinary care or skill in the management of his property, except so far as the person injured has willfully or by want of ordinary care brought the injury upon himself, but a mere licensee cannot recover where his injuries are caused solely by reason of the unsafe condition of the premises, and without any active or overt act of negligence committed against him by the occupant or owner thereof.

4. Electricity ⚡19(4)—Evidence that railroad company used street without franchise when brakeman was struck by light pole held admissible.

In an action for injuries to a railroad brakeman by coming into contact with an electric light pole erected by a city near the railroad tracks on a street, the court erred in refusing to admit evidence that the railroad company had no franchise to operate its cars

on such street, for even if, by reason of long use, without any objection from the city, the company had ceased to be a trespasser in so encroaching on the street, neither it nor its employees could have acquired any status better than that of a mere licensee with respect to such use of the street.

5. Municipal corporations ⚡590—City held independent of general laws on municipal affairs except as limited by charter.

In view of Const. art. 11, §§ 6 and 8, providing that cities by their charters may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their charters and that, in respect to other matters, they shall be subject to and controlled by general laws, the city of Los Angeles, on adopting its city charter (article 1, § 2, subd. 51), empowering it to make and enforce all such laws and regulations, except as therein limited, became independent of general laws on municipal affairs, including laws giving the Railroad Commission powers over public utilities, except as limited by its charter.

6. Electricity ⚡9(1)—Municipal corporations ⚡733(3)—Railroad Commission's order, prohibiting poles within given distance of railroad tracks, held applicable to city street lights.

While the supplying of electric light and power by a city to its inhabitants is within the scope of municipal purposes, where the right to conduct such business has been granted to the city, the city of Los Angeles, though vested by its Charter (article 3, § 31), with power to regulate the placing or maintaining of poles and suspending of wires along or across its streets, and though its board of public service commissioners, by charter (article 18, § 192g), is vested with power to construct, operate and maintain electric plants, systems, and equipments for supplying the city and its inhabitants with electric light, power, etc., in conducting such business is exercising proprietary, rather than governmental, functions, and is liable for negligence in the operation thereof, so that a general order of the State Railroad Commission prohibiting the erection of poles within eight feet of the center line of a railroad track applies to and controls the location by such city of poles for use as a part of its power distributing system to the same extent as to a private corporation exercising similar rights under a franchise, the subject-matter of such order being of general interest, and not merely of local, municipal concern.

7. Electricity ⚡15(1)—Violation by city of order of State Railroad Commission as to erection of poles near railroad tracks not negligence where railroad company was using street without franchise.

A city erecting an electric light pole less than eight feet from the center line of an adjacent railroad track, in violation of the State Railroad Commission's order, is not guilty of negligence as respects the rights of a railroad brakeman injured by coming into contact with such pole while climbing the side of a moving box car which extended over the line of the

street in which the pole was erected, where the railroad company employing such brakeman was so using and occupying the street without a franchise, since there cannot be neglect without the existence of a corresponding duty.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by James R. Sincerney against the City of Los Angeles and the Board of Public Service Commissioners of the City of Los Angeles. Judgment for plaintiff, and defendants appeal. Reversed.

Charles S. Burnell, City Atty., W. B. Mathews, Lewis E. Whitehead, Trent G. Anderson, and Ray C. Eberhard, all of Los Angeles, for appellants.

Stuart M. Salisbury, Stannard A. McNeil, and Philip C. Sterry, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover damages for personal injuries sustained by the plaintiff when, in the course of his employment on August 31, 1918, as a brakeman on the Atchison, Topeka, & Santa Fé Railway, he was climbing the side of a moving box car which had been detached from the engine, and came in contact with a pole which appellant, board of public service commissioners, had erected near the railway track and on the sidewalk of Palmetto street, in the city of Los Angeles. This pole was a part of a system of poles and wires for the transmission of electric power to the inhabitants of said city, for which service the city was receiving remuneration and deriving a profit from the sale of said electric power. The car on which the plaintiff was riding was traveling on a spur track built on a private right of way immediately north of and adjacent to Palmetto street. Judgment was entered upon the verdict in favor of plaintiff in the sum of \$2,500, from which judgment defendants appeal.

The railroad track was so located that at the point opposite the pole the nearest rail was only 1.65 feet from the north line of the street. The width of the car (which was an ordinary box car on the side of which respondent was climbing on a ladder at the instant of the accident) was such that the car projected more than a foot beyond the street line, and over the sidewalk. This condition of the track, and similar use thereof by the railroad company, had existed for a long time. Accordingly the fact is established that the railroad company, and respondent as its employee, both before and at the time of this accident, were engaged in the business of using and occupying the street for the purpose of operating railroad trains thereon. Supplementary to the foregoing facts and for the purpose of establishing their contention that respondent, at the time of the accident, was a trespasser

upon the street, appellants offered evidence, appropriate for the purpose, to prove that the railway company had no franchise to operate its cars on Palmetto street at the point where the accident occurred. Objections to this evidence were sustained upon the ground that, as stated in the objections of counsel, evidence concerning the franchise was immaterial—

"in view of the law in this case that an obstruction shall not be placed within so many feet of a railroad track. It is immaterial where the franchise extends to."

Appellants contend that the court erred in rejecting this evidence. The "law in this case," referred to in the objection, is general order No. 26 of the Railroad Commission of the state of California, which establishes a minimum clearance for pole lines on each side of the center line of railroads. Appellants were charged with negligence in the erection and maintenance of the pole, in that the pole was located less than eight feet from the center line of the railroad track, and therefore was so placed in violation of law.

[1] The right of a railroad corporation to use a street within an incorporated city cannot exist unless it is granted by a two-thirds vote of the town or city authorities from which the right must emanate. Civ. Code, § 470; *San Pedro, etc., Co. v. City of Long Beach*, 172 Cal. 631, 158 Pac. 204. In *Pittsburgh, etc., Co. v. Hood*, 94 Fed. 618, 36 C. C. A. 423, the Circuit Court of Appeals said:

"In the absence of legislative authority, either direct or through the authorized action of a municipality, the construction and use by a railroad company of its road longitudinally on a highway or street is a public nuisance, and the company is subject to indictment for creating and maintaining such a nuisance. * * * Such unauthorized occupation and use of streets and highways, being wrongful, not only creates a nuisance, but constitutes a railway company a trespasser, and renders it liable for such damages as proximately result to persons or property in the absence of contributory negligence."

In response to the proposition last above stated, counsel for respondent say that the right of way in question had been given to the railroad company by the city of Los Angeles, and had been used by the railroad for over 15 years; that the railroad was not a trespasser in using this track; further, that this question is not raised by the pleadings, but was raised for the first time upon the trial of the case. But they do not refer us to any part of the record showing that any right of way over Palmetto street had ever been given to the railroad by the city. The error which appellants complain of is that the court refused to permit appellants to introduce evidence proving that no such right of way had ever been granted.

[2] It was not necessary that appellants in their answer allege that respondent, at the time and place of the accident, was a trespasser upon the street, or that the railroad company was using the street without a franchise. Under the denial of negligence on the part of the defendants, and their denial that the plaintiff had suffered damage through such alleged negligence, as well as under their plea that the plaintiff's injuries were due to his own negligence, they were entitled to prove any fact which, if established, would make good these defenses.

[3] Liability for negligence arises where one person causes an injury to another by his want of ordinary care or skill in the management of his property, except so far as the person injured has willfully, or by want of ordinary care, brought the injury upon himself. Civ. Code, § 1714. But the standard by which to test the "ordinary care or skill" required of a person in the management of his property is different, in the case of a trespasser or mere licensee upon the defendants' property, from the standard established in favor of a person lawfully present upon the premises where the injury is inflicted, and whose right to be there is not limited to that of a licensee.

"A mere licensee cannot recover where the injuries are caused solely by reason of the unsafe condition of the premises, and without any active or overt act of negligence committed against him by the occupant or owner of the premises." *Herold v. P. H. Mathews Paint House*, 39 Cal. App. 489, 493, 179 Pac. 414.

[4] Even if it were conceded that by reason of long use, without any objection from the city, the railroad company had ceased to be a trespasser in encroaching upon the street in the manner hereinabove stated, without any franchise having been granted to it for that purpose, the company and its employees could not in any event have acquired any status better than that of a mere licensee with respect to such use of the street. So considered, any person using the street under that license must take the premises as he finds them. Under the evidence in this case no claim can be made that any active or overt act of negligence was committed by appellants against respondent at the time and place of the accident by which his injuries were received. The unsafe condition of the premises, if they were unsafe at all, was caused solely by reason of the presence of the pole in the place where it had been set up before the day when the accident occurred. This being so, appellants would not have been guilty of any negligence of which respondent had a right to complain. Therefore we conclude that the court erred in refusing to admit the offered evidence. And if evidence to the effect that the train was being operated without a franchise had been

received, appellants would have been entitled to have appropriate instructions given to the jury stating the legal effect of such evidence if believed and found to be true.

[5] The distance of the pole as located and placed by appellants was less than eight feet from the center line of the spur track. This was less than the minimum clearance for pole lines on each side of the center line of railroads, as established by general order No. 26 of the Railroad Commission, which is set out in the complaint. Respondent claims that the order is applicable to the location or maintenance of poles in the public streets of the city of Los Angeles, and that therefore the pole was erected and maintained at that place in violation of law, and that this was negligence, in that it was a violation of an obligation imposed by law, due from appellants to respondent at the time and place of the accident. Appellants contend that the order has no application to the location or maintenance of poles in the public streets of said city, and therefore that the court erred in giving to the jury the following instruction:

"You are instructed that if the defendants, or either of them, placed a pole such as is alleged in the complaint at a point nearer than eight feet from the center line of the railroad track described in the complaint herein, then I instruct you that the defendants are guilty of negligence, and if you find that such negligence was the proximate cause of the injury complained of, your judgment shall be for the plaintiff, unless you further find that the plaintiff's injuries were caused by his own contributory negligence."

The city council of the city of Los Angeles is vested with power by ordinance to regulate the placing or maintaining of poles and the suspending of wires along or across any of its streets. Charter, art. 3, § 31. The board of public service commissioners is vested with power to construct, operate, maintain, and extend electric plants, works, systems, and equipments, and other means for supplying the city and its inhabitants with electricity for light, power, heat, and other purposes. Charter, art. 18, § 192g. Subdivision 51 of section 2 of article 1 of the charter empowers the city—

"to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter. * * *

This charter power is conferred within the terms of sections 6 and 8 of article 11 of the state Constitution which provides that by their charters cities may—

"make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

Referring to the adoption of said subdivision 51 the Supreme Court, in *Civic Center Ass'n v. Railroad Commission*, 175 Cal. 441, 448, 166 Pac. 351, 354, said:

"Thereupon, according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted, and limited by the charter 'only,' and free from any interference by the state through general laws, including laws giving the Railroad Commission powers over public utilities. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it."

[6] In view of the law as above stated, if the location of poles in a public street of said city is in all of its possible relations a municipal affair, the conclusion must follow that the general order in question of the Railroad Commission had no force or effect with reference to the location of the pole with which respondent came into contact, and thereby received the injuries of which he complains. The use of the streets of a municipality for the maintenance therein of telegraph and telephone poles and wires, although a use secondary to the ordinary uses thereof by the general public, is a municipal affair. *Sunset Tel. & Tel. Co. v. Pasadena*, 161 Cal. 265, 285, 118 Pac. 796. But while in general terms this is true, it is also true that these and analogous uses of a street sometimes have interrelations with things of general state interest which are not municipal affairs. In recognition of this fact, it has been held that the right and power of the Railroad Commission, under section 43 of the Public Utilities Act (St. Ex. Sess. 1911, p. 40), to require state railroads to establish viaducts or subways at street crossings in the city of Los Angeles, is a right and power to make regulations which are matters of general state concern, which are not properly municipal affairs.

"The right of the Legislature, under sections 17, 22, and 23, art. 12, of the Constitution, to commit the regulation of these railroads, so far as they operate within the cities, to the exclusive control of the Railroad Commission, is not a matter which can be classed as a municipal affair, but is a matter of general concern, and the legislative declarations on the subject are paramount to any city charter." *Civic Center Ass'n v. Railroad Comm.*, 175 Cal. 441, 451, 166 Pac. 351, 355.

The principle of decision based upon the Constitution and charter provisions above mentioned is applicable to appellant city while acting in the capacity of a corporation owning and conducting the business of selling and distributing electric power. While the supplying of water by a city to its inhabitants

is held to be a municipal purpose (*Marin Water, etc., Co. v. Town of Sausalito*, 168 Cal. 587, 598, 143 Pac. 767), and while the supplying of electric light and power by a city to its inhabitants is also a thing within the scope of municipal purposes where the right to conduct such business has been granted to the city, it is also well established that, in conducting business of this character, the city is exercising proprietary, rather than governmental, functions. It is upon this principle that cities are liable for negligence in the operation of such business. *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; *Chaffor v. City of Long Beach*, 174 Cal. 478, 487, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106. In *Davoust v. City of Alameda*, supra, the court (quoting *Western S. F. Society v. Phila.*, 31 Pa. 185) said in effect that, where the power is given to a city to supply gaslight to its inhabitants, the city thereby exercises a special private franchise; that the investment made in such business is the private property of the city, as much as are the lands and houses belonging to it; that the city stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.

We conclude, therefore, that general order No. 26 applies to and controls the location by appellants of poles for use as a part of their power-distributing system, to the same extent that it is applicable to a private corporation exercising similar rights under any franchise. That the subject-matter of the order, whether the particular matter involved be within or without the city of Los Angeles, is of general interest, and not merely of local or municipal concern, is quite as clear as that the power to require state railroads to establish viaducts or subways at street crossings in that city is a matter of general state concern. The act of setting a telephone pole in the street within eight feet from the center line of a railroad track was a violation of a valid order, having the force of law, governing that situation.

[7] But the unqualified statement made in the court's instruction to the jury, that if the defendants placed the pole less than eight feet from the center line of the railroad track they were guilty of negligence, would not have been a correct statement as applied to the situation existing between the plaintiff and the defendants, if it had been a proved fact in the case that the railroad company, in whose business the plaintiff was employed, was occupying and using the street without any franchise giving it a right to such occupancy and use. "There cannot be neglect without the existence of a corresponding duty." *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153. It seems clear that the rejection of the evidence heretofore

discussed, affecting plaintiff's rights in the street under the stated circumstances, was prejudicial error.

Judgment reversed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 458

CITY OF LOS ANGELES v. SHAFER et al.
(Civ. 3155.)

(District Court of Appeal, Second District, Division 2, California. July 9, 1921.)

Municipal corporations — 347(1) — Contractor's bond held not to provide for liquidated damages.

Under Street Improvement Act, § 9, providing that a contract for the improvement of streets must be let to the lowest responsible bidder, who must give bond for the faithful performance of the work, and, on failure of the contractor to do the work, that the legislative body may relet the contract and pay costs of it, and expenses incident to the reletting out of funds due or to become due to the contractor, and hold him and his sureties responsible on his bond for costs and expenses, and damages resulting from abandoning the contract, a bond given by contractor to perform his contract is not for liquidated damages, and in the absence of evidence of actual damages there can be no recovery on the bond.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the City of Los Angeles against M. T. Shafer and the Maryland Casualty Company, a corporation. From judgment for plaintiff, defendants appeal. Reversed.

Bicksler, Smith & Parke and F. C. Austin, all of Los Angeles, for appellants.

Charles S. Burnell, City Atty., and Wm. P. Mealey, Asst. City Atty., both of Los Angeles, for respondent.

SHENK, Judge pro tem. This is an action against the contractor and his surety on a faithful performance bond given pursuant to the Street Improvement Act of 1913 (St. 1913, p. 954).

In May, 1917, the city of Los Angeles, after proceedings regularly taken, invited proposals for the improvement of Oregon and Ezra streets. The defendant M. T. Shafer submitted a bid to do the work for \$4,487.84. The bid was accepted, and the contract, which was awarded to him, was executed on June 16, 1917. On the same day the defendant Shafer and Maryland Casualty Company, as his surety, executed a bond in the sum of \$1,125 for the faithful performance of the contract, as required by section 9 of said act. The city then proceeded to ascertain the damages to private property by reason of the proposed improvement, and to

levy and collect an assessment sufficient to pay the damages and the contract price. On December 22, 1917, the city, through its board of public works, caused a notice to be deposited in the United States mail, addressed to the defendant contractor at 220 West Thirty-Third street, Los Angeles. This street number was the address placed by Mr. Shafer on his bid when the same was submitted by him in May. The notice stated that there was sufficient money and bonds in the special improvement fund to pay the contract price, and concluded with the following:

"You are further notified to commence within twenty days from the date of service upon you of this notice, and thereafter diligently prosecute to completion, the work of said improvement, according to the terms of that certain contract therefor made and entered into between you and the city of Los Angeles, dated the 16th day of June, 1917, and now on file in the office of the city engineer of said city."

Work was not commenced within 20 days after the date of the mailing of the notice, nor at all. On January 21, 1918, the contract was canceled by resolution of the board of public works, and the city relet the contract to another contractor for \$5,104.97, or \$617.13 more than Mr. Shafer's bid. On June 10, 1918, the plaintiff brought this action. Judgment for the full amount of the bond was rendered against the defendants, both of whom have appealed.

The principal contentions presented on behalf of the appellants are: First, that the contractor never was placed in default in accordance with the statute, and therefore no liability accrued on the bond; and, second, that the trial court enforced the obligation under the bond as one for liquidated damages, whereas it is contended the plaintiff is entitled under the statute to actual damages, and none other, and that no such actual damages were shown.

[1] As to the first contention, it is urged that, under section 9 of the act, and the contract made in pursuance thereof, the plaintiff must allege and prove receipt by the contractor of the said notice before he can be put in default. Section 9 provides that—

"The contract shall provide that the work must be commenced within twenty days after the contractor receives written notice from the superintendent of streets that there is sufficient money or bonds, or money and bonds in the special fund devoted to the proposed improvement to pay the contract price, and completed within such time as the superintendent of streets shall prescribe."

In obedience to this requirement of the statute the contract contains the following provision:

"It is further understood and agreed that the work herein mentioned shall be commenced by the party of the first part within twenty days

(200 P.)

after notice in writing is received by said party from the board of public works of the city of Los Angeles that there is sufficient money or bonds, or money and bonds, in the special fund devoted to the improvement, * * * and shall be completed within sixty days after the receipt of said notice by the said party of the first part."

The contention of the appellants is well taken. Under the statute and the contract the receipt of the notice by the contractor starts the time within which work must be commenced, or he be in default, and subject to a cancellation of the contract, and the burden is on the plaintiff both to allege and prove receipt by the contractor of the notice. The complaint alleges that the plaintiff—

"did duly perform or did cause to be duly performed all of the conditions and acts on its part which it was required to do under said contract and under said statute hereinbefore referred to."

This allegation is denied and issue is thus properly joined under section 457, Code of Civil Procedure. The court found "that on the 24th day of December, 1917, the board of public works of said city served the defendant M. T. Shafer with a notice that there was at that time in the special fund devoted to the improvement" sufficient money and bonds to pay the contract price. Assuming that this is equivalent to a finding that the contractor received the notice, it is the position of the appellants that there is no evidence to support such finding. There is no contention by the respondent that the notice was served other than by mail to the address given by Mr. Shafer in his bid, which was submitted over six months before the mailing of the notice. It is contended, however, by the respondent that the deposit of the notice in the mail on the 22d day of December, 1917, together with the presumption of receipt provided for in subdivision 24 of section 1963, Code of Civil Procedure, is sufficient to prove its receipt. The presumption relied upon is: "That a letter duly directed and mailed was received in the regular course of mail." But before this presumption can arise it must be shown that the letter was duly directed. A letter is duly directed when it is addressed to the person intended at the city or town where he resides or has his place of business, or at the post office where he usually receives his mail. 22 Corpus Juris, § 39, and cases therein cited. There is no evidence that the place to which the envelope containing the notice was directed was the address of the defendant Shafer at the time of the mailing. On the contrary, the only evidence as to his post office address at that time was that of Shafer himself, who testified that he had moved to Exeter, Cal., in August, 1917, and that his post office address at the time of the

mailing in question, to wit, December, 1917, was at that place.

There is authority to the effect that the presumption of receipt arises when the letter is addressed to a former address if it be shown that the addressee gave a forwarding address to the postal authorities, or that such authorities knew of the change of address. *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43. But no such showing was here made. In the absence of such showing, certainly it may not be said that the letter was duly directed. The presumption, therefore, did not arise. The defendant Shafer testified that he did not receive the notice. Respondent comments on this testimony by saying that the trial court did not believe this testimony. But we are here dealing not with the question of whether the presumption has been overcome, but with the question of whether the presumption has arisen at all under the evidence. Our conclusion is that it has not.

It is further alleged in the complaint that—

"On the 22d day of December, 1917, the board of public works of said city notified the said defendant M. T. Shafer, under the provisions of section 20 of said act, that there was sufficient money in the hands of the city treasurer," etc.

This allegation was made apparently on the theory that, if the mailing of the notice without proof of receipt is insufficient under section 9 of the act, such mailing would be sufficient under section 20 of the act. That section provides that when sufficient money is on hand to pay the estimated damages, and all expenses and costs of doing the work—

"It shall be the duty of the superintendent of streets to notify the contractor for the work of that fact, and to draw demands on such special fund for the respective amounts of damages awarded by the report, and to notify the owner of each parcel of land declared by the report to be damaged, if the name of such owner is stated in the report, that the awards of damages are payable, and that he may receive the sum awarded him on executing a release to the city of all liability for damages caused by the improvement. Such notification may be given by depositing a notice, postage prepaid, in the post office, addressed to such person at his last known place of residence."

Respondent's contention is that the mailing of the notice to the "last known place of residence" permitted by this section applies to the notice to the contractor as well as to the notice to the property owners. There would be some force to this contention if this section stood alone, but, when this provision is read in connection with section 9, we conclude that it was intended to apply only to the notice to property owners, whose present addresses are usually widely sepa-

rated and difficult to follow. Reading the two sections together there is no indication in any language used in section 20 of an intention to dispense with the requirement of receipt of notice by the contractor as specified in section 9.

The second contention of appellants is that there was no evidence to support the finding that the amount of the bond in question was agreed upon as liquidated damages in the event of a breach of the contract, and that it was impossible under the evidence to fix the actual damages sustained by reason of the alleged breach. The bond is to the effect that the principal and his surety are bound unto the city of Los Angeles in the sum of \$1,125. The condition is that, if the principal shall faithfully perform all covenants, conditions and agreements of the contract, then the obligation to be void; otherwise to remain in full force and effect. If it be assumed that under some circumstances and an appropriate statute a bond in this form might be held to constitute an agreement for liquidated damages, we are again confronted with the particular statute under which the agreement was made, and which must be read into it and considered a part of it.

Section 9 further provides that "the legislative body must let the contract to the lowest responsible bidder, who shall give bond for the faithful performance of the work in such sum as may be required by it;" that if the contractor fails to proceed with the work the legislative body may relet the contract and "pay the cost of the same, and also any expenses incident to the reletting, out of the funds due, or to become due the contractor, and also hold him and his sureties responsible on his bond for such costs and expenses, and also any damages resulting from the abandonment." Under the statute the city is not authorized to agree on any sum as liquidated damages, but only to hold the contractor and his surety for "any damages resulting" from the breach. The statute contemplates that if any damages result they are ascertainable. If the Legislature intended that the obligation be one for liquidated damages or for a penalty or a forfeiture, it could have so provided. It is significant that in this same section 9 it is provided that the certified check required to be deposited with the clerk when the bid is submitted "shall be forfeited to the city" in case the bidder fails to enter into the contract awarded to him. Not so as to the faithful performance bond. As to it the section specifies that the recovery thereunder shall be for "any damages," in the sense, we think, of "whatever damages" resulted from the abandonment.

It was stipulated that the city levied the assessment, that it collected either money or bonds in sufficient amount to pay the awards of damages, the contract price, and the incidental expenses. It was also stipulated

that upon the reletting of the contract a supplemental assessment was levied to cover the difference between the Shafer contract and the subsequent contract. It therefore appears that the property owners paid the entire cost of the proceeding through the original and the supplemental assessments, and that the city itself did not bear any of such cost. It is the position of the city, as expressed by its counsel at the trial, that, if the full amount of the bond cannot be recovered, no recovery is sought. It is urged that, although the city, as a corporation, is out nothing from a monetary standpoint, yet there is an unascertainable loss to the public of the use of the improved street because of the delay in the commencement and completion of the work.

In this connection the city produced witness Gibson who was asked if in his opinion it was possible to estimate the damages to the city of Los Angeles because of the failure of the original contractor to improve the street. The question was objected to on general grounds, and on the ground that it called for the conclusion of the witness. The court sustained the objection, and declared that this was not a question of fact, but a question of law under the statute. Thereafter the court found:

"That the city of Los Angeles and its inhabitants were deprived of the use of Oregon street as it was contemplated to be improved under and by virtue of said contract during the time that the contract was being relet and said supplemental assessment was being levied and collected; that it is impossible to fix the actual damages suffered or sustained by plaintiff by reason of the failure of said defendant M. T. Shafer to carry out the terms of said contract and to do the improvement work specified therein; and that by reason thereof the sum of \$1,125 was agreed upon by the said plaintiff and the said defendants as liquidated damages for the breach of said contract."

We believe the court was in error in assuming that it was a question of law as to whether it would be impracticable or extremely difficult to fix the actual damages. In *Consolidated Lumber Co. v. City of Los Angeles*, 33 Cal. App. 698, 166 Pac. 385, it is said:

"Whether 'it would be impracticable or extremely difficult to fix the actual damage' in a case in which the parties have attempted to agree upon the liquidated damages in advance, is a question of fact."

See, also, *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823; *Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295; *McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Long Beach City School District v. Dodge*, 135 Cal. 401, 67 Pac. 499. In *Consolidated Lumber Co. v. City of Los*

Angeles, supra, the general rule is also stated to the effect that the declaration of the parties in their contract that the actual damages would be difficult of ascertainment, and that the sum agreed upon should constitute liquidated damages, tends strongly to establish the fact required by the statute to exist. In the present case the plaintiff alleged that "it would be and was and is impracticable or extremely difficult to fix the actual damage suffered by the plaintiff by reason of the breach of said contract," and "by reason of such impracticability or extreme difficulty of fixing such damages the sum of \$1,125 was agreed upon by the said plaintiff and the above-named defendants as liquidated damages for the breach of said contract." These allegations were denied, but were found to be true notwithstanding the fact that neither the contract nor the bond so declared, and no evidence was admitted to support the allegations. There is therefore no support in the evidence for the findings complained of. Furthermore, there is no evidence in the record to show that the contractor to whom the contract was relet completed the work at a date later than the defendant Shafer could have done under the contract had he duly proceeded thereunder.

There is nothing in the statute or the contract or the bond to indicate that the parties had in mind an agreement for liquidated damages. In *Re The Colombia* (D. C.) 197 Fed. 661, it was said, quoting from *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149:

"The courts are disposed to lean against any interpretation of a contract which will make it liquidated damages; and in all cases of doubtful intention will pronounce the stipulated sum a penalty."

Respondent contends that this rule should not be invoked as against a public corporation, and cites authority to the effect that a city should be favored in attempting to enforce a contract for liquidated damages in connection with public work. *Brooks v. City of Wichita*, 114 Fed. 297, 52 C. C. A. 209. But in that case the contract provided for the payment of a sum as liquidated damages, and not as a penalty. The intention of the parties was manifest. No good reason has been advanced why a public corporation of this state should be relieved under present law from the operation of sections 1670 and 1671 of the Civil Code.

The authorities cited by the respondent are not inconsistent with the authorities supporting the appellants' contention, or the conclusions herein expressed. The cases of *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388, and *Pogue v. Kaweah Power & Water Co.*, 138 Cal. 664, 72 Pac. 144, and earlier cases relied upon, were actions in which the parties agreed upon a sum which should constitute liquidated damages, or in which the

court found from the peculiar circumstances surrounding the contract and the intention of the parties that the obligation was one for liquidated damages.

The determination of the two principal contentions of the appellants disposes of or renders unnecessary a discussion of other points suggested.

The judgment is reversed.

FINLAYSON, P. J., and CRAIG, J. We concur in the judgment of reversal on the ground that there is no evidence to support the finding that the sum named in the bond was agreed upon as liquidated damages. That instrument is a statutory undertaking, and should therefore be construed in the light of the statute, which declares that, if the contractor abandons the work or fails to proceed with it as rapidly as required by his contract, the city may hold him and his sureties responsible on the bond for the cost of any new contract that may be relet by it, for the expenses incurred in reletting the contract, and for "any damages resulting from such abandonment." St. 1913, pp. 959, 960. The damages thus referred to are actual damages, and the statute therefore contemplates the recovery of no more than the damages actually sustained, including the costs and expenses incurred in reletting the contract. It follows that the amount of the city's recovery must be measured by its actual damage; and since respondent failed to prove the amount of its actual damages, if any were sustained, there is no basis for the judgment.

52 Cal. App. 353

STETSON v. SHEEHAN, Sheriff, et al.
(Civ. 3728.)

(District Court of Appeal, First District, Division 1, California. April 26, 1921. As Modified by Order of May 26, 1921, Denying Rehearing. Hearing Denied by Supreme Court July 25, 1921.)

1. Appeal and error § 437—Appeal by plaintiff from insufficient judgment does not affect lien.

Code Civ. Proc. § 949, did not have the effect of staying proceedings on a money judgment, so as to either deprive plaintiff of the benefit of his lien acquired by the docketing of the judgment on property of the judgment debtor, or to deprive him of the right to file for record a transcript of the docket in another county, under section 674, although he was appealing from the judgment because he deemed it inadequate in amount.

2. Appeal and error § 460(1)—Plaintiff entitled to redeem from money judgment, notwithstanding appeal.

Where plaintiff obtained a money judgment, and appealed, without executing undertaking

under Code Civ. Proc. § 671, deeming judgment inadequate in amount, and pending the appeal filed a transcript of the judgment in another county, under section 674, he was entitled to exercise the rights of a redemptioner accorded under section 701, as regarded land of judgment debtor sold under execution in another suit.

3. Judgment 780(4)—Transcript filed after execution sale gave judgment creditor lien on right to redeem.

Where transcript of money judgment obtained in another county was filed after land of judgment debtor had been sold under execution in another action, a lien attached to the judgment debtor's right to redeem, under Code Civ. Proc. §§ 671, 674.

4. Appeal and error 1177(1)—New trial unnecessary, in view of stipulation in trial court.

Where parties in trial court stipulated that, in event court found that a redemption from execution sale was duly made under an agreed statement of facts, the plaintiff should be entitled to a judgment for a certain sum, and not the land, and trial court found that there was no redemption, the appellate court, on finding on defendant's appeal that there was a redemption under the agreed statement of facts, will not order a new trial, but will reverse and remand, with directions to enter judgment for defendant.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Harry N. Stetson against M. Sheehan, as Sheriff, etc., and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Hearing denied by Supreme Court, 200 Pac. 392.

J. J. Lermen, of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Thos. C. Jordan and Wright, Wright & Stetson, all of San Francisco, and A. Kincaid, of Redwood City, for respondent.

RICHARDS, J. This action was submitted to the trial court upon an agreed statement of facts, of which the following is a brief, but sufficient, summary:

On or about January 11, 1918, in an action pending in the county of San Mateo, wherein George O. Rich was plaintiff and Micajah Cross and Moss Beach Realty Company, a corporation, were defendants, a judgment was made and entered in favor of said plaintiff for the recovery against the defendants of the sum of \$1,025.94. Thereafter, and on January 14, 1918, an execution duly issued upon such judgment, and was delivered to the sheriff of said county, who proceeded to make a levy thereunder upon certain real estate then belonging to the said Moss Beach Realty Company within said county, and thereafter, and on February 18, 1918, an execution sale

was had under said writ and the levy thereof, at which said sale the right, title, and interest of the said Moss Beach Realty Company in said property so levied upon was sold to one Thomas C. Jordan as the highest and best bidder therefor, who thereupon paid to the said officer conducting said sale the sum of \$1,080 in cash, being the whole amount of said judgment, with accrued costs, and thereupon, and on February 18, 1918, a certificate of sale of said property was duly issued to such purchaser and filed for record in the office of the county recorder of said county. Thereafter, and on February 20, 1918, said Thomas C. Jordan transferred said certificate of sale and all of his rights in said property acquired thereunder, to Harry N. Stetson, the respondent in the present case. Thereafter said George O. Rich commenced another action in the superior court of the city and county of San Francisco against the said Moss Beach Realty Company to recover certain sums of money alleged to be due as commissions upon the sale of certain properties of said corporation, in which action a judgment was made and entered on September 20, 1918, in favor of said George O. Rich for the sum of \$311.43 and costs. Thereafter, and on November 18, 1918, the said plaintiff therein, George O. Rich, being dissatisfied with the amount of said judgment in his favor, took an appeal therefrom and from the whole thereof to the Supreme Court by the alternative method provided for taking appeals, filing no bond of any kind upon such appeal. This appeal was transferred by the Supreme Court to Division 2 of this court, where it was still pending and undetermined at the time of the institution, trial, and appeal of the present case.

After having taken and perfected said appeal, and on February 17, 1919, the said George O. Rich procured from the clerk of the superior court of the city and county of San Francisco a certified transcript of the original docket of the said judgment, which transcript he caused to be filed with the recorder of the county of San Mateo, and having so done he proceeded to give written notice of redemption of the property of the said Moss Beach Realty Company sold to said Thomas C. Jordan under said former judgment and execution sale, at the same time paying to the sheriff the sum required to consummate said redemption, and otherwise doing all of the acts required by the statute effectuate such redemption. Thereafter, and after the expiration of the time for any further redemption of said property, and on or about April 23, 1919, the said sheriff, upon his demand therefor, made, executed, and delivered to said George O. Rich, as such redemptioner, his sheriff's deed, wherein he attempted to convey to said George O. Rich all of the right, title, and interest of the Moss Beach

Realty Company in and to said property affected by such redemptions; and thereafter, and on the same date, the said George O. Rich and Mary A. Rich, his wife, made, executed, and delivered to one Hall C. Ross their deed to said premises, which deed said Hall C. Ross received and took with full knowledge of all of the matters and proceedings whereby the said George O. Rich had acquired whatever right, title, and interest he undertook to convey by said deed. Thereafter, and on May 13, 1919, plaintiff herein, Harry N. Stetson, as the transferee and successor in interest of said Thomas C. Jordan, the original purchaser at said execution sale, commenced the present action against said Sheehan, as the sheriff as aforesaid, and also against George O. Rich and Mary A. Rich, his wife, and Hall C. Ross, the grantee under their aforesaid deed, wherein said plaintiff sought to have a decree entered compelling said sheriff to execute and deliver to him a deed to the premises in question under said original execution sale, and to further have it declared that said George O. Rich and his said wife, and also their said grantee, Hall C. Ross, had no right, title, interest, or estate in said property, and to have the aforesaid attempted redemption of said property by said George O. Rich canceled, and all subsequent acts done by him thereunder declared null and void.

This case came to trial upon an agreed statement of facts, of which the foregoing is a summary, at the conclusion of which the trial court adopted the said agreed statement of facts as its findings of fact, and as its conclusions of law based thereon found that—

"The defendant Rich having appealed from the San Francisco judgment, the transcript of the original docket of that judgment before the appeal was determined gave him no rights; hence judgment will be entered for plaintiff as per stipulation herein."

The judgment followed in practically the form of the prayer of the complaint, adjudging the attempted redemption of the premises in question by said Rich to have been ineffectual, and the sheriff's deed to him to have been void, and hence also his conveyance of the premises to said Ross, and directing the said sheriff to execute a deed of said property to the plaintiff, Stetson, as the successor in interest of said Thomas C. Jordan, the original purchaser of the premises at said execution sale. The defendants have prosecuted this appeal from said judgment.

Two questions are presented and discussed upon this appeal. The first of these is as to whether said George O. Rich, as the plaintiff and judgment creditor in the case of *George O. Rich v. Beach Realty Co.*, in the superior court of the city and county of San Francisco, having himself taken and prose-

cuted an appeal from such judgment, was entitled to have issued to him while said appeal was pending the certified transcript of the docket of said judgment, and was entitled to file the same for record in the county of San Mateo. It is the contention of the respondent herein that the effect of the appeal of Rich from said judgment was to create a stay of proceedings upon such judgment, within the meaning and effect of section 949 of the Code of Civil Procedure, and that, this being so, the said plaintiff and appellant Rich in that case was not entitled to have issued to him the transcript of the docket of said judgment for record in the county of San Mateo under section 674 of the Code of Civil Procedure, and hence that he acquired no rights as a redeeming judgment creditor by virtue of the issuance and recordation of said transcript of the docket of said judgment in the county of San Mateo.

[1] Upon this first question we are of the opinion that the appeal taken by the plaintiff Rich from the said judgment in his favor cannot be held to have had the effect of staying proceedings upon said judgment, so as either to deprive him of the benefit of his lien acquired by the docketing of said judgment upon any property which the defendant Moss Beach Realty Company might have had in the city and county of San Francisco, or to deprive him of the right to file for record a transcript of said docket in the county of San Mateo, and by so doing acquire the lien of a judgment creditor upon any interest in real property which the said judgment debtor might have in the latter county. We are led to this conclusion by the language of the Supreme Court in the case of *Halsted v. First Savings Bank*, 173 Cal. 608, 160 Pac. 1075, wherein the court, in construing section 949 of the Code of Civil Procedure in its application to the facts of that case, said:

"The stay given by the statute in the event of appeal is effectual only as to the judgment in so far as it affects the appellant, requires him to do something, or permits something to be done as to him."

Clearly the plaintiff, appealing from a money judgment in his favor which he deems inadequate in amount, could have no intent or desire to stay the operation of and proceedings under said judgment in so far as the same was in his favor; nor, on the other hand, could the judgment debtor be entitled to the benefits of a stay of proceedings upon a judgment as to the amount and effect of which it was so far satisfied as to have taken no appeal on its part.

The case of *In re Schedel*, 69 Cal. 241, 10 Pac. 334, and the later cases of like import, relied upon by the respondent, do not fit the situation presented in the instant case, since in each of those cases the appellant

needed the benefit of a stay of proceedings to prevent the injurious operation of the judgment or order appealed from against his interests pending the appeal. But that is not this case; and it would seem that the only penalty which a plaintiff appealing from a money judgment in his favor might be put to in the event of his seeking to enforce said judgment pending his appeal would be that of having his appeal dismissed upon the ground that he had waived the same by accepting or seizing upon the benefits of said judgment. This ground would not be available for obvious reasons to the respondent here.

[2] We think the foregoing conclusion is correct for another reason. The apparent intent and purpose of section 674 of the Code of Civil Procedure was to enable a judgment creditor to acquire a like judgment lien upon the real property of a judgment debtor in another county to that acquired by him upon the real property of the judgment debtor in the county in which his judgment was obtained and docketed. Under section 671 of the Code of Civil Procedure, when a judgment is docketed in the county in which it is obtained, it becomes a lien upon all the real property of the judgment debtor owned by him at the time or which he may afterward acquire in said county until the lien ceases. This lien, by the express terms of that section, "continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases." It would seem clear that the lien of a judgment creditor appealing from a money judgment in his favor would not cease to exist upon the taking and perfecting by him of an appeal, and that, if it did so exist, he would be entitled to exercise the rights of a redemptioner accorded him under section 701 of the Code of Civil Procedure; and if under such circumstances he would have such right, it would follow that he would have the further right to record his judgment in another county and acquire the like lien of a judgment creditor and right of a redemptioner therein.

Upon the first point in this case we are therefore of the opinion that the plaintiff Rich in said former action was entitled, notwithstanding the pendency of his appeal therein, to apply for and have issued to him a transcript of the docket of his judgment therein for the recordation in the county of San Mateo, and was entitled to have the same filed for record in said county for whatever statutory benefits might accrue to him by virtue of said acts.

[3] The remaining question presented upon this appeal has reference to whatever rights

as a judgment creditor of the Moss Beach Realty Company said George O. Rich acquired by said recordation of the transcript of his judgment in San Mateo county with relation to the property of said corporation in said county which had already been sold under execution to the predecessor in interest of the plaintiff herein. It is the contention of the respondent herein that said Rich did not become invested with any right to redeem said property from said prior execution sale by the doing of the aforesaid acts. This contention is based, in part, at least, upon the respondent's construction of the provisions of section 674 of the Code of Civil Procedure having relation to the effect of the filing for record of the transcript of a judgment in a county wherein the judgment creditor has an interest in real property. That section reads as follows:

"The transcript of the original docket of any judgment, the enforcement of which has not been stayed on appeal, certified by the clerk, may be filed with the recorder of any other county, and from such filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years unless the judgment is previously satisfied or the lien otherwise discharged."

Respondent herein argues that the judgment so filed for record under the terms of the above section becomes thereby a lien upon the real property of the judgment debtor which is "owned by him at the time or which he may afterward and before the lien expires acquire," and that in the instant case the judgment debtor did not own the real estate to which it is sought to have said judgment lien attach for the reason that all of the said judgment debtor's right, title, and interest in said property had been theretofore sold at said execution sale.

We think that this is altogether too narrow a construction to place upon the provisions of the above-quoted section of the Code in so far as they purport to create a lien upon the real property or an interest therein of a judgment debtor. The same precise language is employed in section 671, Code of Civil Procedure, in relation generally to judgment liens, and to hold that a judgment creditor, filing his transcript of judgment in another county, did not thereby acquire a lien upon such of the real property of the judgment debtor as had theretofore been sold at an execution sale, but which was still subject to redemption, would be to hold in effect that no judgment creditor having such subsequent judgment could acquire such a lien or become a redemptioner of property which had been subjected to such prior execution sale but

which was still open to redemption. To so hold would be to nullify the provisions of subdivision 2 of section 701 relating to the redemption of real property from execution sale, which section reads as follows:

"Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest: (1) The judgment debtor, or his successor in interest, in the whole or any part of the property; (2) a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

We are cited to a number of cases by respondent as to the effect of execution sales in relation to the interest of the judgment debtor acquired by the purchaser at such sale. It is not necessary to review in detail these cases, since none of them go to the extent of holding that, notwithstanding the sale under execution of the real property of a judgment debtor, such judgment debtor does not retain during the redemption period such an interest in said property as may be subjected to the lien of a subsequent judgment creditor who may become a redemptioner under the express terms of section 701 of the Code of Civil Procedure. On the other hand, the Supreme Court has in numerous cases expressly recognized the rights of judgment creditors becoming such after execution sales to redeem the property of the judgment debtor from such sales. The following are some of these cases: *Bennett v. Wilson*, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61; *Id.*, 133 Cal. 379, 65 Pac. 880, 85 Am. St. Rep. 207; *Woods v. Kellerman*, 3 Cal. App. 422, 89 Pac. 358; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655. In the case last above cited Mr. Justice Field, in discussing the origin and effect of section 230 of the Practice Act (which has been retained in precise terms in section 701, Code of Civil Procedure), shows its derivation from the New York Code, and also shows by a uniform current of authority in that state that a junior judgment creditor, becoming such subsequent to the creation of the lien upon which the real property of the judgment debtor has been sold upon execution, has the right to redeem the property from such execution sale.

We do not think that any change in the statute with respect to the interest of the judgment debtor passing after such execution sale was ever intended to take away this right of redemption in junior judgment creditors which has so long obtained, and which would seem to have been expressly reserved in the retention of section 230 of the Practice Act in its ancient origin and precise form in section 701, Code of Civil Procedure. It is our conclusion, therefore, that the junior judgment creditor, Rich, had the right to redeem the property in question from said execution sale. It is conceded that he took all of the proper statutory steps to exercise that right and that there was no other redemption. It follows that he had a right to demand and receive from the sheriff the deed to the premises which was issued to him, and hence that the conveyance thereof by himself and wife to Ross operated to transfer all of the right, title, and interest acquired by him under such redemption and sheriff's deed to the grantee; and it results as a necessary conclusion that the plaintiff was not entitled to the relief which was accorded him by the judgment in his favor herein upon the record as it was made up at the time of the entry of such judgment and of the appeal therefrom.

[4] By stipulation of the parties, the agreed statement of facts was accepted and adopted by the trial court. The appeal is from the judgment. Consequently it is unnecessary to order a new trial. *City of Eureka v. McKay*, 123 Cal. 666-673, 56 Pac. 439; *Perkins v. Cowles*, 157 Cal. 625-627, 108 Pac. 711, 30 L. R. A. (N. S.) 283. The parties stipulated that, in the event the court found that a redemption was duly made by Rich, the plaintiff should be entitled to judgment for the sum of \$1,209.60, the amount of the redemption money paid by Rich for that purpose and no more. Consequently, upon the determination of this court that Rich was entitled to, and did, redeem the property, appellants are entitled to have judgment entered in accord with the stipulation.

The judgment is reversed, and the cause is remanded, with directions to the lower court to enter judgment, upon the agreed statement of facts in conformity with the views expressed in this opinion.

We concur: WASTE, P. J.; KERRIGAN, J.

186 Cal. 334

STETSON v. SHEEHAN, Sheriff, et al.
(S. F. 9534.)

(Supreme Court of California. June 23, 1921.)

Appeal and error $\Leftrightarrow$ 833(3)—Modification by appellate court of judgment held to extend time for petition for hearing in Supreme Court.

A modification by the District Court of Appeal of a judgment which merely reversed the judgment of the trial court, so that the judgment of the trial court was reversed and the cause remanded, with directions to enter judgment for appellants without new trial, extended the jurisdiction of the Supreme Court to grant a petition for hearing for 30 days thereafter, although such would not be true of a modification of the opinion which did not affect the judgment.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Harry N. Stetson against M. Sheehan, as Sheriff, and others. Judgment for plaintiff, and defendants appealed. Reversed, and cause remanded by the District Court of Appeal (200 Pac. 387) and plaintiff petitions for a hearing. Petition held duly filed.

J. J. Lermen, of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Thos. C. Jordan and Wright, Wright & Stetson, all of San Francisco, and A. Kincaid, of Redwood City, for respondent.

PER CURIAM. A petition for hearing in this court, after decision by the District Court of Appeal of the First Appellate District, Division One, was filed herein on June 4, 1921, on the theory that the judgment of the District Court of Appeal was given on April 26, 1921. The judgment of April 26, 1921, of the District Court of Appeal, was, however, modified by that court on May 26, 1921, with the result that the judgment of the District Court of Appeal in the matter, as finally given, was given on May 26, 1921, and does not become final in that court until 30 days thereafter, viz. on June 25, 1921, and the jurisdiction of this court to grant a petition for hearing herein continues for 30 days thereafter, viz. to and including July 25, 1921.

A different situation would be presented if the modification by the District Court of Appeal had been solely with regard to its opinion. Such a modification would not have affected the judgment, which would in that event have become final in that court on May 26, 1921, with the power in this court to grant a hearing within 30 days thereafter. See *National Bank of California v. Los Angeles, etc.*, Co., 2 Cal. App. 659, 663, 84 Pac. 466, 468.

The petition for a hearing filed herein June

4, 1921, will be considered as duly filed herein, and will be acted upon prior to the expiration of the time within which it may be considered by this court, viz. on or before July 25, 1921.¹

All concur.

186 Cal. 632

WAKABASHI v. STAFFORD PACKING CO.
(L. A. 6529.)

(Supreme Court of California. Aug. 6, 1921.)

Chattel mortgages $\Leftrightarrow$ 110—Payments by mortgagee for fish purchased from mortgagor held not advancements.

Even if the taking possession of the property under a chattel mortgage securing the debt and future advancements without foreclosure of the mortgage canceled the liability of mortgagor for the debt and advancements, the amounts paid by mortgagee after the mortgagor had begun delivering fish to it were merely payments on the purchase price of the fish, and not advancements, so that the mortgagor or his assignee cannot recover such purchase price, where such payments exceeded the price.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by N. S. Wakabashi against the Stafford Packing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

S. C. Schaefer, of San Pedro, for appellant.
Henry Stieglitz, of San Pedro, and W. A. Alderson, of Los Angeles, for respondent.

WILBUR, J. This action was brought by the plaintiff to recover the sum of \$990 for fish delivered by his assignor, Harry T. Yoshida, to the defendant. Yoshida was a fisherman and the defendant a canning company. An arrangement was made between them by which the defendant paid off an indebtedness upon a fishing motor boat named Roma and took a chattel mortgage to secure the amount thus advanced, amounting to the sum of \$2,340.38. This chattel mortgage also provided that it was security for future advances to be made by the defendant to Yoshida. A fishing agreement was entered into between Yoshida and the defendant, in addition to the chattel mortgage and note. During the fishing season Yoshida delivered \$482.37 worth of fish. During that same period defendant paid out on account of Yoshida \$1,492.83, or more than \$1,000 in excess of the value of the fish delivered to defendant by Yoshida. Thereafter defendant took possession of the boat. It was stipulated that the assignment to the plaintiff was merely for the purposes of collection and that the plaintiff is for that purpose the agent of Yoshida.

$\Leftrightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ The court, on July 25, 1921, denied a hearing.

The chattel mortgage provided that upon default the mortgagee might take possession of the motor boat and would thereupon become vested with absolute title thereto and the mortgagors' indebtedness thereby be fully paid. This portion of the mortgage was clearly void. Civ. Code, § 2889. But it was apparently treated by the parties and by the court as valid. The defendant by counterclaim set up the indebtedness from Yoshida to the defendant of \$1,492.83, and also by cross-complaint, to which Yoshida was made a party defendant, sought to foreclose the chattel mortgage; but upon the trial announced to the court that inasmuch as it had treated the mortgaged property as its own and in full satisfaction for the balance of indebtedness due it, no foreclosure should be had of the mortgage. Yoshida does not appeal from that portion of the judgment which exonerated him from the mortgage indebtedness, but his agent appeals from that portion of the judgment which denied judgment for the fish delivered by him. The theory of the plaintiff is that the seizure of the vessel and its appropriation by the defendant operated to pay the entire indebtedness, which included not only the original amount advanced and evidenced by the promissory note thereby secured, but also was a satisfaction of all subsequent advancements and therefore of the total advancement of \$1,492.83, thus leaving the amount of \$482.37 still due and owing from the defendant to Yoshida and by assignment to the plaintiff. The defendant kept an account on its books with Yoshida. This account showed that in July Yoshida delivered \$315.09 worth of fish; in August, \$135.13 worth; in September, \$12.15 worth; and in October, \$20 worth—total, \$482.37. During this same period the defendant paid out upon the order of and for the account of Yoshida \$1,492.83. All payments made previous to the delivery of fish might be considered as advancements within the meaning of the mortgage, but payments made subsequently on the order and for the account of Yoshida would in effect be payments for the fish delivered by Yoshida. Yoshida was simply credited upon the general account with the amount of fish delivered and debited with the amounts subsequently paid out for and on his account. These two amounts offset each other, with \$1,010.46 balance in favor of the defendant.

While very meager portions of the record are printed in the briefs, we have examined the entire typewritten transcript and are satisfied therefrom that the appellant is not aggrieved by the judgment and that there has been no miscarriage of justice.

A motion to dismiss the appeal was made by the respondent on the ground that the notice was insufficient by reason of the fail-

ure to give proper notice that an appeal was taken. There is no merit in this motion. The notice conforms to that held sufficient in *Estate of Faber*, 168 Cal. 491, 143 Pac. 737. No point is made of the fact that Yoshida does not appeal.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; LENNON, J.; SHAW, J.; LAWLOR, J.; SHURTLEFF, J.

188 Cal. 252

SAN DIEGO TUBERCULOSIS ASS'N v. CITY OF EAST SAN DIEGO et al.
(L. A. 6544.)

(Supreme Court of California. June 17, 1921.)

1. Municipal corporations ⇨625—Ordinance, prohibiting hospital for contagious and infectious diseases, unreasonable.

An ordinance, prohibiting maintenance anywhere in the city of any hospital for treatment of contagious or infectious diseases, is wholly unreasonable, and so not justified as an exercise of the police power.

2. Injunction ⇨105(2)—Enforcement by prosecution of invalid ordinance against hospitals restrained.

Enforcement by threatened repeated prosecutions of invalid city ordinance against maintenance of a hospital for tuberculosis will be enjoined, as they would cause substantial and irreparable injury, and there is no adequate remedy in the ordinary course.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the San Diego Tuberculosis Association against the City of East San Diego and others. From an adverse judgment, plaintiff appeals. Reversed.

W. Jefferson Davis, of San Diego, for appellant.

Arthur T. French, of San Diego, for respondents.

OLNEY, J. This is an appeal by plaintiff from a judgment rendered against it upon the sustaining of a demurrer to its complaint. The sole question in the case is as to whether or not the facts stated in the complaint make out a cause of action. The facts are:

The plaintiff is a corporation formed for benevolent purposes, and has for some years owned and operated a hospital for the treatment of those afflicted with tuberculosis. The hospital is located in the city of East San Diego, a small municipality adjoining the

city of San Diego proper, and the defendants are the municipality and certain of its officials. On July 8, 1919, the city trustees passed an ordinance, declaring every hospital for the treatment of persons afflicted with contagious or infectious diseases to be a nuisance, making the maintenance of any such hospital within the limits of the city a misdemeanor, making its maintenance a separate offense for each day it was maintained, and providing for punishment by fine or imprisonment for every offense. After the passage of the ordinance, the city authorities commenced a series of criminal prosecutions against the plaintiff, and threatened to arrest and prosecute its officers and employees and to keep on arresting and prosecuting them until the plaintiff should be compelled to close the hospital. Upon the grounds that the ordinance is invalid and that the plaintiff would be irreparably injured in its property right to maintain and conduct the hospital and had no other adequate means of relief, an injunction was asked enjoining the defendants from attempting to enforce the ordinance.

[1] Two questions are presented: First, is the ordinance invalid? and, second, even if it is, can its enforcement by the city officials be enjoined? The answer to both of these questions seems to us plain.

The ordinance can be justified only as an exercise of the city's police power. This power is, of course, very broad, but it is not without limitation. One limitation enforced in numerous cases is that an ordinance purporting to be an exercise of the city's police power "may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business." *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 93 Pac. 70. See, also, *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; *Los Angeles County v. Hollywood Cemetery Association*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75; *In re Smith*, 143 Cal. 368, 77 Pac. 180; *Abbey Land Co. v. San Mateo*, 167 Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

Such being the law, was the present ordinance a reasonable one in its essential feature, that of prohibiting within the city any hospital for the treatment of contagious or infectious diseases? Such prohibition is very different from regulation, and can be justified only on the ground that such a hospital, no matter how well conducted, is a menace

to the public peace, morals, health, or comfort. That a well-conducted, modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent of institutions needs no argument. There is not the slightest danger of the spread of disease from it, and this is the only possible ground on which objection could be made to it. We have no hesitation in holding an ordinance prohibiting the maintenance anywhere within a city of an institution so necessary in our modern life and so beneficent to be wholly unreasonable and invalid. For closely analogous cases see *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, and *Abbey Land Co. v. San Mateo*, 167 Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804.

[2] As to the second question, the enjoining of the enforcement of the ordinance, the rule is thus stated in *Abbey Land Co. v. San Mateo*, just referred to, 167 Cal. on page 440, 139 Pac. on page 1070, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804:

"The doctrine that an action will lie to enjoin the enforcement of an [invalid] municipal ordinance in cases where such enforcement will cause substantial and irreparable injury to private property or private property rights, and in which there is no adequate remedy in the ordinary course of law, is now too well settled to require discussion. The doctrine is stated and the cases supporting it are cited in 2 McQuillin on Municipal Corporations, § 805. See, also, *Dobbins v. Los Angeles*, 195 U. S. 241, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18; *Davis, etc., Co. v. Los Angeles*, 189 U. S. 218, 47 L. Ed. 778, 23 Sup. Ct. Rep. 498; *Ex parte Young*, 209 U. S. 146, 14 Ann. Cas. 764, 13 L. R. A. (N. S.) 932, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441; *Philadelphia v. Stimson*, 223 U. S. 621, 56 L. Ed. 570, 32 Sup. Ct. Rep. 340; *Savage v. Jones*, 225 U. S. 521, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715."

It is evident in the present case that the enforcement of the ordinance would cause substantial and irreparable injury to the plaintiff's property, and that against the threat of its enforcement by the repeated prosecutions which the ordinance permits the plaintiff has no adequate remedy. The case, therefore, comes within the rule stated in *Abbey Land Co. v. San Mateo*, and upon the facts alleged in the complaint the plaintiff was entitled to have the enforcement of the ordinance enjoined.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

136 Cal. 570

(200 P.)

CITY OF OAKLAND v. GREAT WESTERN POWER CO. (two cases.)
(S. F. 9274, 9275.)

(Supreme Court of California. July 28, 1921.)

1. Electricity ⚡—4—Constitutional franchise not invalidated by acceptance of franchise from city.

Where an electric company furnished electricity for lighting under a constitutional franchise under Const. art. 11, § 19, it did not surrender that franchise by becoming a bidder for and accepting a franchise under Oakland City Charter, art. 20, and a provision of the latter franchise for payment to the city of a percentage of the gross receipts is invalid as far as concerns revenues from electricity furnished for lighting purposes.

2. Electricity ⚡—4—Acceptance of a franchise from a city held not to invalidate a prior franchise.

The acceptance of a franchise to furnish electricity for heat and power, sold to the highest bidder, under Oakland City Charter, did not invalidate a former franchise granted the same company under St. 1905, p. 777, so as to require payment of the percentage of the receipts prescribed in the later franchise.

3. Electricity ⚡—10—Franchise payments held not payable on electrical energy delivered outside city limits, though meter within city; "delivery."

Where an electric company was bound by its franchise to pay a percentage of its receipts on all electrical energy sold within the city limits, the city cannot collect for energy delivered to a corporation outside the city limits, even if the meters are within the limits, since "delivery" takes place at the junction of the wires of the customer and of the wires of the seller and not at the meter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver—Delivery.]

4. Electricity ⚡—10—Franchise held not to apply to electrical energy redelivered within the city by customer outside the city limits.

Where, by franchise, the city was to get a certain percentage on sale of electrical energy within the city limits, the fact that a customer of the franchise owner outside the city limits redelivered electrical energy for use within the city limits does not authorize the city to collect a percentage on the energy so redelivered.

In Bank.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by the City of Oakland against Great Western Power Company, a corporation. From judgment partly in favor of plaintiff and partly in favor of defendant, both plaintiff and defendant appeal. Reversed, with instructions.

H. L. Hagan, City Atty., and John Jewett Earle, Asst. City Atty., both of Oakland, for appellant.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for respondent.

WILBUR, J. We adopt as correct the statement of facts and of the issues prepared by Mr. Justice Richards in the opinion of the District Court of Appeal, First District, First Division, as follows:

"This action was instituted by the city of Oakland to recover from the Great Western Power Company, a public service corporation, certain moneys alleged to be due the plaintiff under and by virtue of a certain franchise awarded by it to the defendant in the year 1913, after due proceedings for its advertisement and sale. Under the terms of said franchise the defendant was permitted to occupy and use the streets of said municipality for the transmission and distribution of electricity for furnishing light, heat, and power, and for any and all other uses to which electricity may or can be put; and said franchise provided that for the exercise of the rights and privileges granted thereunder the grantee thereof was to pay to the grantor certain graduated percentages of its gross annual receipts resulting from the sale of electricity under said franchise and during the life thereof within the limits of the municipality.

"Upon the trial of the action, certain stipulations were entered into between the parties as to the specific quantities of electric energy involved during the period covered by the plaintiff's claim for light and heat and power respectively; and also as to the gross annual receipts of the defendant from the sale of these respective forms of electric energy, which stipulations remove these matters from controversy. The issues in dispute between the parties were thus narrowed to the question as to how much of the entire gross annual receipts of the defendant from its sales of electric energy in these several forms within said municipality was received by it for electricity distributed by it under said franchise, and upon which it was bound to pay the percentages to recover which this action was brought.

"The claim of the defendant with respect to this question was at the trial, and is here, that a large portion of its gross annual receipts were derived by it under and by virtue of its possession of certain earlier franchises for the distribution of electricity within said city, which did not provide for the payment of the percentage which the plaintiff here sought to recover; and the defendant made and makes the further claim that as to a certain quantum of electricity sold by it to a particular customer it was not sold or delivered within said city, and hence upon that particular transaction no percentages were due.

"These claims on the part of said defendant were based upon the following facts: In the year 1908, the defendant having been organized as a corporation for the purpose of the distribution of electric energy * * * [installed] a distributing system for the purpose of furnishing electric light to the said city and its inhabitants by virtue of its right to do so un-

der the provisions of section 19 of article 11 of the state Constitution, and, having installed such system, proceeded to furnish said city and its people electricity for lighting purposes under its said constitutional franchise; in the year 1909 the said defendant applied to said municipality for a further franchise for the supply and sale of electric energy in the forms of heat and power within its limits. This application was made under the so-called Broughton Act (Stats. 1905, p. 777), which expressly provided for the granting by municipalities of franchises for the distribution of electric energy for heat and power; and the same was granted by said city. The franchise thereupon issued provided, in accordance with the terms of said act as it read at the time of said grant, that work under the franchise must be completed within 3 years. * * * The term of this franchise was 50 years, and it provided for the payment by its grantees of 2 per cent. of the gross annual receipts derived under its exercise, commencing five years after the date of the franchise and continuing at said rate thereafter during its life. The defendant began operations under this franchise, using in the main the same distributing system employed by it under its constitutional franchise for furnishing light within said city. In the year 1911 section 19 of article 11 of the state Constitution was so amended as to eliminate the so-called constitutional franchise provision thereof, and to commit to municipalities the power to establish and operate their own public works for supplying light, water, power, heat, etc., to their inhabitants, or of granting franchises to private persons or corporations so to do under such conditions as might be prescribed in their organic law. Following this amendment to the Constitution the serious question arose as to whether the constitutional franchise or privilege, which was in the course of exercise by many public service corporations in most of the municipalities of this state, had not been thereby terminated, at least in so far as any future extension of their distributing systems established and in use thereunder was concerned. This controversy came before the Supreme Court of this state in the Matter of Russell, on Habeas Corpus, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152, wherein it was decided that the constitutional privilege to occupy the streets of municipalities, exercised under the provisions of the original section of the Constitution, could not be held to cover or permit extensions of a distributing system in operation thereunder after said amendment, and to streets not occupied and used for such purposes prior to the taking effect of such amendment. The decision of our Supreme Court to this effect was handed down in September, 1912. The matter was thereupon taken before the Supreme Court of the United States upon a writ of error for final determination, and was determined by it in the case entitled Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 712, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282, decided April 6, 1914, in which decision the latter court disapproved the conclusion of the Supreme Court of this state, and in so doing decided that the amendment to the Constitution of California above referred to, and the ordinance of the city of Los Angeles passed subsequent thereto, could not be permitted to in any wise impair constitutional

franchises in course of exercise prior to such amendment, and under which the holders thereof were entitled to hold, maintain, and extend their distributing system established and in operation prior to such amendment.

"The trial court in the instant case took cognizance of the matters involved in these two decisions, and made an express finding to the effect that during the pendency of the Matter of Russell in the Supreme Court of this state and in the Supreme Court of the United States during the years 1912, 1913, and 1914, the defendant herein took an active part in the presentation of said matter on behalf of said Russell and with a view to having his contentions sustained. By this finding the trial court placed the defendant herein in the attitude, during the years above mentioned, of actively and strenuously contending for the full validity of its constitutional privilege or franchise for supplying electric light to the city of Oakland and its inhabitants which it had been exercising prior to said amendment to the Constitution, and of its full right to make extensions of its distributing system within said city for lighting purposes under said franchise and notwithstanding said amendment. The significance of this finding of the trial court consists in the fact that during the year 1913, and specifically upon the 22d day of March of that year, the said defendant made and filed an application before the city council of the city of Oakland, expressing the desire of the defendant to acquire a municipal franchise from said city for the transmission and supply of electricity for use in the forms of light, heat, and power, and for all other uses to which electricity may or can be put, and for the erection, construction, and maintenance and operation of such a distributing system within said city as would enable it so to do; and said defendant in its said application requested said official body to take such legal steps as would be proper to enable the applicant to acquire such franchise. This application was accompanied with a form of ordinance suggested for adoption, embodying the form of the desired franchise, and providing for such advertisement and sale thereof as was required by law. The city council of said city acted upon said application favorably by adopting the proper ordinance for the advertisement and sale of said franchise substantially in the form suggested by the defendant, and said franchise was thereafter duly offered for sale. The only bidder therefor was the defendant, and its bid conformed to the terms of the proposed franchise in respect to the percentages of gross annual receipts of the successful bidder therefor arising from its exercise. On the 8th day of June, 1913, the said city council, by an ordinance regularly adopted, duly awarded to the defendant said franchise, and the said defendant then and there duly accepted and received and has ever since possessed and owned the same.

"The trial court, having found substantially the foregoing facts, made and filed its conclusions of law thereon, and in so doing held in effect as follows: As to the gross annual receipts of the defendant derived through its distributing system from the sale and supply of electric light to the city of Oakland and its inhabitants, the court held that these receipts of the defendant were derived by it through its ownership, possession, and exercise of its con-

stitutional right, privilege, or franchise for supplying electric light to said city and its people, and that constitutional right, privilege, or franchise was not waived or surrendered or withdrawn by said defendant through its application for or by the grant to it of the municipal franchise of 1913; and hence that none of said gross annual receipts of the defendant derived from the sale and supply of light to said city or its people were derived from or through the exercise of said last-named franchise, and that the city of Oakland, the plaintiff herein, was therefore not entitled to collect or receive any portion of defendant's annual receipts derived from its sale and supply of electric light within said city. The trial court further held that as to the municipal franchise for the sale and supply of electric energy in the form of heat and power granted to said defendant by said city on the 25th day of October, 1909, and under which it had thereafter engaged in such sale and supply of electric heat and power in said city, the said exercise of such franchise and its operation thereunder ceased by virtue of the grant to an exercise by said defendant of the franchise sold and granted to it on the 9th day of June, 1913, and that said defendant had not since said last-named date sold or delivered any electric energy for heat and power within said city under said franchise of 1909, but that all of its sales and deliveries of electric heat and power within said city had been made under and by virtue of the franchise of June 9, 1913, and that all of the defendant's gross annual receipts derived from the sale and supply of heat and power within said city were received by it under and by virtue of the exercise of the said franchise of 1913, and hence that the said plaintiff was entitled to have and recover from said defendant the percentage of said gross annual receipts derived by it from this last-named source. Judgment was therefore ordered in favor of the plaintiff for the aggregate amount of said percentages. The trial court further held that as to certain sales and deliveries of electric energy for use otherwise than for lighting purposes to the Pacific Gas & Electric Company, and designated as the 'Moraga' sales, such electric energy was delivered to said last-named corporation within the limits of the city of Oakland, and hence that the plaintiff was entitled to receive the percentages stipulated in its franchise of 1913 upon the gross annual receipts of said defendant derived from such so-called 'Moraga' sales; and ordered and entered judgment accordingly for the accumulated sum of such percentages.

"From the judgment of the trial court in plaintiff's favor as above set forth the defendant has appealed; while from that portion of said judgment which is in the defendant's favor, in so far as the court has denied to said plaintiff the right to collect any percentages upon the gross annual receipts of the defendant derived from the sale and supply of electric light within said city, the plaintiff has also taken an appeal. The record in these two appeals has been by stipulation of the parties presented in one transcript, and it is agreed that they may be heard and determined together.

"The sole question presented upon the plaintiff's appeal is that relating to the correctness of the ruling of the trial court upholding the validity and vitality of the defendant's so-called constitutional franchise, and declaring the de-

fendant's sales and deliveries of electric light within the city of Oakland to have been wholly made thereunder and not under or by virtue of the franchise of 1913. There are two contentions of the defendant upon its appeal; the first being that the trial court was in error in its holding that the defendant's deliveries of electric energy in the forms of heat and power to the city of Oakland and its inhabitants were made under the franchise of 1913, and its second contention being that as to the 'Moraga' deliveries the uncontradicted evidence showed that these were made outside of the limits of the city of Oakland, and that said defendant was therefore not liable to pay any percentages upon its gross annual receipts derived from that source."

The Gross Receipts from Electricity Furnished for Lighting Purposes.

[1] It is admitted that under the decision of the United States Supreme Court in *Russell v. Sebastian*, supra, the Great Western Power Company at all times after 1908 had a franchise which enabled it to furnish electricity for lighting throughout the whole city of Oakland. The contention of the city is that by the application for the franchise in 1913 and by the acceptance of a franchise which covered the whole city (with the exception of a certain district), the defendant thereby surrendered its constitutional franchise in lieu of the franchise granted in 1913. Whatever justification there might be for this theory, if the granting of the franchise of 1913 had been a result of mutual bargaining between the parties, assuming that they stood on the same basis as private persons negotiating for similar rights and entering into a new contract with relation to those rights, there is absolutely no justification for the extension of this theory to the facts involved in this case, where the grant of the franchise of 1913 as well as that of 1909 was required to be to the highest bidder at public auction. The applications of the defendant to the council of the city of Oakland to offer for sale at public auction the form of franchise, if he bids at the sale, proposed by it, merely set in operation the machinery provided in the charter act for the sale of franchises. Charter of Oakland, art. 20 (Stat. 1911, p. 1628). The applicant for such a franchise stands upon no different footing from any other individual in the community who may be a prospective buyer of the franchise.

The charter in effect at the time of the sale of the 1913 franchise provided that the franchise should be sold to the "bidder offering to pay to the city during the life of the franchise, permit or privilege, the highest percentage of the gross annual receipts received from the use, operation, or possession of the franchise, permit or privilege; provided, that such percentage shall not be less than two per cent. of said gross annual receipts the first five years," etc. Section 146,

subd. 2, art. 20, of the Charter (Stat. 1911, p. 1629).

It is difficult to see upon what theory the purchase by the defendant of this franchise, either directly from the city, or from some purchaser of the franchise at public auction, could in any wise affect a right which it theretofore owned. There is no provision in the franchise requiring the surrender to the city of other franchises. There was no agreement in the application or at any other time on the part of the defendant to surrender such franchise, and the charter does not require such surrender. We cannot understand how the purchase of such franchise by the defendant can be justly made a basis for a claim that it thereby agreed to pay 2 per cent. of the gross returns from the operation of the properties and franchises theretofore owned and operated by the purchaser. On the contrary, the charter required that the bidding should be on the basis of the annual receipts derived from the possession of the franchise so purchased (subdivision 2, *supra*), and not from the possession of prior franchises. Neither the franchise granted by the city nor that granted by the Constitution were exclusive. The ordinance granting the franchise expressly provided that it was not an exclusive privilege. If the franchise offered for sale had been purchased by some competitor of the defendant, there was no reason why the defendant could not continue to operate under its constitutional franchise and no legal reason why it could not again apply to the council to advertise a new blanket franchise covering the city. The whole scheme for the sale of franchises at auction upon competitive bidding is opposed to the theory that the purchaser of the franchise surrenders any right it theretofore had, merely by purchase at such sale. It is not contended that the defendant surrendered its rights by the application for the franchise, nor would it be contended that it surrendered its rights to some other bidder for the franchise if it had been unsuccessful in the competition. At what point, then, can it be said that the defendant surrendered its constitutional franchise to the city?

The answer presented by the city is, "At the time it acquired the new franchise," but this answer ignores the fundamental requirement of competitive bidding for all franchises.

The city makes the point that certain sections of the ordinance granting the franchise of 1913 show an intention to substitute the new franchise for the old. For instance, the franchise of 1913 contains an agreement by which the grantee obligates itself to sell to the city, for cash, all property used in the enjoyment of the franchise. Section 16. This provision of the franchise was required by the charter to be inserted in every ordinance

granting a franchise. Charter of Oakland, § 145, art. 20, *supra*.

This point is answered by the fact that the ordinance granting a franchise is not the result of mutual bargaining, from which it might well be inferred that the defendant was agreeing to sell all its property to the city, but is a general proviso applicable alike to all prospective purchasers, and therefore to be construed only as applicable to property used in the exercise of the particular rights granted by the franchise and not otherwise owned or acquired. To require a purchaser owning a perpetual franchise to distribute electricity for light and another to distribute electricity for power and heat to agree to sell that system at the end of 35 years, long before its rights to so distribute electricity for light, heat, and power terminated under its other franchise, as a condition of bidding for the new 1913 franchise, would be obviously putting such a purchaser at a great disadvantage as compared with other bidders owning no system and no rights, and would require a consideration from it wholly out of proportion to that tendered by other bidders. The contention that the defendant, by bidding in this franchise, in effect agreed to surrender a perpetual franchise, and a 50-year franchise, and agreed to sell its property in 35 years, and that the agreement so to do is a consideration for the new franchise, if sustained, shows that the city was requiring from this bidder a consideration it had no right to require or to exact, for the only consideration the city was authorized to accept in such competitive bidding was a percentage of the gross receipts to be derived from the franchise sold. The basis upon which the percentage was to be computed is the same in the case of each bidder. This contention of the city cannot be sustained if the fundamental principle of equal competitive bidding for franchises be conceded, as it must be in the light of the express requirements of the charter. Section 140, subd. 5, art. 20, *supra*. Furthermore, as its bid of percentages would cover the receipts from its plant and distributing system already installed, which amount the city is seeking to recover in this action, while another competitor would be compelled to pay only on the revenue from its plant subsequently installed, it is apparent that a bid of 2 per cent. from a corporation with a larger business already developed would be vastly greater in proportion than that of a similar percentage from a bidder that might take years to develop its system to the point already attained by its competitive bidder.

On the other hand, suppose that the defendant's constitutional franchise required an annual payment to the city of 5 per cent. of the gross returns, would it be contended that the defendant, by bidding in a blanket franchise requiring no payment for three

years, and 2 per cent. thereafter, would thereby be released from the payments due under its original franchise where it continuously occupied the streets with its poles and wires and conducted its business? Assuredly not. If it did not terminate its duties under the old franchise, it is equally clear that the mere bidding in of such a blanket franchise did not terminate its rights thereunder.

Other points of the city based upon an analysis of the terms of the franchise of 1913 are met by the same considerations, and therefore need not be considered in detail.

There is no basis whatever, in law or in fact, for the contention that the defendant's rights and duties under its old franchise terminated by the acceptance of the new. The customers of the defendant were entitled to be served under the terms of the old franchise, a right derived by them from the Constitution, and the people in the district not yet served by the defendant were entitled to the same privilege. *Russell v. Sebastian*, supra. These mutual rights and duties should not be deemed impaired or terminated by mere inferences derived from circumstances that defendant applied for and subsequently bid in a new franchise duplicating in part rights it already enjoyed and was entitled to continue to exercise. The situation presented by the record is simply this:

The defendant at all times since 1908 has had the right, by an express grant to it by the Constitution of the state, to serve the inhabitants of the city of Oakland with electricity for lighting purposes.

All revenues derived from the sale of electricity for light are revenues derived by the corporation by reason of its constitutional franchise and not by reason of the franchises subsequently obtained from the city for the distribution of electricity for lighting purposes.

If it should be held that the franchise of 1913 had any effect upon the prior right of the bidders, it would follow that there could be no equal and competitive bidding.

The charter expressly provides that franchises shall be so framed that there shall be no direct or indirect restriction upon free and open competition in bidding therefor. Article 20, § 140, subd. 5, supra.

The Great Western Power Company, if compelled by its bid to surrender its perpetual franchise for the distribution of electricity for lighting purposes, could not afford to bid as much for the franchise as some other bidder who had no such interest at stake, and the same would be true with reference to any other owner of a franchise which would be included in the blanket rights covered by the franchise of 1913. Hence no such surrender can be implied.

The city relies very strongly upon the case of *Hanford v. Hanford Gas, etc., Co.*, 169 Cal. 749, 147 Pac. 969, while the defendant relies

with equal assurance upon the decision in the *Town of Suisan City v. Pacific Gas & Electric Co.*, 35 Cal. App. 380, 170 Pac. 1078. We will refer to the former as to the *Hanford* and to the latter as the *Suisan Case*. The question involved in the *Hanford Case* is altogether different from that involved in the case at bar. In that case suit was brought by the city to recover from the holder of a franchise for heat, light, and power the 2 per cent. of the gross annual receipts arising from the use of the franchise. The defendant demurred to the complaint, making no issue upon the allegation of the complaint, that the receipts sought to be recovered were derived from the franchise, but claiming that by reason of its holding a constitutional franchise it had the right to distribute heat and power as well as light. This contention was determined against the defendant, and it was held that the franchise gave the right for heat and power distribution, something which the company did not possess under the Constitution. The question answered in that case is thus stated in the decision: "Did the defendant, in accepting this franchise from the city of Hanford, acquire anything of value?" Instead of supporting the contention of the plaintiff it is apparent from the decision, taken as a whole, that the court considered that there was no inconsistency between the grant for light, already owned by the gas company, and the right to distribute gas for light and power purposes, covered by the new franchise.

The *Suisan Case* was an action similar to the one at bar brought by the city to recover a percentage of the gross receipts from a franchise granted by the board of trustees of *Suisan* for light and power purposes to one *Prior*, who had theretofore been distributing electricity for lighting purposes under the constitutional franchise. It was held that the grant by the city for lighting purposes was void and in conflict with the constitutional franchise, and that the obligation to pay 2 per cent. did not arise on the electricity distributed for lighting purposes. A petition for hearing in this court was denied in the *Suisan Case*. The only distinction between that case and the one at bar favorable to the contention of the plaintiff is that subsequent to the grant of the franchise in the *Suisan Case* the Constitution of the state was amended. Const. art. 11, § 19. On the other hand, it is urged that the city of Oakland was not by such amendment vested with authority to grant franchises for the distribution of electricity for lighting purposes, and therefore that the rule in the *Suisan Case* is still applicable. In view of our conclusion that the defendant has the right to furnish electricity for lighting purposes under its constitutional franchise, and is not required to pay 2 per cent. of its gross return therefrom, we deem it unnecessary to further discuss the

authoritative force of either the decision in the Hanford or the Suisan Case. Neither of these cases is opposed to the conclusion reached by us.

Rights to a Percentage of the Gross Receipts under the Franchise of 1909.

[2] The question is whether the franchise granted the defendant in 1909 by sale at public auction in accordance with the Broughton Act (Stat. 1905, p. 777) is still in effect, or whether the acceptance of the franchise of 1913 operated to supersede the prior franchise.

What we have said with reference to the effect of the grant of the franchise of 1913, upon the constitutional franchise theretofore owned by the defendant is largely determinative of the question here involved. The franchise of 1909 was for a 50-year period and for the distribution of electrical energy for heat and power purposes only. It was believed by the defendant that the right to continue construction under this franchise terminated in 3 years. The new franchise, so far as the distribution of electricity for heat and power was concerned, was desired to cover those districts in the city not theretofore occupied by the power lines of the defendant, in view of the termination of the right to continue construction under the franchise of 1909. There is no dispute as to the amount which would be due on the theory that the ordinance of 1909 remained in full force and effect as these amounts were stipulated before the trial court. What we have said with reference to competitive bidding applies with equal force to the rights of the defendant under the franchise of 1909, although the Broughton Act differs somewhat from the charter. If, as a condition of bidding, or as a result of the acceptance of the new franchise, the rights of the defendant under the old franchise of 1909 were thereby surrendered or lost, then it would follow that the bidding was not competitive. The defendant could only bid at the hazard of losing rights it already possessed, while other persons or corporations could bid without such hazard. There is no inconsistency in the ownership by the defendant of rights under several distinct franchises. The parties have been able to stipulate in dollars and cents the return to the city from the respective franchises, if all are still in existence, and there is nothing in the nature of such franchises to justify the conclusion that the acceptance of the later franchise was a surrender of the earlier franchise. The only difference between the defendant as a purchaser of the franchise and any other bidder is that the acceptance of the franchise by the defendant enables it to furnish the heat and power to customers and in districts not theretofore served under the franchise of 1909 without duplicating poles

and wires in the districts theretofore served.

The conclusion of the trial court was erroneous upon this branch of the case. This conclusion is fortified by the fact that the franchise of 1913 made no reference to existing construction, but was framed upon the theory of additional and new construction to be commenced within four months of the date of the granting of the franchise, and therefore had no application to rights under a previous franchise and construction already erected thereunder.

[3] As to the percentage upon deliveries to the Pacific Gas & Electric corporation at Moraga. It appears from the evidence without question that the defendant corporation sold electric energy to the Pacific Gas & Electric Company. A portion of this power was delivered from the power lines of the defendant company to the power lines of the Pacific Gas & Electric Company at a point named Moraga, outside of the city limits of the city of Oakland. Under both the franchises of 1909 and 1913 the payment of a percentage by the defendant to plaintiff was only "upon the gross annual receipts resulting from the sale of electric energy delivered within the limits of the city of Oakland." The contract between the defendant and the Pacific Gas & Electric Company provided for a delivery "at the junction of the power company's main electric transmission lines and the main electric transmission lines of the consumer, about eight miles southeasterly from said Ridge station." This point is known as Moraga. It was also provided that the meters and measuring instruments for measuring the power delivered at Moraga should be installed in the power company's electric substation in said Alameda county known as its "Fourth Avenue substation." It is clear, however, that so long as the electricity remained on the power lines of the defendant it was not delivered to its customer, the Pacific Gas & Electric Company. Obviously, the point of delivery was the junction of the lines of the two systems, as was expressly provided in the contract between them. The fact that there was power line loss between the measuring station and the point of delivery is of no significance whatever. Such loss is a known quantity, and the amount of electricity delivered at the point of intersection of the two power lines could be as accurately determined by a meter several miles away as by a meter at the point of delivery. Both the contract and the physical facts demonstrate that the point of delivery was outside the city of Oakland and consequently not within the terms of the franchise.

[4] A point is made by the plaintiff that some portion of the power delivered by the defendant to the Pacific Gas & Electric corporation is subsequently returned by that corporation and distributed within the limits of the city of Oakland. Obviously, the de-

fendant is not concerned with the distribution of power by its consumer, and such deliveries by the consumer are not deliveries within the meaning of the franchises held by the defendant. It may be said, however, in connection with this point, that the 12,000 kilowatt hours delivered by the defendant to the Pacific Gas & Electric Company is mingled with the other current flowing in the wires of the Pacific Gas & Electric Company derived from independent sources of power, and that only about 500 kilowatt hours of the total of 25,000 kilowatt hours in the lines of the Pacific Gas & Electric Company are subsequently used within the city of Oakland. This quantity, however, is immaterial to any point involved in this litigation. The court was in error in holding the defendant liable for a percentage of the gross annual returns upon the power delivered at Moraga.

In the event that it was decided that the defendant owns and holds its constitutional light franchise and its franchise of 1909 and 1913, and that the sales of electricity delivered at Moraga are not to be considered in determining the gross earnings of the defendant company, the proper amount of the judgment in favor of the plaintiff and against the defendant was stipulated.

Judgment reversed, with instructions to the trial court to enter judgment in accordance with the stipulation of the parties as to the amounts due under the law as determined by this court.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

186 Cal. 634

GRAY et al. v. JANSS INV. CO. et al.
(L. A. 6235.)

(Supreme Court of California. Aug. 8, 1921.)

1. Brokers ⚡86(1)—Evidence held to show defendant brokers agreed to negotiate exchange of properties listed with them and plaintiff brokers and divide commissions.

In an action by brokers against a realty company to recover half the commission paid the latter by both parties to an exchange of realty, evidence held sufficient to support a finding that plaintiffs and defendants agreed to co-operate in negotiating the exchange, which agreement was modified to permit defendants to negotiate the exchange alone and collect commissions from both parties for the joint benefit of plaintiffs and defendants.

2. Appeal and error ⚡1071(1)—Variance of agreement as found by trial court from that pleaded not reversible error, where both arose out of same transaction.

In an action by real estate brokers to recover half the commissions paid to a realty company, to which they intrusted the negotia-

tion of an exchange of their principal's property for property listed with such company, under an agreement that defendants would collect the commissions from both principals and divide the same with plaintiffs, though the trial court found that the agreement was that each should receive the commission coming from their respective principals, such variance from the pleaded agreement could not have so misled or surprised defendants as to place them at a disadvantage, and thus warrant the reversal of the judgment for plaintiffs; both agreements relating to and arising out of the same transaction.

3. Appeal and error ⚡171(3)—Where case tried without objection on theory other than that raised by pleadings, neither party may urge such error on appeal.

Where an action between real estate brokers for the recovery by plaintiffs of half the commission paid to defendants by their respective principals on an exchange of properties, the negotiation of which was intrusted to defendants alone under an agreement that they should collect the commission from both principals and divide the same with plaintiffs, was tried, with the acquiescence of both parties, on the theory that the agreement was that each should receive the commission coming from their principal, such variance from the pleaded agreement was not fatal to the judgment for plaintiffs; the rule being that, where the court and the parties try the action on a theory not strictly in accord with the issues raised by the pleadings, and the court on evidence adduced to that issue and received without objection on the ground of variance finds in accordance therewith and on the theory that it was addressed to a material issue in the case, neither of the parties will be heard to say on appeal for the first time that there was no such issue.

4. Brokers ⚡43(2)—Oral agreement to exchange principals' properties and divide commissions not within statute.

An oral agreement between real estate brokers to co-operate in exchange of properties of their principals and divide commissions, as subsequently modified to permit one only to negotiate the exchange, collect commissions from both principals and divide them is not within the statute of frauds (Civ. Code, § 1624, subd. 6), neither party undertaking to pay the other a commission, but merely to divide the commission earned.

5. Brokers ⚡66—May recover commission paid by principal to other brokers to whom negotiation of exchange was intrusted regardless of whether they could have collected same from such principal.

Where plaintiff brokers, to promote exchange of principal's property, confided to defendant brokers the privilege of conducting negotiations for exchange for property listed with defendants, the latter became the agent of the former in negotiating plaintiff's end of the exchange, and the commission received by them from plaintiff's principal was received for and belonged to plaintiffs, who could recover same whether or not, in the absence of a valid agreement of employment between

them and their principal, they would have been entitled to such commission had they conducted the exchange alone.

6. Brokers ⚡66—**Partnership** ⚡15—**Defendant broker, agreeing to pay another broker commission received from latter's principal on exchange of properties, must convey land accepted as commission, or value thereof; agreement held to create partnership.**

Where plaintiff brokers intrusted to defendant brokers negotiation of an exchange of properties of their principals, under agreement that defendants should collect commissions from both principals and pay to plaintiffs commission collected from their principal, and defendants accepted from plaintiff's principal, as commission, a conveyance of part of the land, plaintiffs were entitled to a conveyance of the land so received by defendants, or, if the latter were without unincumbered title, to the value thereof, and the agreement, though it covered but a single transaction, created a partnership between plaintiffs and defendants.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by E. A. Gray and others against the Janss Investment Company and others. Judgment for plaintiffs, and defendants appeal. Reversed, with directions.

Lloyd W. Moultrie, of Los Angeles, for appellants.

James E. Kelby and Kemp & Clewett, all of Los Angeles, for respondents.

LENNON, J. In this action the plaintiffs, real estate brokers, sued the defendants, also real estate brokers, pursuant to the terms of an alleged oral agreement, for the recovery of one-half of a commission alleged to have been paid to the defendants by both parties to an exchange of real properties.

The plaintiffs' complaint alleged, among other things, that, as a result of several conferences between the plaintiffs and defendants concerning the exchange of the said real properties, an agreement was entered into between plaintiffs and defendants whereby any commission or compensation which should be earned and paid should be equally divided between the plaintiffs and defendants. Subsequently, and as the result of further conferences and negotiations between the plaintiffs and the defendants, it was agreed between them, so the complaint alleged, that for the purpose of more effectively promoting an exchange of said real properties the plaintiffs would not actively participate in the exchange negotiations, and that the same should be conducted solely by the defendants, who thereupon and in consideration thereof promised and agreed with the plaintiffs to charge and collect, upon the consummation of the contemplated exchange, a commission from both owners and to di-

vide the same with plaintiffs. Thereupon and thereafter, the plaintiffs confided the entire management and control of the negotiations for the exchange of the said properties to said defendants. In short plaintiffs' complaint proceeded upon the theory that the agreement between plaintiffs and defendants as formulated and made was, in effect, one of copartnership in the promotion of the proposed exchange and a division of the commissions between the plaintiffs and the defendants which were to be collected by the defendants alone from both principals. The defendants consummated an exchange of the said properties and collected from each of the respective owners of the said real properties a large commission and compensation.

The complaint further alleged that defendants concealed from plaintiffs the character, extent, and amount of the commissions so received by them from both owners of the said real properties, and that although plaintiffs demanded an accounting therefor the defendants refused to acknowledge plaintiffs' claim of an interest in any part of said commissions so received.

The facts adduced in support of plaintiffs' case are substantially these: The defendants, the Janss Investment Company, doing business as real estate brokers in the city of Los Angeles, were the agents for the owners of certain lands in the states of Idaho and Utah, who were desirous of exchanging the same for income property situate in the city of Los Angeles, and accordingly listed said lands with the defendants for such an exchange. At about the same time, the owners of a certain apartment house in the city of Los Angeles, known as the Bowers Hotel, listed the same with the plaintiffs for exchange, and one of the plaintiffs, accompanied by the owner of the Bowers Hotel, inspected the same for the purpose of acquiring data to be used in negotiating an exchange of said property. Subsequently, and prior to the time of plaintiffs entering into negotiations with the defendant Janss Investment Company, the plaintiffs made several separate endeavors to sell or exchange the Bowers Hotel property, and with that end in view said property was shown to several prospective purchasers. Some time in the month of June, 1917, after the Bowers Hotel property had been listed with the plaintiffs, a Mr. Shiffer, a real estate broker operating in the city of Los Angeles, inquired of the plaintiffs if they had listed with them and could submit for exchange for Idaho and Utah lands income business property in the city of Los Angeles. Plaintiffs replied that they had listed with them several such properties, including the Bowers Hotel property. Thereupon Mr. Shiffer stated that he was making inquiries for Mr. Kendall of the Janss Investment Company, and upon the fol-

lowing day he brought Mr. Kendall to the office of the plaintiffs, who then and there submitted to Mr. Kendall, for exchange, a list of several properties situated in the city of Los Angeles, including the Bowers Hotel property. Kendall mentioned the Idaho and Utah lands, and, after giving a description of the same to plaintiffs, said: "I think that that Bowers Hotel will interest my party." Plaintiffs thereupon prepared and presented to Mr. Kendall for the defendant Janss Investment Company a typewritten detailed description of the Bowers Hotel property, and thereafter were in frequent communication with Mr. Kendall concerning the details of the proposed exchange. The plaintiffs and defendants had several conferences for the purpose of getting their principals together on a proposition for an exchange of their respective properties. These conferences, conducted by the plaintiffs and the defendant Kendall as agent of the Janss Investment Company, culminated in a proposal from Kendall, accepted by plaintiffs, that plaintiffs and defendants work together in negotiating an exchange of the properties of their respective principals. At that time, and as a part of these conferences, the defendant Janss Investment Company, through their agent Kendall, furnished plaintiffs with a description and list of the properties in Idaho and Utah which were to be exchanged for the property of the plaintiffs' principal situated in the city of Los Angeles. Thereupon the plaintiffs presented the proposition of exchange to their principal, the owner of the Bowers Hotel in Los Angeles. It was understood and agreed between plaintiffs and defendants in the first instance that the plaintiffs for their commission would look to their principal, the owner of the Bowers Hotel, and that the defendants for their commission would look to their principals, the owners of the Idaho and Utah lands.

While the exchange negotiations were pending, and prior to the time that the said Idaho and Utah landowners examined the Bowers Hotel property, the defendant Kendall, as agent for the Janss Investment Company, stated to the plaintiffs that complications would be avoided if the Janss Investment Company handled the deal alone, and for that reason requested that the plaintiffs permit the Janss Investment Company to handle the whole of said deal alone, and then and there stated to the plaintiffs that such an arrangement would make no difference to the plaintiffs in so far as their compensation was concerned, and, in effect, said further that the defendant Janss Investment Company would protect the plaintiffs in the adjustment and collection of their commission from the owners of the Bowers Hotel property. The plaintiffs acceded to Kendall's proposition in this behalf, and he thereupon requested, and the plaintiffs thereupon con-

sented, that he alone be permitted to show the Bowers Hotel property to his principals.

After the consummation of the exchange, the defendant the Janss Investment Company, in lieu of a cash commission of \$3,500 from the owner of the Bowers Hotel property, accepted, so the defendant Kendall testified, with said owner's consent and concurrence, from the Idaho and Utah landowners, a conveyance of 160 acres of land, admittedly worth \$30 an acre. It is a fair inference from the evidence adduced upon the whole case that said 160 acres of land would otherwise have been conveyed to the owner of the Bowers Hotel property as a part of the lands given in exchange for his said property. The defendant Janss Investment Company, received the sum of \$720 in cash from the Idaho and Utah landowners as reimbursement for expenditures made in negotiating the exchange, and for their commission, in negotiating the Idaho and Utah landowners' end of the exchange, received from said owners a conveyance of 35 acres of land situated in the state of Utah, presumably of the same value as the 160 acres agreed to be conveyed to said defendants as a commission from the Bowers Hotel end of the exchange. In addition to said 35 acres, the said defendants entered into an agreement with Idaho and Utah landowners, whereby, as further compensation and in lieu of a cash commission for making said exchange, defendants were to receive from said Idaho and Utah landowners, on demand, a conveyance of an additional 135 acres of land in the same location, and presumably of the same value as the 35 acres already conveyed to said defendant.

The defendant Janss Investment Company did not then nor thereafter communicate to the plaintiffs the fact that they had adjusted said commissions earned in making said exchange, and on the demand for a statement from the said plaintiffs as to the amount of commissions collected from the owners of the Bowers Hotel property refused to disclose to plaintiffs the amount or character of the commissions earned by them.

Kendall, the agent of the Janss Investment Company, among other things, testified to the arrangement he had made with plaintiffs concerning their commission, to the effect that it was the original agreement with the plaintiffs that they should receive their commission from the owner of the Bowers Hotel, and that the Janss Investment Company should receive its commission from the owners of the Idaho and Utah lands. Kendall also testified that at the inception of the exchange negotiations and for some little time thereafter he considered that the plaintiffs had an interest in whatever commissions might be earned and collected for making the exchange, but that immediately before the deal was closed he concluded, by a process

of deduction all his own, that the plaintiffs were not entitled to any consideration at all in the matter of the sharing of commissions as originally agreed upon.

From these among other facts, the trial court made its findings to the effect that the agreement between the plaintiffs and the defendants was that the defendants alone should conduct the negotiations for the exchange; that the plaintiffs should receive whatever sum was paid as a commission by the owners of the Bowers Hotel property; that the defendant Janss Investment Company should receive whatever sum was paid as a commission by the Idaho and Utah landowners; and that the said defendant was to make arrangements for the payment of the commission of the plaintiffs in accordance with said agreement.

The trial court also found the value of said 160 acres of land, which by agreement were to be conveyed to the Janss Investment Company as a commission from the Bowers Hotel end of the exchange, was the sum of \$3,500. No further question is raised in the case, and none is involved upon the record before us, of the validity of the agreement to divide the commissions being void upon the grounds of public policy because made secretly and without the knowledge of either or both principals.

[1, 2] Clearly, the evidence adduced in behalf of the plaintiffs' case, as hereinbefore epitomized, not only supports the finding of the trial court to the effect that the plaintiffs and defendants entered into an agreement whereby they would co-operate in an endeavor to negotiate an exchange of the properties of their respective principals, but warrants as well the further finding that such an agreement was subsequently modified to the extent of permitting the defendant to negotiate the exchange alone and collect the commissions therefor from both parties for the joint benefit of both plaintiffs and defendants. Strictly construed, the trial court's finding that the agreement of the parties was that the plaintiffs should receive the commission coming from the Bowers Hotel end of the exchange, and that the defendants should receive the commission coming from the Idaho and Utah landowners, is nonresponsive to the issue raised by the pleadings that the agreement of the parties was that the defendants would collect the commission from both principals to the exchange and divide the same with the plaintiffs.

[3] This variance, however, is not found in the proof of a totally dissimilar and independent agreement from that pleaded in the plaintiffs' complaint. The most that can be said is that the agreement found varies in its terms from the pleaded agreement, but the fact remains that both agreements were related to and arose out of the same transaction. Consequently, the variance could not

have so misled or surprised the defendants as to have placed them at a disadvantage, and, that being so, the variance cannot be held to warrant the reversal of the judgment. *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267. In any event, this variance cannot be held to be fatal to the judgment when measured by the fact that, apparently, the case was tried by the trial court with the acquiescence of counsel for both parties, upon the theory that the agreement of the plaintiffs and defendants was the agreement found by the trial court, rather than the precise agreement pleaded in the plaintiffs' complaint. Conceding, therefore, a variance between the pleaded agreement and the proven and found agreement, still the defendants will not be heard to complain of the same after judgment, for it is the rule that where the trial court and the parties to the action proceed, as the record shows was done in the instant case, to a trial of the action upon a theory not strictly in accord with the issues raised by the pleadings, and the trial court, upon evidence adduced to that issue, and received without objection upon the ground of variance, finds in accordance with that evidence and upon the theory that it was addressed to a material issue in the case, neither of the parties will be heard to say on appeal for the first time that there was no such issue. *Clark v. Allen*, 125 Cal. 276, 57 Pac. 985; *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459; *Frear v. Sweet*, 118 N. Y. 454, 23 N. E. 910; *Kaufman v. Bloch*, 5 Misc. Rep. 404, 25 N. Y. Supp. 758.

[4] There is no merit in the contention that the agreement between the plaintiffs and defendants is void because not in writing. The agreement is not one to pay a commission for the sale or exchange of real property. None of the parties to the agreement undertook to pay the other a commission. They obligated themselves in the first instance to do no more than co-operate in the exchange and divide the commissions earned therefor, and the subsequent modification of the original agreement, whether as pleaded in the plaintiffs' complaint or as found by the trial court upon the issue raised by the evidence, left it still a co-operation agreement between broker and broker to divide commissions, and consequently does not fall within the inhibition of subdivision 6 of section 1624 of the Civil Code. *Gorham v. Helman*, 90 Cal. 346, 27 Pac. 289; *Casey v. Richards*, 10 Cal. App. 57, 101 Pac. 36; *Johnston v. Porter*, 21 Cal. App. 97, 131 Pac. 69; *Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 175; *Baker v. Thompson*, 14 Cal. App. 175, 111 Pac. 373.

[5] Plaintiffs having confided to the defendants at the latter's request and for the purpose of more effectively promoting the exchange the privilege of exclusively conducting the exchange negotiations, the defendants thereby became the agent of the

plaintiffs in negotiating the Bowers Hotel end of the exchange. Therefore, as between the plaintiffs and the defendants, the commission received by the defendants from the Bowers Hotel end of the exchange was received for and belonged to the plaintiffs (*Kohn v. Jacobs*, 4 Misc. Rep. 265, 23 N. Y. Supp. 1033), and, having been received by the defendants, was recoverable from them, regardless of whether or not, in the absence of a valid agreement of employment between the plaintiffs and the owner of the Bowers Hotel property, the plaintiffs would have been entitled to a commission from said owner had they alone conducted the Bowers Hotel end of the exchange. *Dearing v. Sears*, 50 Hun, 604, 3 N. Y. Supp. 31; *Kohn v. Jacobs*, supra; *Kaufman v. Bloch*, supra; *Johnston v. Porter*, supra.

[6] It is contended that, granting, as we find, that the plaintiffs have a cause of action upon the pleaded and proven facts, still the judgment in their favor should have been only for a recovery of the land received by the defendant the Janss Investment Company as a commission from the Bowers Hotel end of the deal, rather than a money judgment to the extent of the value of said land. This contention, we think, must be sustained. The agreement in suit, although it covered but a single transaction, in effect, created a partnership between plaintiffs and defendants, and therefore in this action for an accounting the plaintiffs' judgment in strictness, upon principle, and in keeping with the agreement found by the trial court, should have directed the defendants to make a conveyance to the plaintiffs of the land received as a commission from the Bowers Hotel end of the deal or pay to plaintiffs the value thereof.

The judgment is reversed, with directions to the court below to enter judgment upon the findings as made, that the defendant Janss Investment Company convey to plaintiffs the land received by said defendant as a commission from the Bowers Hotel end of the deal; and for the purpose of having an effective judgment, the court below, before modifying the judgment, as now directed, is directed to take evidence for the purpose of determining whether or not the said defendant still retains an unincumbered title to said land and is in a position to convey it to the plaintiffs, and if upon the taking of such evidence the court finds to the contrary, then the judgment shall be for the plaintiffs for the value of the land as originally found.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; SHAW, J.; LAWLOR, J.; SHURTLEFF, J.

PER CURIAM. The judgment in the above-entitled cause having been in effect af-

firmed in all of its essential features, and having been reversed with directions for certain modifications in a minor particular, not seriously urged by the appellant as a ground for reversal, it is ordered that the appellants do not recover their costs on appeal.

186 Cal. 623

FONNER v. MARTENS. (S. F. 9276.)

(Supreme Court of California. Aug. 6, 1921.)

1. Appeal and error $\hookrightarrow$ 907(4)—Recitation that omitted judgment roll was introduced compels assumption that findings were correct.

Where the bill of exceptions did not include a judgment roll in a partition suit related to the present suit, but contained a recitation that the judgment roll was presented in evidence at the trial, the court assumes that the evidence introduced in the judgment roll supports findings of the trial court.

2. Partition $\hookrightarrow$ 17(2)—The judgment is conclusive between the same parties in a subsequent suit over same property.

Where plaintiff, after suit by his wife for divorce, conveyed land to defendant, and on a subsequent suit by his divorced wife against him for partition of the land the defendant and G., who also had an interest in the land, were parties, since the rights of all parties in the title were directly in issue, under Code Civ. Proc. § 759, the judgment in the partition suit in favor of defendant was conclusive that the deed from plaintiff was an absolute conveyance of plaintiff's title, under section 766, making partition judgments binding upon all parties to the suit who then had an interest in the premises.

3. Estoppel $\hookrightarrow$ 3(3), 69—Sworn answer and testimony as witness in partition suit disclaiming title precluded defendant from having a conveyance declared a mortgage.

Where a husband conveyed to another to defraud his wife, who had sued for divorce, and in a partition suit by wife against husband and grantee, brought after she had secured an award of property in the divorce suit, the husband by sworn answer and oath as witness disclaimed title, and thus enabled grantee to secure decree quieting title in him, the husband was estopped to have the conveyance declared a mortgage as against grantee, and contention of husband that he was entitled to relief because grantee induced him to disclaim, and a confidential relation existed between them, was of no avail since he disclaimed to defeat his wife and secure a secret interest, and not to aid grantee.

4. Mortgages $\hookrightarrow$ 32(6)—Grantor, estopped by disclaimer from having deed declared a mortgage, held not reinvested with a title which he could assert in action to declare deed a mortgage.

Where, after conveying land to defendant to defraud his wife, who had sued for divorce, plaintiff by sworn answer and on oath as a

witness in a partition suit by wife of the decree in divorce suit, disclaimed title and thus enabled defendant to obtain judgment, fact that plaintiff remained in possession of the land and received loans without giving security to defendant, unless the land was security, did not reinvest plaintiff with a title which he could assert in action to declare the deed a mortgage.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit by H. C. Fonner against Henry Martens, also called Henri Martens. From a judgment for plaintiff, defendant appeals. Reversed.

E. M. Rea and A. A. Caldwell, both of San Jose, for appellant.

Owen D. Richardson, of San Jose, and Monroe Thomas, of Palo Alto, for respondent.

SLOANE, J. The plaintiff brought this action to have his conveyance to defendant of certain real property by deed, absolute in form, declared a mortgage, and to quiet his title thereto. The trial court found upon sufficient evidence, if it was admissible, that the deed was given to secure advances of money made and to be made by defendant for the plaintiff, subject to certain payments due for money advanced on the mortgage security. This appeal from the judgment turns upon the question of various matters operating by way of estoppel against the respondent and *res adjudicata*, to bar the relief granted.

The record presents a complicated story, but we think the case must be decided upon certain considerations presented by the findings, and which are alleged to be inconsistent with the judgment. At the time this deed in dispute was executed the land in question was in litigation between the plaintiff Fonner, who then owned it, and his wife. The wife had sued him for divorce on the ground of extreme cruelty, and for an allotment of the property to her as community property. Pending this controversy, and after his *pendens* was filed in the divorce proceedings, plaintiff here, who will be hereafter referred to as respondent, executed the deed in controversy to Martens, the appellant.

Subsequently, one Gopcevic obtained judgment against respondent for \$563.73, and levied upon and sold respondent's interest in this land at sheriff's sale. Gopcevic became the purchaser and received a sheriff's certificate of sale. After the deed from respondent to appellant and the levy and sale under the Gopcevic judgment, Mrs. Fonner obtained judgment in her divorce suit, and on the strength of the judgment, allotting her a half interest in the land, commenced an action in partition to which respondent, ap-

pellant, and Gopcevic were made parties defendant.

The rights of each of the parties were put in issue in this action, and the court by its decree determined the title to be vested entirely in Martens and Gopcevic, to the exclusion of both respondent and his wife. Appellant, in his answer in this case, pleaded this judgment as *res adjudicata* in his favor upon the status of this title.

[1] The bill of exceptions on this appeal does not include the judgment roll in the partition suit, but it recites that it was introduced in evidence on the trial, and we are therefore bound to assume that the showing made thereunder supports the findings of the trial court. *Western Cal. Land Co. v. Welch*, 41 Cal. App. 435, 183 Pac. 169.

[2] The findings pertinent to the partition judgment are substantially as follows:

That on the 30th day of December, A. D. 1908, Susie L. Fonner filed that certain action for the partition of said property entitled in the superior court of the state of California, in and for the county of Santa Clara, Susie L. Fonner, plaintiff, v. M. C. Fonner, Henry Martens, John Doe and Richard Roe, defendants, said action being numbered 17917 of the files of the office of the clerk of the above-entitled court; that in and by the complaint filed by said Susie L. Fonner it was alleged that the real property referred to in plaintiff's complaint herein was owned by said Susie L. Fonner and H. C. Fonner, share and share alike, and that said deed made by H. C. Fonner to Henry Martens (the appellant) on the 20th day of February, A. D. 1908, was executed in pursuance of a conspiracy and for the purpose of cheating and defrauding plaintiff from enjoying the use and occupation of the property referred to in plaintiff's complaint, and to defeat the operation of said divorce decree entered in said divorce proceeding, and that said deed made by H. C. Fonner to Henry Martens was void and of no effect, and asking for the partition of said real property between said Susie L. Fonner and H. C. Fonner; that Mylos Gopcevic, on December 4, 1909, appeared in said action by answer to the said complaint setting up his right, title, and interest to said property under sheriff's certificate of sale, and thereafter, by amendment, setting up that, no redemption from said sale having been made, the sheriff's deed was executed conveying said property to defendant; that in said proceeding H. C. Fonner (the respondent), answering the complaint of said Susie L. Fonner in said action, denied that he had any right, title, or interest in and to said real property described in plaintiff's complaint, and denied that Susie L. Fonner had any right, title, or interest in said real property, and alleged in said an-

swer that said Henry Martens was the owner in fee simple of said real property described in plaintiff's complaint, and that in the month of February, A. D. 1908, he made, executed, and delivered a deed of the whole of said premises to the said defendant, Henry Martens, by which deed he conveyed the said premises in fee simple to said defendant, Henry Martens, for and in consideration of the sum of \$3,000, which said sum of money was paid to him; and denied that said deed of February 20, 1908, or any deed made by him, is "wholly or otherwise fraudulent or void, or that it was made with the intention on his part to defraud the rights, or any rights, of said Susie L. Fonner in and to the real estate described in said deed or any part thereof;" and further denied that the judgment or the lien of the execution issued in the case of Gopcevic against him or the certificate of sale of said premises is subsequent to or subject to the rights, or any rights or interest, of said Susie L. Fonner in said real estate, or any part thereof.

Said defendant Martens filed his answer to said complaint, and denied that the said Susie L. Fonner and H. C. Fonner were the owners of or had any right, title or interest whatever in said premises; denied any conspiracy for the purpose of defeating the rights of Susie L. Fonner in said property, and alleged that in the month of February, 1908, H. C. Fonner executed and delivered to him, Henry Martens, a deed whereby said H. C. Fonner conveyed to him the whole of the premises mentioned and described in said complaint for and in consideration of the sum of \$3,000, which said sum was paid to H. C. Fonner by said defendant.

It is further found by the trial court here that said partition case was thereafter brought to trial, and upon said trial Henry Martens testified under oath, in the presence of the plaintiff herein, H. C. Fonner, that he (Henry Martens) had purchased the property described in the complaint for the sum of \$3,000 on the 20th day of February, 1908; that he had received a deed to the property from H. C. Fonner; that said plaintiff, H. C. Fonner, was a witness and testified at the said trial, and made no denial of the said testimony of the defendant Martens, and that thereafter judgment was rendered in said suit and by said judgment it was declared that Henry Martens and one Mylos Gopcevic were the owners of said real property described in plaintiff's complaint in that action, which was the same property described in paragraph 1 of plaintiff's complaint herein, and that the said Susie L. Fonner had no right, title, or interest in and to said real property, or any part thereof; that the judgment of the court in said action was made awarding the said property to the said Mylos Gopcevic and Henry Mar-

tens, and declaring that Susie L. Fonner had no right, title or interest therein, and was based entirely on the answer of the defendant herein in that action, and upon the answer of the said Henry Martens in that action, and on the answer of said Mylos Gopcevic in said action, and upon the testimony of Henry Martens and the testimony of Mylos Gopcevic; that said judgment is still in full force and effect, and never has been appealed from, and the time has now passed when an appeal could be taken therefrom.

Upon what theory it was found that Mrs. Fonner had no interest in the property, in view of the evidence appearing in the record that notice of pendency of the action against her husband in which she was awarded a one-half interest therein was on file and of record prior to the transactions by which appellant and Gopcevic acquired their interests, does not appear. The findings of the court make no reference to the lis pendens. However, that is a matter which does not immediately concern this action. No appeal was taken by either of the parties, and the judgment in the partition suit became final. It decreed title to this property, and the whole of it, in appellant and Gopcevic. This was done in pursuance of respondent's verified answer disclaiming any interest in the premises, and affirming the validity and good faith of his transfer of an absolute title to appellant, and upon a trial which not only afforded to respondent every opportunity, but which called upon him in the exercise of good faith, both to his divorced wife and the court, to proclaim his interest, if he had not parted with his title. The validity and effect of this very deed was one of the main issues before the court.

The rights of all the parties in this title were directly in issue in that action (Code Civ. Proc. § 759), and the judgment is conclusive and binding upon all the parties to the suit who had at the time any interest in the premises (Code Civ. Proc. § 766; *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81; *Bartlett v. Mackey*, 130 Cal. 182, 62 Pac. 482; *Adams v. Hopkins*, 144 Cal. 29, 77 Pac. 712; *Kuns v. Dias*, 32 Cal. App. 651, 658, 163 Pac. 1052).

We see no escape from the conclusion that the partition judgment is *res adjudicata* as to the nature and effect of the deed in controversy here, in determining it to have been an absolute conveyance of respondent's title, unless it is shown that appellant was in some way estopped from taking advantage of it on the present trial.

[3] It is well settled that the mere fact that the judgment was procured by misrepresentations and false testimony in matters intrinsic to the action cannot afford the respondent any relief, even if he had not himself been a party to the fraud (*Pico v. Cohn*,

91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736), and a judgment which the parties themselves have obtained by fraudulent collusion is not open to attack by either party.

It is said in *Bancroft v. Bancroft*, 178 Cal. 359, 173 Pac. 579, L. R. A. 1918F, 1029, that:

"Courts of equity will not interfere to relieve a party to an action from a judgment which has been procured through a collusive agreement between the parties to the effect that either of said parties shall commence the action and obtain by the connivance or consent of the other a judgment to which he would not otherwise be entitled."

Much less can a party who has disclaimed any rights in the premises, and pleaded by his answer the very facts upon which the judgment is based, and has done this for the purpose of defrauding another party to the action, as the findings show was the situation here, be permitted to stultify the action of the courts, and by declaring his iniquity avoid the judgment obtained through his own connivance.

It is claimed by respondent, and was found by the court, on the trial of this action, that respondent was induced to disclaim his own interest and concede the title of appellant in the partition action by persuasion, misrepresentation, and undue influence of the appellant. We discover no evidence in the record to support such a finding. The relations of the parties were not confidential; they were dealing at arm's length. It is true that respondent trusted the appellant, but not to a degree or under circumstances to bring their dealings within the rule of confidential relations. If he falsely disclaimed any title to this property it was for the purpose of defeating his wife's claim and protecting his own secret interest. There is no doubt, if we accept the findings of the trial court, that there was connivance between these two throughout the entire transaction to enable respondent to avoid the claim of his wife to a half interest in this land, but respondent was at all times an active and responsible mover in the matter, and, as he supposed, was to benefit by it.

If the appellant was playing a double purpose, that of saving the property from the demands of respondent's wife, only that he might acquire it for himself, it in no wise relieves respondent from the onus of his share in the deceit. But we may not lose sight of the fact that the decree in the partition suit closes the door upon the alleged fraud of appellant as having induced respondent to vest absolute title in him to this

land, on the representation that it would be treated as a mortgage, unless some extrinsic fraud on the part of appellant estops him from taking advantage of such judgment.

The judgment did not, as suggested by counsel for respondent, purport to merge an interest created as a mortgage into a title in fee, but it was a conclusive adjudication, made at the instance of respondent himself, that the instrument in question never was a mortgage, but was from the time of its execution an absolute conveyance. And it is such an adjudication as the courts can only annul or avoid on a showing of some extrinsic or collateral fraud or mistake in its procurement.

When counsel argue that to permit appellant to use this judgment for the purpose of defrauding respondent is a use that equity will not permit, they are begging the question. Precisely what the partition judgment determined was that it was not a fraud to treat this instrument as an absolute deed, and not a mortgage, since it was intended between the parties as a deed.

If the partition judgment in *Martens'* favor had been procured in furtherance of an honest purpose, then, under the representations of appellant that he would continue to hold the title subject to a previous agreement that it should have the effect of a mortgage, the title thus established by such judgment might properly be declared a trust in favor of respondent. But his connivance in obtaining the judgment for a fraudulent purpose estops him from such relief.

It is in this respect that this judgment is distinguishable from that in the case of *Bradley Co. v. Bradley*, 165 Cal. 237, 131 Pac. 750, cited by respondent. In that case the grantor had conveyed title to land by grant deed to enable the grantee to effect a loan thereon in plaintiff's favor. In order to make the land satisfactory security, a decree was obtained in the name of the grantee under the *McEnerney Act* (St. 1906 [Ex. Sess.] p. 78), confirming title in the grantee. This was done in good faith between the parties, and with the understanding that the title thus established in fee in the grantee was still to be held in trust for the grantor. In sustaining the rights of the grantor as against such decree this court said:

"And, finally, upon this subject it may be added, that relief is not here sought against a judgment fraudulently obtained. The relief is sought against the fraudulent use of a judgment obtained through understanding between the parties and in furtherance of a trust relationship which existed between them. That such relief may be secured against the fraudulent use of a judgment not fraudulently obtained is well recognized in equity."

The respondent here cannot be permitted to create a trust in his favor out of a trans-

action thus tainted with his own fraud and deceit.

[4] There has been much in the relations of the parties since the partition judgment to indicate that appellant had, as is claimed, and found by the trial court, given respondent assurances that this property would be restored to him on the repayment of moneys advanced by appellant on account of the land. Considerable sums of money have been advanced to respondent by appellant, without security, unless it was understood that respondent retained an interest in the property. The Gopcevic mortgage title was conveyed to appellant in consideration of money advanced to Gopcevic by appellant, and charged to respondent's account. Respondent has at all times remained in possession of the premises and claimed title thereto.

It cannot be said, however, under the pleadings in this case, in view of the final adjudication of title in appellant in the partition matter, that any of the subsequent transactions or oral promises are such as to reinvest respondent with a title which he can assert or quiet in this form of proceeding. As to what extent they might serve as a defense to an action by appellant to recover money advanced, or for possession of the premises, or in an action for affirmative relief upon pleadings based upon adverse possession, we express no opinion.

We have not discussed the relation of the Gopcevic execution sale to this title, for the reason that it is, in view of our holding as to the effect of the partition judgment, immaterial. If it could be held that respondent's deed to appellant was a mortgage, it would then be necessary to determine whether appellant had obtained an independent title through the sheriff's deed and the conveyance of Gopcevic. As held by the District Court of Appeal, from which this case comes to us on rehearing, we might have denied respondent relief under the well-established rule that one must come into a court of equity with clean hands; but if it were properly established here that appellant was attempting to hold this property under a deed executed to him as a mortgage, and that it was procured by fraudulent connivance with the respondent to defeat the claim of respondent's divorced wife, we should hesitate, in view of such double fraud by the appellant, to permit, as between the two offenders, the appellant to remain the beneficiary of the fraud.

As we view the facts and law of the case, we think respondent is barred in this action by the former judgment in the partition suit.

The judgment is reversed.

We concur: LENNON, J.; SHAW, J.;
LAWLOR, J.; SHURTLEFF, J.

HEILBRON et al. v. SUMNER et al.
(L. A. 6536.)

(Supreme Court of California. Aug. 10, 1921.)

1. Municipal corporations ⇨271—Power to construct water impounding dam held vested in common council, and not in board of water commissioners.

The power to erect a dam for purpose of impounding water, or to contract for the erection thereof and to expend the proceeds of the sale of bonds, issued by the city of San Diego for such purpose, under St. 1901, p. 27, held vested in the common council of such city, under San Diego City Charter, art. 2, c. 2, § 1, subds. 52, 54, as amended, under Const. art. 11, § 6, by St. 1919, p. 1532, giving the common council control of all public works not otherwise provided for in the charter to be done for the city or for any board or department and not in the board of water commissioners of the city, in view of San Diego City Charter, art. 6, c. 2, §§ 12, 13, notwithstanding art. 5, c. 1, §§ 4, 7, added to charter by amendment of 1919, creating the board of water commissioners and giving it exclusive supervision of the impounding of water by the city, and of the waterworks and water impounding system, since such board is not to exercise such control until after the system has been constructed and turned over to it by the council, and notwithstanding St. 1901, p. 27, § 9, as amended by St. 1907, p. 611, providing that, in cities having a board of public works, such board shall have charge of the expenditures and money raised by the issuance of bonds under such act, since such statute is rendered nugatory by the charter.

2. Municipal corporations ⇨79—City having freeholders' charter not subject to general laws concerning municipal affairs, except as the charter itself may provide.

A city which has amended its charter, so as to come under Const. art. 11, § 6, as amended in 1914, authorizing cities having a freeholders' charter to empower themselves to make and enforce laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations in their charters, is not subject to general laws in matters concerning municipal affairs, except as the charter itself may provide.

3. Municipal corporations ⇨867(2)—Charter provisions as to indebtedness held not applicable to liability incurred in making contract.

San Diego City Charter, art. 6, c. 2, §§ 12, 13, providing that the common council must not contract debts or liabilities exceeding the income and revenue for any year without the assent of two-thirds of the qualified voters of the city voting at an election on the subject and that the proceedings taken for raising the money shall be in accordance with the provisions of the general law in force at the time such proceedings were taken and that the council must not contract a debt in excess of such limit, except after the election therein specified, and in incurring such indebtedness must proceed in accordance with the general law in

force at the time, referred to the liability incurred by the issuance and sale of the bonds and the procurement of the money to be used in the erection of public works, and not to a liability or indebtedness incurred in entering into a contract for the construction of public works to be constructed with the bond money.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Fred A. Heilbron and others against Charles E. Sumner and others. Judgment for defendants, and plaintiffs appeal. Reversed.

S. J. Higgins and A. F. H. Wright, both of San Diego, for appellants.

Heskett & Sample, Charles E. Sumner, and Heskett, Sample & Harden, all of San Diego, for respondents.

SHAW, J. This is an appeal by the plaintiffs from a judgment given in the court below upon an agreed case submitted to it, as provided by sections 1138, 1139, and 1140 of the Code of Civil Procedure. The plaintiffs are members of the common council of the city of San Diego, and the defendants are the members of the board of water commissioners of said city.

The matter submitted for decision was the question whether the common council of the city, or the board of water commissioners of the city, is empowered to expend a certain fund in the city treasury obtained by the sale of bonds issued by the city, pursuant to an election authorizing the same, to raise funds for the acquisition, construction, and completion of a dam on Cottonwood river at a place known as Barrett dam site, in the county of San Diego, but outside of the city of San Diego. The dam was to be made for the purpose of impounding water. Apparently the city is carrying on a system of waterworks for the distribution of water within the city for municipal, domestic, and other uses, and the said dam is to constitute a part of that system. The case is argued by both parties on that theory, and we will assume it to be true, although the agreed statement does not so declare.

[1] We are of the opinion that the power to erect said dam or contract for the erection thereof and expend the said sum for so doing is lodged in the common council of the city, and not in the board of water commissioners. The bonds were issued under the provisions of the bonding act of 1901. Stats. 1901, p. 27. This act provides a method of procedure for the calling of an election to submit the question of the issuance of the bonds to popular approval and authorizes the issue thereof in case the election is favorable thereto. Section 9 of the act, as amended in 1907 (Stats. 1907, p. 611), provides that—

"In cities, towns, or municipalities operating under a charter, heretofore or hereafter framed

under section 8 of article 11 of the Constitution and providing for a board of public works all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the board of public works of such city, town or municipality, and, in case such charter also prescribes the manner of letting and entering into contracts for the furnishing of labor, materials or supplies for the constructing or completion of public works or improvements, the contracts therefor shall be let and entered into in conformity with such charter."

[2] The city of San Diego in 1919 amended its charter, so as to come under section 6, article 11, of the Constitution, as amended in 1914, authorizing cities having a freeholders' charter to empower themselves to make and enforce laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations in their charters. Section 1, c. 2, art. 2, subd. 54, p. 1532, Stats. 1919. As a result thereof the city is not subject to general laws in matters concerning municipal affairs, except as the charter itself may provide. *Civic Center Ass'n v. R. R. Com.*, 175 Cal. 448, 166 Pac. 351; *Morgan v. Los Angeles*, 187 Pac. 1052. Section 52 of the same section, amended at the same time, provides that—

"The common council shall have charge, superintendence and control of all public works of every kind, where not otherwise provided for in this charter, to be done for the city, or for any board or department thereof, and also of the furnishing of all labor, work, materials, and supplies for said city. This charge, superintendence and control of public work shall be subject, however, to such ordinances as the common council may from time to time adopt."

No ordinance has been adopted in regard to the matter here in controversy transferring any power to the board of water commissioners, and therefore the powers of the common council remain as stated in subdivision 52. This subdivision was a re-enactment of the provision as it previously stood in that section of the charter. It is obvious that the matter of erecting a dam for the purpose of impounding water for use in the public water system carried on by the city of San Diego for the benefit of itself and its inhabitants is exclusively a municipal affair. Consequently, since the charter provides that the council shall have charge thereof, the provisions of the act of 1901 and the amendment thereto in 1907, providing that in cities which have a board of public works that board shall have charge of the expenditures of money raised by the issuance of bonds under that act, is rendered nugatory by the provision of the charter. The charter prevails over the general law in regard to all municipal affairs concerning which the charter speaks. The question is therefore to be determined with reference solely to the provisions of the charter itself,

for the general law aforesaid is not applicable. Furthermore, it is to be observed that the charter of the city of San Diego does not provide for any board of public works, and hence it does not come within the terms of the proviso in section 9 of the bonding act aforesaid.

Other provisions of the charter confirm the proposition that the matter is committed to the common council. Subdivision 29 of section 1 aforesaid of the charter provides that the council shall have power "to adopt, enter into and carry out means for securing a supply of water for the use of the city, or its inhabitants, or for irrigating purposes therein, and along the line of its water supply." This provision confers upon the common council power to use all means necessary for securing a supply of water. It would therefore include the power to contract for the construction of a dam, and to use the money of the city and supervise its expenditure for such construction, to impound the water necessary for the city use.

We find nothing in the charter which has the effect of transferring this power to the board of water commissioners. In 1919 the charter was further amended by adding a new chapter to article 5 thereof, numbered I, providing for a "water development board." This chapter created the board of water commissioners, the defendant herein, and confers upon it all the power that it has. Section 4 provides that said board "shall have exclusive charge and supervision of the conservation and impounding of water by said city and of the water, water rights, waterworks, water impounding system, and other properties of said city used in the development of said water impounding system." It is under this provision that the board of water commissioners claims the authority to have exclusive charge of the construction of the said dam and of the expenditure of the bond money for that purpose. But, in view of the other provisions of the charter, we think the proper construction of this section is that the board shall have charge of the operation and preservation of said system after it is constructed and that it was not the intention to confer upon the board exclusive power to provide for and construct the waterworks of which it is to have supervision. The several provisions of the charter should be harmonized as far as possible.

If the contention in behalf of the board as to the effect of section 4 is correct, the result would be that the two provisions we have referred to are in direct conflict; one giving the power to the common council and the other giving the same power to the board of water commissioners, both provisions being adopted at the same time. It is reasonable to believe that the intention was to charge the common council with the duty of providing the waterworks, and charge the

board of water commissioners with the duty of taking charge and supervision of the system after it is provided. This is indicated, also, by the fact that in chapter I aforesaid, relating to the water development department, section 7 creates a "water development fund," which is to consist of "not less than twenty-five per centum of the gross receipts derived from the sale of water by the city of San Diego, and of such other moneys as may be transferred into said fund. Said fund shall be used for the management, maintenance and development of the water development system." This obviously refers to a water development system already constructed, and it indicates that the board of water commissioners is to use one-fourth of the revenue from the sale of water, obtained by it in its supervision of the system, for the upkeep and further development of the system, so far as may be possible with said fund. The matter of transferring other money to said fund is, by other provisions of the charter, left wholly within the power of the common council. Consequently no portion of the fund can be transferred to the water development fund unless the council shall so determine. All this furnishes additional reason for holding that the power to construct the works and control the expenditure of the money therefor is lodged in the council.

[3] Another provision of the charter (sections 12 and 13, c. 2, art. 6) provides that the common council must not contract debts or liabilities exceeding the income and revenue for any year without the assent of two-thirds of the qualified voters of the city voting at an election on the subject, and that the proceedings taken for raising the money "shall be in accordance with the provisions of the general law in force at the time such proceedings are taken." Section 12 also provides that the council must not contract a debt in excess of the above limit, except after the election therein specified, and that in incurring such indebtedness the council must "proceed in accordance with the general law" in force at the time. These provisions do not, in our opinion, apply to a liability or indebtedness incurred in entering into a contract for the construction of the works to be constructed with the bond money, but refers to the liability incurred by the issuance and sale of the bonds and the procurement of the money to be used in the erection of the works; that is, the liability for such bonded indebtedness. None of these provisions takes away or affects the power given to the common council by the charter provisions first above mentioned. The conclusion is that the power in question is not in the board of water commissioners, but is vested in the common council.

The judgment is reversed.

We concur: SLOANE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

185 Cal. 668

In re BOSSE'S ESTATE. (S. F. 9565.)

(Supreme Court of California. May 17, 1921.)

1. Courts ⇨202(5)—Presumption favors jurisdiction of probate court.

On appeal points made by appellant must be considered in the light of the provision that orders and decrees made by the superior court in probate proceedings need not recite the existence of facts or the performance of acts on which jurisdiction depends, but that the decrees need only contain the matters ordered or adjudged except as otherwise provided, Code Civ. Proc. § 1704, and the rule that every intentment is in favor of the decree.

2. War ⇨12—Constitutional rights of enemy corporation not invaded by turning over its property to Alien Property Custodian.

As Trading with the Enemy Act, as amended (U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), was expressly excepted from the operation of the joint resolution terminating war-time acts adopted March 3, 1921, and the former act itself provides that it shall remain in force until the end of the war, and the war not having been declared ended at the time of a probate decree declaring property to belong to a German corporation, no constitutional rights were violated by decree turning over the property to the Alien Property Custodian.

3. War ⇨12—Demand and notice presumed in favor of decree giving property to Alien Property Custodian.

Where the enemy alien character of the appellant corporation is apparent on the face of the decree, in view of the fact that every intentment in favor of the probate decree distributing the property of appellant to the Alien Property Custodian, it must be presumed that such Custodian, shown by the decree to have been represented by counsel when the distribution was ordered, had regularly appeared and made any and all demands and given all notice essential under the Trading with the Enemy Act, as amended (U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), in the manner provided by the act.

4. War ⇨12—Probate decree giving Alien Property Custodian full control of property decreed to belong to alien enemy corporation held required by act.

The provisions of the Trading with the Enemy Act, as amended (U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), particularly section 7, subd. "c," relating to requirements of the President as to conveyance to the Alien Property Custodian, and section 12, providing that money received by the Custodian shall be deposited to the Treasurer of the United States to be administered with other property by him as a common-law trustee, required the superior court in the distribution of property decreed to belong to an alien enemy corporation to assign the same to the Alien Property Custodian, in view of demand made and notice given by him, to be held and accounted for by him as provided in the act, properly guarding in the decree all the rights of appellant corporation.

5. War ⇨12—Superior court sitting in probate might distribute property decreed to Alien Property Custodian.

Notwithstanding the limited function of superior courts in probate matters under our statutes, the superior court had the right, in decreeing property to belong to an alien enemy corporation, to provide for its distribution to the United States Alien Property Custodian, since any distribution which did not regard the interest of the United States would be in substantial violation of the provisions of the Trading with the Enemy Act, as amended (U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j).

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

In the matter of the estate of C. Bosse, deceased. From a portion of a decree of final distribution decreeing property to the appellant, but distributing it to Francis P. Garvan, as Alien Property Custodian of the United States, to be accounted for by him, the Reichsausschuss der Kriegsbeschädigten und Kriegshinterbliebenenfürsorge appeals. Decree affirmed.

Gustav Gutsch, of San Francisco, for appellant.

John S. Partridge, Garret W. McEnerney, and H. D. Lempke, all of San Francisco (John K. M. Ewing, of Washington, D. C., and V. K. Butler, Jr., of San Francisco, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a part of the decree of final distribution in the matter of the estate of C. Bosse, deceased, which was given and made May 7, 1920. By this decree Marie Bosse, mother and sole heir at law of the deceased, a resident of Bremen, Germany, and a public corporation named the Reichsausschuss der Kriegsbeschädigten und Kriegshinterbliebenenfürsorge, organized for the purpose of dispensing funds for war sufferers and having its principal place of business at Berlin, Germany, were adjudged to be entitled to the whole of the residue of the estate, consisting entirely of personal property, the respective interests being fully defined and specified, subject to the rights of Francis P. Garvan, as Alien Property Custodian, under and by virtue of the terms of an act of Congress known as the Trading with the Enemy Act, approved October 6, 1917 (40 U. S. Stat. 411), as amended November 4, 1918 (40 Stat. 1020 [U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j]). This appeal is taken by such public corporation from the further portion of said decree which is as follows:

"And it is further ordered, adjudged, and decreed that all the money and property to which

the said Marie Bosse and the said" public corporation "are entitled under the terms of this decree be, and the same are hereby, distributed to the said Francis P. Garvan as such Alien Property Custodian, to be held, administered, and accounted for by said Alien Property Custodian as provided by law and as provided for by this decree defining the interests of the said Marie Bosse and the said" public corporation "therein, and that the said executor be and he is hereby ordered and directed to deliver to said Alien Property Custodian the estate so distributed."

It is claimed that this portion of the decree was unauthorized. The record on appeal brought here by appellant consists solely of the decree and the notice of appeal.

[1, 2] We must consider the points made by appellant in the light of the statutory provisions that orders and decrees made by the court in probate proceedings "need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided" (section 1704, Code Civ. Proc.), and of the rule that every intendment is in favor of the decree. It must now be taken as settled, in view of the decisions of the United States Supreme Court (see *Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194), that at the time this decree was made a state of war still existed between this country and Germany, notwithstanding the cessation of actual hostilities, and that, at least in so far as any provision thereof material here is concerned, the provisions of the Trading with the Enemy Act were still in force and effect. It should be noted that, among other acts of Congress, "the act known as the Trading with the Enemy Act * * * and all amendments thereto," and all proclamations issued under the authority conferred by such act, were expressly excepted from the effect and operation of the joint resolution terminating war-time acts adopted by Congress March 3, 1921. The act itself provided that it shall remain in full force until "the end of the war," which is defined in the act to mean "the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date." We see no force whatever in the suggestion that any constitutional right of appellant is infringed by the enforcement of the Trading with the Enemy Act according to its terms, at any time prior to the ratification of a treaty of peace, notwithstanding the actual cessation of hostilities. The courts may not lawfully refrain from enforcing the registered will of the legislative and executive departments of the government in this matter, if such departments have not

exceeded the power conferred upon them by the Constitution.

[3] The enemy alien character of appellant is apparent on the face of the decree. Upon the record, in view of the fact that every intendment is in favor of the decree, it must be presumed that the Alien Property Custodian, who, the decree shows, was represented by counsel when distribution was ordered, had regularly appeared in the proceeding and made any or all demands and given all the notice essential under the Trading with the Enemy Act in the manner provided by the act.

[4] We have seen that the decree as given fully adjudicated and defined the right of appellant with regard to the property to which it was entitled, subject to the rights of the Alien Property Custodian under the Trading with the Enemy Act, with the result that in any subsequent proceeding on the part of appellant for accounting and delivery of the property appellant's rights as absolute owner, subject only to the provisions of the act, stand judicially declared. As to this no complaint is made. The claim of error is solely as to the subsequent portion of the decree which "distributes" such property to which appellant is so entitled to such Alien Property Custodian to be held, administered, and accounted for by him as provided by law and as provided by the decree defining appellant's interest. It appears plain to us that this portion of the decree is in substantial accord with the requirements of that act and the proclamation of the President thereunder. The act provides (section 6) for an Alien Property Custodian, "who shall be empowered to receive all money and property in the United States belonging to an enemy, * * * which may be paid, conveyed, transferred, assigned or delivered to said custodian under" its provision. By section 7, subd. "c," it is provided that, "if the President shall so require," any money or property belonging to or held for an enemy not holding a license granted by the president under the act "shall be conveyed, transferred, assigned, delivered or paid over to such Custodian, or may be seized by him, to be held, administered and disposed of as provided in the act." By section 12 it is provided that all moneys received by such Custodian shall be deposited in the treasury of the United States, and that all other property so received shall be held and administered by him as a common-law trustee, and that after the end of the war any claim of an enemy to any money or property so received and held shall be settled as Congress may direct. By executive order of October 12, 1917, the President vested in the Alien Property Custodian the executive administration of all the provisions of section 7, subd. "c," including the

power and authority conferred upon him to require the conveyance, transfer, assignment, etc., of any money or property belonging to or held for any enemy. By executive order of February 26, 1918, it was provided that such Custodian might make demand for any such conveyance, etc., and that, when such demand is made and notice given as provided, "such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded, and such power or authority thereafter as may be included within the demand." The plain effect of these provisions was to require the superior court, in any distribution of appellant's interest that it might make, to assign the same to the Alien Property Custodian, in view of the demand made and notice given, which we must assume, to be held and accounted for by him as provided in the act, properly guarding within the decree all the right of the appellant in relation thereto. This appears to be recognized by all the authorities to which our attention has been called. See *In re Kelly*, 101 Misc. Rep. 495, 167 N. Y. Supp. 256; *Estate of Gregg*, 266 Pa. 189, 109 Atl. 777; *Matter of Schaefer*, 112 Misc. Rep. 308, 182 N. Y. Supp. 732; *Keppelmann v. Palmer* (N. J.) 108 Atl. 432. In *Youghiogheny, etc., Co. v. Lasevich*, 171 Wis. 347, 176 N. W. 855, involving awards by the State Industrial Commission in favor of alien enemies in which the Commission ordered the awards paid to the Alien Property Custodian, the court said:

"We cannot doubt * * * that the Alien Property Custodian, under his appointment by the President, became vested with an interest and qualified title to the moneys and property so acquired and invested him with substantial rights and interest to the exclusion of the enemy."

We think the right of the Alien Property Custodian to such a disposition of the property on distribution as will give him full control of the property for the purposes of the act is fully recognized by what is said in *Estate of Henrichs*, 180 Cal. 175, 181, 179 Pac. 883.

[5] We are of the opinion that there is no substantial force in the claim that, in view of our statute, the superior court was with-

out power to incorporate this provision in its decree. The contention to the contrary is based upon the theory as to the limited function of superior courts in probate matters, under our state statutes. It is claimed that thereunder the court on distribution is limited to an ascertainment of the heirs, legatees, and devisees, and a distribution to them, or to other persons to whom such heirs, legatees, or devisees may have conveyed their interests. The provision is, in substance, but a recognition of the interest of the representative of the government in the property under the terms of the Trading with the Enemy Act, which interest gives to him the right of possession for the purposes of the act, accompanied by a direction that such possession be given. The objection of appellant is based upon the theory of a special and limited jurisdiction vested by our state law in superior courts in the transaction of probate business. The provision complained of is in substance but an award of the possession of the property otherwise adjudged by the court to belong to the appellant to the proper representative of the government for the purposes of the Trading with the Enemy Act, and, in our opinion, was such a provision as the court was required by such act to make if it undertook to then finally distribute the property of the estate. Any distribution which did not guard the interest of the United States in the matter would be in substantial violation of the provisions of that act. See *Estate of Henrichs*, 180 Cal. 175, 181, 179 Pac. 883. The decree as made fully recognized and adjudged the rights of appellant as required by our statute and the award of the possession of the property in the hands of the executor to the Alien Property Custodian for the purposes of the Trading with the Enemy Act was simply in conformity with requirements of an act of Congress adopted in the valid exercise of its war power, to which all courts in the land, state as well as federal, must conform. This view is fully sustained by the authorities hereinbefore cited.

The decree is affirmed.

We concur: SHAW, J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

185 Cal. 672

(200 P.)

PALADINI v. MUNICIPAL MARKETS CO.
(L. A. 6556.)

(Supreme Court of California. May 18, 1921.)

1. Judgment ☞595—Suit for portion of single account bars subsequent suit for balance.

Where the items of a claim arose upon the same running account, and the entire amount was due when a suit was begun for a portion only of the items, the judgment in that suit would be a bar to a subsequent suit on the remaining items of the account, since a party cannot split up a single cause of action and make it the basis of several suits.

2. Judgment ☞951(1)—Burden is on defendant to establish that former judgment was for portion of same account.

In an action for goods sold and delivered, the burden is on the defendant to prove his asserted defense that goods for which recovery is sought were purchased on the same account as goods for which recovery had been had in a prior action.

3. Judgment ☞595—Accounts from separately operated branch houses of same proprietor are separate.

Where a proprietor of several branch houses operated each branch separately, a purchase of goods by the same customer from two different branches creates two separate accounts, so that a recovery for the goods purchased from one branch would not bar a subsequent action for the price of goods purchased from another.

4. Judgment ☞951(4) — Evidence of purchase from separate branch houses held to rebut presumption of single account.

Even though proof that all the items covered by the two accounts separately sued on were for fish sold and delivered by plaintiff to defendant within two years prior to the first suit is sufficient prima facie showing that both claims arose on one open account, such showing is rebutted by proof that plaintiff was operating two branch houses, and that the goods formerly sued for were purchased at a different branch from those involved in the case at bar, though the plaintiff's evidence that the branches were separately operated was not conclusive.

5. Appeal and error ☞934(2) —Presumption in favor of judgment held not to sustain plea in abatement.

The rule that every presumption should be most strongly applied in support of the judgment is not to be pressed too far on a purely technical defense by plea in abatement so as to defeat recovery for the price of goods admittedly received, especially where the expression of the court at the trial indicated that, because of an erroneous view of the law, the evidence determining the validity of the plea in abatement was considered immaterial.

6. Pleading ☞34(4), 111—Pleas in abatement are not favored.

Pleas in abatement are not favored, and should be subjected to strict construction both as to pleading and evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. Paladini against the Municipal Markets Company. Judgment for defendant, and plaintiff appeals. Reversed.

Wm. M. Morse, Jr., and Samuel B. Dannis, both of Los Angeles, and Hoefler, Cook & Snyder, of San Francisco, for appellant.

Fred. W. Heatherly, of Los Angeles, for respondent.

SLOANE, J. The plaintiff in this action was engaged in the wholesale trade of selling fish. He had branch establishments operating such business in various cities of California, one of which was at San Francisco, and one at Monterey. Within two years prior to June 29, 1917, he had sold fish and fish products to the defendant, a dealer in Los Angeles, to the amount of \$1,043.75. While all of said amount was due and owing, plaintiff brought suit in the justices' court of Los Angeles against the defendant and obtained judgment therein on an account for \$231.82, for part of the goods which went to make up the total indebtedness of \$1,043.75. The present action was brought subsequently in the superior court of Los Angeles county on an account for \$811.93, the remaining sum of said total indebtedness. Judgment was for the defendant.

It is the defendant's contention that all the items aggregating the total amount constituted a single, open, and running account between the parties.

The defendant set up as its sole defense, and the trial court found:

"That each and every and all items constituting the account mentioned in the amended complaint on file herein, and each and every and all the items constituting the amount sued upon and mentioned in said action in said justices' court, constituted, and do now constitute, a part and parcel of said open and running account existing between plaintiff and defendant prior to said 29th day of June, 1917, and were, by reason thereof, necessarily involved in said former action,"

—and further:

"That by reason of the said premises this action" is barred by the adjudication and judgment in the justices' court.

It is upon the correctness of this finding and conclusion of the court that the judgment appealed from depends.

[1] Appellant does not dispute that, if the items of this entire claim arose upon the same running account, and that the entire amount was due and owing when the suit in the justices' court was begun, the failure to prosecute the entire claim in one action would be a bar to the subsequent suit on the

remaining items of the account. It is clearly established that a party may not split up a single cause of action and make it the basis of several suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim. 15 R. C. L. Judgments, § 440; *Van Horne v. Treadwell*, 164 Cal. 620, 130 Pac. 5; *Bingham v. Kearney*, 136 Cal. 175, 68 Pac. 597; *Bolen Coal Co. v. Whittaker Brick Co.*, 52 Kan. 747, 35 Pac. 810.

[2] It is appellant's contention that the evidence does not sustain the finding that there was but a single account involved in both suits. The defense was an affirmative one, and the burden was on the defendant to establish it. The only evidence supporting this defense was the showing that all of the items covered by the entire claim were for fish sold and delivered by plaintiff to defendant within two years prior to the first suit. Conceding that this was sufficient as a prima facie showing that both claims arose on one open and running account, was it rebutted by the undisputed fact that plaintiff was carrying on his business in separate establishments, one at San Francisco and one at Monterey, and that the suit brought in the justices' court was for fish bought and delivered from the Monterey branch, and the present action was for fish bought and delivered from the San Francisco house?

[3] We think there can be no question that where a single proprietor is conducting the same line of business in different towns and localities, operating them independently so far as dealing with customers is concerned, and keeping separate accounts as between the several branches of the business, that the liability of purchasers from one or the other constitutes a separate account, even though the same customer buys from more than one of the branches. This must necessarily be so to keep any systematic check on the various branches of the business, and it would be an intolerable hardship on the proprietor to have to marshal the accounts of all his branch houses before he could press to judgment any one of them. In the absence of controlling authority to the contrary, we should be constrained to hold as a matter of business policy that for purposes of all dealings with his customers the proprietor is entitled to operate his branch houses as separate and independent establishments, and our attention has been called to no authority to the contrary. The citations in support of this contention, so far as they go, tend to uphold the doctrine.

The principle governing this matter is well illustrated in *Secor v. Sturgis*, 16 N. Y. 548, in which the same defense in abatement of a second action upon a single and indivisible claim was interposed. The plaintiff was a copartnership carrying on the business of ship carpenters and ship chandlers. The

two branches of the business were operated in the same building, but separately, one or more members of the firm conducting the carpenter business, and another the ship-chandler business. They rendered services and furnished materials to the ship of defendant at the same time. It was held that there were two accounts which could be sued separately. The principle stated is that where the several items have their origin in one contract, as on an agreement to sell and deliver goods or perform services or advance money, it is a single cause of action, and that in the case of a running account it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued either for a period or at the pleasure of one of the parties. But there must be an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items where they arise at different times in order to make a single demand or cause of action. The court in its opinion says:

"Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim; but, on the contrary, that they were several, and formed two several causes of action. The business of the plaintiffs consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made. * * * Here was no express contract connecting the two accounts; and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended."

That the distinction here made was not based upon the different classes of service carried on in the two branches of the business is shown by the comment of the opinion upon another decision, where it is said:

"In *Colvin v. Corwin* [15 John, 432], two suits were brought for lottery tickets sold the defendant. On the trial of the first the defendant admitted he had bought the tickets alleged to have been sold to him, and judgment was rendered for the plaintiff. The judgment was set up as bar in the second suit, and on the trial it appeared that the tickets claimed in the suits were delivered to the defendant by two different agents of the plaintiff, at different offices occupied by them, at different times, and it was held by the Supreme Court that the previous judgment was a bar to a recovery. It is manifest that this decision rests on no sound principle, and is not law. A plainer case of distinct independent causes of action could hardly be presented."

Other authorities cited, recognizing the distinction here stated, are: *Borngegger v. Harrison*, 12 Wis. 544, 78 Am. Dec. 757; *Johnson v. Pirtle*, 1 Swan (Tenn.) 262; 1 Corp. Juris, 1113; 23 Cyc. 1178; *Cook v. Conners*, 215 N. Y. 175, 109 N. E. 78, L. R. A. 1916A, 1074, Ann. Cas. 1917A, 248.

The rule is laid down in *Hall v. Susskind*, 109 Cal. 203, 41 Pac. 1012, that—

"It is only where a claim is founded upon one entire contract, or upon one single or continuous tortious act, that it cannot be divided into distinct demands, and be made the subject of separate actions."

The difficulty in this case is that the evidence as to the manner in which the branches of plaintiff's business at San Francisco and Monterey were conducted, and their relations to each other, is very meagre and unsatisfactory. Plaintiff's counsel made several attempts to show affirmatively that the accounts were kept separately, and that the branch establishments were conducted independently of each other, but the evidence given to that effect was stricken out by the court as a statement of the conclusion of the witness. No exception is taken to the rulings of the court in excluding this evidence.

[4] We are inclined to the opinion, however, that the undisputed fact that plaintiff was operating these two branch houses, and that the account sued on in the justices' court was ordered and delivered from the Monterey branch, and the account sued on in the present action was ordered and delivered from the San Francisco branch negatives any presumption of a single running account that might have arisen from the mere fact that the entire indebtedness was to a single creditor for the same line of goods throughout.

[5, 6] The account sued for was admittedly owing and unpaid, and the rule that every presumption should be most strongly applied in support of the judgment ought not to be pressed too far on a purely technical defense. Pleas in abatement are not favored, and should be subjected to strict construction both as to pleading and evidence. *Thompson v. Lyon*, 14 Cal. 39; *Cal. Sav. & L. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525; *Reed & Co. v. Harshall*, 12 Cal. App. 697, 108 Pac. 719. This is particularly true here in view of the fact that the court made no finding to indicate its attitude upon the effect of the separate branch houses upon the unity of the account. In fact, it may be inferred from the ruling upon the admission of evidence that the court did not attach any significance to the question as to whether the plaintiff was conducting separate branches of his business, or made part of the sales from one establishment and part from another. In sustaining an objection to a question by plaintiff's counsel to the treasurer of the defendant company in which he was asked if he did not know that plaintiff had different branches in different parts of the state, the court remarked that—

"It doesn't make any difference. They are all his, and he is bound to know what goes on in every one of them."

The court of appeal in affirming the judgment of the trial court evidently took the same position, disposing of this part of the evidence by the statement that—

"The goods were all ordered from plaintiff, and the fact that he had different branches of his business from which a part of the goods were shipped in filling the defendant's orders is immaterial."

It is with this view of the law that we differ, and, in the light of the fact that the subject-matter of these separate suits arose on sales from different branches of the business at different localities, we hold that there could be no controlling presumption that they constituted but one account.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; SHAW, J.; LENNON, J.; OLNEY, J.; WILBUR, J.

186 Cal. 643

In re HOUK'S ESTATE.

CITY OF OCEANSIDE v. MOODY et al.

(L. A. 6730.)

(Supreme Court of California. Aug. 10, 1921.)

1. Wills $\Leftarrow$ 14—Bequest to city for pleasure pier must be made 30 days before decease of testator, city not being a "state institution" and the use not being "for use or benefit of state."

Under Civ. Code, § 1313, as amended by St. 1917, p. 272, providing that no estate shall be bequeathed or devised to any charitable or benevolent society or corporation or to any person in trust for charitable uses, except done by will executed 30 days before decease of testator, but that bequest or devise to the state or to any "state institution" or "for use or benefit of the state" or any state institution are excepted, a bequest to municipality of fund to build a pleasure pier is not excepted; the municipality not being a "state institution," and the use not being "for use or benefit of state."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, State Institution.]

2. Charities $\Leftarrow$ 38—City receiving gift by will held not entitled to sequester fund before performance of condition.

Under a will directing trustee to pay the city such a sum up to \$100,000 as is necessary to build a pleasure pier on condition that city raise a like fund and that bequest should fall into residue if condition was not performed, the city, without performing or guaranteeing the condition, may not sue the trustee to sequester the \$100,000 fund for use of the city.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of George W. Houk, deceased. Action by the City of Oceanside against Margaret Houk Moody and others, to sequester a fund bequeathed by George W. Houk, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

F. L. Richardson, of San Diego, for appellant.

Donald Barker and Meserve & Meserve, all of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondents.

SLOANE, J. The city of Oceanside is attempting by this action to have a certain fund set aside to its use under the last will of one George W. Houk.

The will under which the plaintiff claims, after making certain personal bequests, gives, devises, and bequeaths the residue of the estate to a trustee "to have and to hold in trust for the uses and purposes and with the powers hereinafter stated." Among the subsequent provisions is the following:

"My said trustee shall, subject to the conditions hereinafter mentioned, pay to the city of Oceanside, county of San Diego, state of California, such sum that may be necessary, up to, but not in excess of, the sum of one hundred thousand dollars (\$100,000.00) providing said city of Oceanside donates a like sum, and providing further that said city builds within three years after my death with said money, a pleasure pier, the site to be selected by my trustee. Upon the failure of the said city to perform said conditions, then the said sum shall be distributed with the residue of the trust property."

Without having taken any steps to perform or guarantee the conditions imposed upon the municipality precedent to the enjoyment of this fund, the city of Oceanside brings this action to obtain an order of court distributing to the trustee for the purposes of this use the sum of \$100,000. The appeal is from the order of court denying this application.

The grounds of objection interposed by the defendant, representing the estate, are: (1) That the attempted bequest is invalid under the provision of section 1313 of the Civil Code that "no estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person * * * in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator"; (2) that if valid in its creation the trust was not effective or operative for any purpose until the city of Oceanside had qualified to receive the benefits by providing a like fund as specified in the will; (3) that the bequest is void for uncertainty, in that it cannot be determined therefrom the amount necessary for the purpose designated; (4) that the trust is not

one that is authorized under section 857 of the Civil Code or any other provision of said Code.

The testator died within 30 days of the execution of this will, and it is conceded by appellant that the trust declared is for a charitable use. Appellant, however, relies upon the amendment of section 1313 by the Legislature of 1917 (St. 1917, p. 272) to take this bequest out of the 30-day limitation of the statute. The provision of the amendment is:

"That bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution, are excepted from the restrictions of this section."

[1] It would require an unjustifiable exercise of construction by implication to extend this proviso to cover a bequest to the use of a municipality of the state for the erection of a purely municipal improvement. The city of Oceanside, or the city of San Francisco, or the city of Los Angeles, is not the state nor a state institution. It is true that cities and counties are agencies of the state, and for certain purposes branches of the state government, and they are state institutions in the general sense that they are organized by state authority and for state purposes. We have, however, agencies of the state for certain limited and specific purposes, such as prisons, hospitals, asylums, and similar establishments, which are officially known as state institutions, both under the Constitution and the statutes. Const. art. 10; art. 4, § 22; Pol. Code, tit. 5. In *Chalfant v. State*, 37 Ohio St. 60, state institutions are defined as institutions belonging to and owned by the state, and not such as might belong to particular municipalities. Municipalities are under the law classified by themselves, and we doubt if an instance can be found where a municipal corporation is defined or classified by statutory enactment or judicial construction under the term "state institution."

Counsel for appellant places special stress upon the clause of the amendment referring to bequests "for the use or benefit of the state." It cannot be disputed that anything in the way of municipal improvement which benefits the municipality benefits the state as a whole. This would be the case were the beneficiary of that aid a private hospital, or charity of any kind which helped to carry the public burden, but that is obviously not what is meant by this provision of section 1313. When it is read with its context it will be apparent that the words "state" and "state institution" are to be read in the clause referred to precisely in the sense used in the preceding clause as referring to bequests directly to the state or in trust for the benefit of the state; directly to, or in trust for the benefit of any state institution.

It may be admitted that every reason of public policy would seem to favor applying the same exception of the statute against this 30-day limitation to bequests to municipalities and municipal institutions as to the state and state institutions, but the very obviousness of this implication makes it unlikely that the Legislature, if it had any such purpose in mind, would have failed to put it in the language which would be so naturally suggested. It can hardly be imagined if the Legislature had intended to include municipalities in this amendment that it would have failed to say so, by the addition of the simple word "municipality," which would have fairly obtruded itself upon them in framing this statute.

[2] In any event, we see no escape from the second objection interposed by respondent, namely, the admitted fact that the city of Oceanside at the time of bringing this proceeding had taken no steps to perform the condition precedent to any claim on this bequest. Under the terms of the will the city could only become entitled to this fund or any part of it upon performance of the condition that it raise a like amount to be devoted to the same purpose. That the bequest was to fail entirely if this was not done is shown by the last clause of the provision fixing a time limit within which the bequest could be made available. It is provided that upon failure of the city to perform the conditions, then the sum shall be distributed with the residue of the trust property. This clearly indicates that it was not to be severed from the balance of the residuary estate left to the trustee, unless or until these conditions were met.

It could not even be determined what sum the appellant would be entitled to until it had in some way signified the amount it would subscribe to the building of a pier, and what amount would be necessary for that purpose. The trust fund provided by the will was not the fixed sum of \$100,000, but an amount necessary for such construction not to exceed \$100,000, and that, only to the extent that the city of Oceanside duplicated the amount claimed from the estate by its own contribution. While it is true the petitioner was not asking in this proceeding for a distribution of the fund to itself, but only that it be placed in the hands of the trustee subject to said use, we are satisfied that until some steps had been taken to fix the amount to which the city would be entitled, and to perform the conditions without which it would not be entitled to anything, that no right existed to require any sequestration of this fund in its behalf.

In view of the conclusions reached as to the points discussed, it is unnecessary to

consider the other matters of defense presented by respondents.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; LAWLOR, J.; SHURTLEFF, J.

186 Cal. 653

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9633.)

(Supreme Court of California. Aug. 15, 1921.
Rehearing Denied Sept. 12, 1921.)

1. Master and servant — 417(7)—Findings on substantial evidence in compensation case conclusive.

The findings and conclusions of the Industrial Accident Commission on questions of fact are conclusive if supported by substantial evidence, and cannot be reviewed by the Supreme Court on certiorari, under Workmen's Compensation, Insurance and Safety Act of 1917, §§ 67(a), 67(c).

2. Master and servant — 373—Accidental shooting by employer held injury "arising out of and in course of employment" within Compensation Act.

A garage employee repairing tires when struck by a bullet from employer's gun intended for a stranger with whom the employer had a controversy over the purchase of gasoline, resulting in the shooting by the employer to defend his business, held to have sustained an injury "arising out of and in the course of the employment," within Workmen's Compensation, Insurance and Safety Act of 1917, § 6(a), in view of section 69(a), though the accident was unusual, and was not anticipated nor peculiar to the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under Workmen's Compensation Act by Samuel ShROUT for compensation for injuries, opposed by Fred BARR, employer, and the General Accident, Fire & Life Assurance Corporation, insurer. Award by Industrial Accident Commission for employee, and the employer and the insurer bring certiorari. Affirmed.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner, Warren H. Pillsbury, and H. C. Kelsey, all of San Francisco, for respondents.

SHURTLEFF, J. Certiorari to review an award of the Industrial Accident Commission granting compensation to Samuel ShROUT,

an employee of one Fred Barr, who, with the General Accident, Fire & Life Assurance Corporation, are the petitioners, hereinafter called the defendants.

The following is a brief statement of the facts:

The petitioner, ShROUT, was employed as an automobile tire repairer by Barr in the latter's garage in San Francisco. During the noon hour of the day upon which ShROUT was injured two men, strangers to Barr as well as ShROUT, drove their automobile into Barr's garage and asked him to serve them gasoline. ShROUT at the time was repairing the tires on an automobile some 40 or 50 feet from the point where the altercation hereinafter mentioned occurred, which was the character of the work he was employed to perform. One of the men in the automobile, addressing Barr, said, "Can we have some gasoline?" to which Barr replied, "Yes; if I have any gas." The tank from which Barr had been serving gasoline proved to be empty, and he stepped over to connect with another tank, when one of the men "hollered" to hurry and give them the gas, to which Barr replied, "Don't talk to me like that or you get no gas at all," whereupon both men jumped out of their automobile and struck him. At this point one of Barr's mechanics returned from his lunch and immediately came to Barr's assistance. During the quarrel Barr stated he was going to "ring up the police" and started up the steps leading to his office, which was one floor above the main floor of the garage, and where, presumably, his telephone was located. One of the two men followed him, and as Barr entered his office he saw all of his money lying on his desk where he had left it when called to serve the two strangers and other customers who had immediately preceded them. Barr testified:

"I pushed it [money] to one side, and the gun was lying there, and I grabbed it, and when he saw me do that he started to run down stairs, and * * * I followed him right to the top of the stairs, and he jumped from the top to the main floor, and I fired the shot right after."

The bullet missed the fleeing man, struck the floor, and, glancing, hit ShROUT, who, as has been said, was repairing tires in another part of the garage, and inflicting the wound forming the basis of the award. So far as appears ShROUT, took no part whatsoever in the controversy.

Counsel for defendants, with considerable force, insist that the injury to ShROUT did not arise out of and in the course of the employment, and for that reason he is not entitled to compensation under the act upon which this proceeding is founded. It is true that in order to uphold the award the injury suffered by ShROUT must have been one "arising out of and in the course of the employment." Section 6 (a), Workmen's

Compensation, Insurance and Safety Act of 1917; *Coronado Beach v. Pillsbury*, 172 Cal. 682-684, 158 Pac. 212.

[1] The findings and conclusions of the Commission on questions of fact are conclusive and final, if supported by substantial evidence, and cannot be reviewed by this court. Act, § 67 (c); *Western Supply Co. v. Pillsbury*, 172 Cal. 407-418, 156 Pac. 491. Our jurisdiction is expressly confined to inquiring into and determining the "lawfulness" of the award (Act, § 67 [a]), and if, therefore, it is supported by substantial evidence, it must be affirmed.

In this case the Commission found that—

"The applicant, Samuel ShROUT, * * * while employed * * * by defendant Fred Barr, * * * sustained an injury occurring in the course of and arising out of his employment as follows: The employer became involved in a controversy with certain customers, and in the course thereof shot at one of them and the bullet struck the applicant [ShROUT], * * * causing a severe wound and fracture of the leg."

That the accident occurred in the course of the employment is obvious and does not admit of discussion. It happened while ShROUT was actually engaged in performing work usual to and included in his employment.

The serious question presented, and which is debatable, is: Was the injury suffered by ShROUT one "arising out of the employment"? The act does not define this phrase and no court has attempted to do so. It seems to be universally conceded that no comprehensive definition or unerring guide can be formulated which will determine with certainty the accidents embraced within it, and that therefore each case must be decided conformably to the specific facts it presents.

[2] In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline. That it ultimately resulted in a personal difference, or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. That would, indeed, be a severe rule to apply in a case where, as here, the injured employee was blameless, and at the time he was injured was in his accustomed place, pursuing his usual employment in the business of his employer.

It is equally true that the fact that the injury to ShROUT was not an anticipated one, nor peculiar to the employment in which he was then engaged, does not defeat his claim to compensation if otherwise it is within the provisions of the act.

In *State ex rel. Duluth Brewing & M. Co. v. District Court, etc.*, 129 Minn. 176, 151 N. W. 912, Mr. Justice Holt, in discussing

(200 P.)

the phrase "accidental injury arising out of the employment," appearing in the Minnesota Workmen's Compensation Act, which is substantially similar to the words "arising out of * * * the employment" found in our act, said:

"The term cannot be restricted to injuries caused from anticipated risks of the service if the law is to be of the benefit intended."

The injury to ShROUT was not intentional, nor was it contemplated, which tends to place it in the category of an accident arising out of the employment, for, as stated by respondent, it can fairly be said that to some extent the risk of shooting, holdups, assaults, and the like has in recent years become so closely associated with the garage business that it may be said that employment in such an industry is hazardous.

It is said that—

"If there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former, even when the connection is somewhat remote, and when the direct and immediate agency of injury is foreign." Archibald v. Workmen's Compensation Commissioner, 77 W. Va. 448, 451, 87 S. E. 791-793.

This language, and the rule it declares, is applicable here because there is no escaping the conviction that there is present a causal connection between the employment and the incident which resulted in the injury to ShROUT. Moreover, such construction, and the resultant rule, is in compliance with the express mandate laid upon the courts by the terms of the act:

"That * * * it shall be liberally construed * * * with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." Act, § 69 (a).

We think it can be said that ShROUT was injured, not merely because he happened to be in the garage at the time of the shooting, but because he was there, regularly employed, and hence exposed to all the dangers which might arise in the conduct and transaction of the business of his employer, including the reasonable protection of the latter's property and right to transact his business in an orderly manner.

The facts of the cases cited by the respective counsel are easily differentiated from those presented here, and hence none of them is exactly in point. They are in conflict touching the application and scope of the phrase "arising out of the employment," and a review of them could serve no useful purpose.

What are termed the "horseplay" cases, and the rule in them announced, have no application here. The injury sustained by ShROUT was not due to skylarking or a frolic,

but was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business. The significance of the presence of these conditions is not lessened by the fact that when the incident is scanned under calmer surroundings it might appear that the exigencies of the occasion did not warrant the snooting.

When BARR began shooting, he voluntarily exposed ShROUT as well as all other employees to the danger of being shot, and the fact that the injury which resulted was unintentional and purely accidental does not, in our opinion, prevent ShROUT from recovering.

The court has given the facts presented upon this review a careful examination and painstaking consideration, and, considering all of the circumstances of the case, we think the evidence and the findings sustain the award, and it is therefore affirmed.

We concur: SLOANE, J.; LENNON, J.;
LAWLOR, J.; SHAW, J.

53 Cal. App. 6

**MURPHY v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO
CO et al. (Civ. 3885.)**

(District Court of Appeal, First District, Division 1, California. May 26, 1921, as Modified by Order of June 24, 1921, Denying Rehearing.)

Criminal law — 576(2) — **Failure to dismiss criminal actions for delay in prosecution held no error.**

Under the federal and state Constitutions, requiring a speedy and public trial, and under Pen. Code, § 1382, subd. 2, requiring the court, unless good cause to the contrary is shown, to dismiss the prosecution, if a trial which was not postponed on application of the defendant was not begun within 60 days after the finding of the indictment, or filing of the information, a refusal to dismiss prosecutions pending more than 60 days is not error where trials could not be had because of the congested condition of the court docket.

Application by Edmund Murphy for a writ of mandate, to be directed to the Superior Court, City and County of San Francisco, and Louis H. Ward, Judge thereof. Writ denied.

See, also, *People v. Murphy*, 200 Pac. 484.

Ernest B. D. Spagnoli, of San Francisco, for petitioner.

Matthew Brady and Leo R. Friedman, both of San Francisco, for respondents.

KERRIGAN, J. This is an application for a writ of mandate to compel the superior court of the city and county of San Francisco to dismiss a number of criminal actions pending therein in which the petitioner in this proceeding is the defendant, on the ground that said actions were not brought to trial within 60 days after the finding of the indictment against the defendant.

The federal Constitution, and also that of this state, provide that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, and the Penal Code of this state also contains a provision (section 1382, subd. 2) that—

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed. * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

From the record herein it appears that in the month of December, 1920, six indictments for felony were found against the petitioner; that upon one of them he was tried and convicted in said superior court in the latter part of December, 1920, in consequence of which he is now serving a sentence of from 1 to 50 years. No trial has yet been had upon any of the remaining charges; but it is not seriously claimed that the 60 days within which the petitioner was entitled to be tried commenced to run until the 17th day of January, 1921. At that date, over the objection of petitioner, the court set the date upon which he should enter his plea to each of the pending indictments, to wit, March 12, 1921. The petition herein was filed April 15, 1921; and, while more than 60 days have elapsed since January 17th, still we think the petitioner is not entitled to have said indictments against him dismissed, for it appears from the return herein that the respondent was engaged practically all of the time between the finding of said indictments and March 25th in the trial of other causes, many of which had precedence over those in which the petitioner is defendant. The averment in the affidavit of the respondent in this behalf is as follows:

"That from the said 17th day of January, 1921, to and including said 12th day of March, 1921, there was no open day upon the calendar of said court upon which said petitioner could have been tried upon any one of said indictments, for the reason that there had prior to said 17th day of January, 1921, been set for trial 46 criminal actions wherein said defendants had entered their pleas, and said actions had been duly and regularly set for days certain for trial, which days extended from said 17th day of January, 1921, to and beyond said 12th day of March, 1921; that each and all of said 46 actions were of importance, and it was necessary in the interests of justice that said actions be forthwith tried; that of said 46 actions 30 thereof had been pending in said court a period longer than that of any of the aforesaid indictments against said petitioner; that, even though petitioner had been brought into court and allowed to plead to said indictments, such action could not have expedited his trial upon any of said indictments, nor could he have been tried upon any of said indictments prior to said 12th day of March, 1921."

Under the circumstances narrated, the petitioner was not entitled to have the indictments pending against him dismissed. *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305; *People v. Peter*, 20 Cal. App. 151, 128 Pac. 415.

In its return the court has accounted for the delay up to the 25th day of March, 1921, the date when the motion to dismiss was made, and the petitioner has made no later motion to dismiss. It follows that the petition should be denied; and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 474

PEOPLE v. MURPHY. (Cr. 959.)

(District Court of Appeal, First District, Division 1, California. July 12, 1921. Hearing Denied by Supreme Court Sept. 8, 1921.)

1. Rape $\S$ 51(4)—Evidence of lack of consent of woman held sufficient.

Evidence that the prosecutrix had been struck and beaten until unable to resist, and that sexual intercourse was against her consent and will, held sufficient to sustain a conviction of rape.

2. Criminal law $\S$ 372(1)—Admission of evidence of another crime, related to crime with which defendant was charged, held not error.

In a prosecution for rape, the admission of evidence that defendant and others had attempted to rape another woman at the same time of the offense charged against defendant held not erroneous, in view of evidence showing a conspiracy between defendant and others to rape both women.

3. Criminal law $\S$ 59(4)—Each conspirator liable for crime of the others committed in furtherance of conspiracy.

When a conspiracy to commit an offense of a certain class is shown, each conspirator is deemed guilty of every such crime committed in furtherance of the conspiracy by any of the conspirators.

4. Criminal law $\S$ 823(12)—Instruction as to credibility of witness held not erroneous in view of another instruction.

In a prosecution for rape, an instruction that the moral delinquency of the prosecutrix should not be considered as affecting her credibility was not erroneous, when given with instructions that the jury were sole judges of the weight and value of the evidence and the credibility of witnesses, in the absence of any evidence of unchastity or moral delinquency.

5. Rape $\S$ 40(1)—Witnesses $\S$ 340(3)—Evidence of unchastity, but not of moral delinquency, admissible.

On a trial for rape, evidence of the unchastity of the prosecutrix is admissible, as bearing on the question of consent, but evidence of her moral delinquency is inadmissible, as affecting her general credibility as a witness.

6. Criminal law $\S$ 1172(6)—Instruction held not prejudicial where omitted element appeared in evidence.

Where the evidence showed that defendant knew that he was suspected of crime, and tried

to escape, an instruction that the flight was a circumstance to be considered by the jury in determining defendant's guilt was not prejudicial, though not stating that he must have had such knowledge.

7. Witnesses $\S$ 246(3)—Leading questions put to witness by court held not erroneous.

In a prosecution for rape, where the prosecutrix, through embarrassment, gave an ambiguous answer to a question, the asking of leading questions by the court in order to make the testimony certain was not erroneous.

8. Criminal law $\S$ 656(2)—Comment of court upon manner of witness held not error.

Where defendant's attorney asked that the record be made to show that a witness hesitated in answering a question, a comment of the court that the witness had not hesitated, and that some people hesitate so that they may be sure, was not an unfair comment on the evidence.

9. Courts $\S$ 113—Refusal to have record show that witness hesitated in answering a question not error.

The refusal of a trial judge to have the record show that a witness hesitated to answer a question was not error, since the hesitation was apparent to the jury, and the hesitation would not aid the appellate court in deciding questions of law.

10. Criminal law $\S$ 655(5)—Comment of court that counsel examining witness was "fishing" not misconduct.

The remark of the trial judge that defendant's counsel was on a "fishing excursion" in certain questioning is not misconduct, in the absence of a showing that defendant's cause was prejudiced thereby.

11. Criminal law $\S$ 1166 $\frac{1}{2}$ (12)—Statement by court concerning testimony held not prejudicial.

Where a witness made a statement concerning the identification of defendant, and later made a statement to the contrary, a remark of the court that the two statements amounted to the same thing was error; but, in view of the explanation by the witness that she did not recollect the circumstances when she answered the first question, and the fact that the variance in the answers was conceded, is not prejudicial.

12. Criminal law $\S$ 1170 $\frac{1}{2}$ (5) $\frac{1}{2}$ —Asking of questions by court held not to have harmed defendant.

The court's questions to a witness who was being cross-examined concerning her misidentification of a person, and his statements that he was not going to have the witness confused, etc., held not to have weakened the force of the misidentification, though the record did not show that the witness was confused, or needed any assistance or protection.

13. Criminal law $\S$ 649(1)—Refusal to postpone cross-examination of a witness held not error.

The refusal of the trial court to permit the cross-examination of a witness to be postponed

is not error, in the absence of an attempt by defendant's counsel to recall the witness for further cross-examination at another time, and in absence of a showing of the subject of the proposed cross-examination.

14. Criminal law $\S$ 1170 $\frac{1}{2}$ (5) — Refusal to grant delay before cross-examination of witness held not prejudicial.

In the absence of a showing how the defense was prejudiced, the refusal of a delay until the next day before cross-examining a witness was not error, counsel having been granted 10 minutes in which to consult with his client.

15. Criminal law $\S$ 649(2)—Refusal of postponement not error.

When the trial had been in progress for only an hour, and it appeared that the defendant was seeking to delay the proceedings without good reason, the refusal to grant a continuance to enable defendant's counsel to examine his absent witnesses in a prearranged order was not error, especially where two of the absent witnesses subsequently testified, and the district attorney offered to stipulate that the other would testify as claimed.

16. Criminal law $\S$ 1035(3), 1037(2) — Misconduct of judge or district attorney must be called to attention of trial court.

In order to be considered on appeal, misconduct of the trial court or of the district attorney must be called to the attention of the trial court in order to give opportunity for its correction, and error must be assigned thereon.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Edmund Murphy was convicted of rape, and appeals. Affirmed.

See, also, *Murphy v. Superior Court*, 200 Pac. 483.

Ernest B. D. Spagnoli, of San Francisco (Wm. F. Herron, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Stanislaus A. Riley, Asst. Dist. Atty., both of San Francisco, for the People.

KERRIGAN, J. Appeal of the defendant from a judgment of conviction of the crime of rape, and from the order denying motion for new trial.

The facts of the case are substantially as stated in the brief of the Attorney General as follows:

On Wednesday evening, November 24, 1920, Jessie Montgomery (whose marriage name is Matthias) was waiting on the corner of Sixteenth and Mission streets, San Francisco, for a car to take her to her home at 315 Fifth street. James Carey, whom she previously had met and danced with, drove

by in an automobile. After recalling himself to her, he invited her and her chum, Miss Jean Stanley, into his car to be taken home. They were driven to Clark's Pool-room, on Mission street near Twentieth, and there were joined by Thomas Brady, a friend of Carey. The four then drove in Carey's car to the Stroller's Café, Ninth and Folsom streets, where each had one drink of sherry wine. Other drinks were served but they were consumed by the men; the girls did not partake of them.

While the four were in the café, defendant Murphy and Edward Kruvosky entered. There ensued a whispered conversation among the four men, the nature of which the girls do not know. But when the girls and their escorts left the premises by one door, Murphy, Kruvosky, and a third man, named Boyd, left by another door and jumped into the machine in which the four were seated. The car was driven to a shack on Howard street, and Murphy, Kruvosky, and Boyd alighted and entered the house, leaving the two girls and their escorts in the car. Upon one pretense and another Brady and Carey prevailed upon the girls to enter the Howard street place; they were admitted by Allan MacDonald, who locked the door after them. Carey and the two girls entered a front room, which was furnished with a table, chairs, and a mattress rolled up. Murphy had already gone out into the kitchen. Brady also went out into another room, and returned with MacDonald who brought in a round of drinks. The Stanley girl took none of them; the Montgomery girl took one-half of her own glass.

Kruvosky, in the meantime, had come in from the kitchen. With Brady holding one of her hands, Kruvosky put the glass to the Montgomery girl's lips, tilted her head back, and poured the liquor down her throat. Another drink was brought in, and the performance repeated. Brady next led the Montgomery girl into the kitchen, where Murphy and Kruvosky were. Murphy demanded that she sing, and, she refusing, insisted that she dance for them. Upon her refusal to dance Murphy struck her on the side of the jaw and felled her. Brady went up to her as she struggled to her feet, and said: "Go on; take off your clothes and dance for them," and upon her further refusal Murphy struck her to the floor a second time. This blow was so violent that she did not know what was going on; at times she did not know anything, and at other times she knew everything that was going on, but could not resist because her strength had failed her. The Montgomery girl screamed when she was hit, and the Stanley girl ran to her aid. Kruvosky hit the Stanley girl in the jaw, and Murphy hit her on the face, breaking her nose. Murphy then picked her up by the hips, held her on the floor, and "binged" her

on the floor. Kruvosky then dragged the Montgomery girl, weakened as she was by the two fellings, into the bathroom adjoining, where he picked her up by the shoulders, threw her to the ground, and knocked her head against a washstand, pulled her to the floor, tore her dress from off her body, rolled her around upon the floor, soiling her underclothing, and finally ravished her. Murphy repeatedly thrust his head in the bathroom during this time and cried: "Hurry up, hurry up!" The girl knew nothing more until she found herself on the mattress in the front room. Here Murphy and Kruvosky pulled her clothes off her in the presence of Boyd, Carey, and Brady, and here Murphy, followed by the others in turn, violated her. These acts were done without her consent and against her will after she could not resist because her strength was gone, and she was absolutely powerless. She was never the wife of the defendant, and had never been married to him.

Carey had meanwhile led the Stanley girl into an adjoining bedroom and brought her a wet rag to bathe her bruised face. He left the room, and defendant entered. Defendant demanded that she submit to him. She refused, and he menacingly brandished a gun in her face. She persisted in her refusal. Defendant then picked her up and threw her on the couch, and held her legs; MacDonald seized her hands and Boyd her head, while Kruvosky, coatless, and with trousers unbuttoned, advanced to the attack. She struggled, begging them to kill her rather than to torture her like that, and finally all left the room save MacDonald. The Stanley girl then got MacDonald to leave the room. She broke the window and jumped out. About this time Carey came to the door of the room where the Montgomery girl was lying on a mattress and cried, "Hurry up, get your coats on; the cops are coming," and Murphy, Kruvosky, Carey, Brady, and Boyd left. The Stanley girl returned to the place with two police officers. Her face was all swollen, her eye blackened, and there was blood all over her clothes and upon her wrists.

Entrance to the Howard street premises was effected by one of the officers through the broken rear window. He opened the door for his fellow officer and the Stanley girl. They found Jessie Montgomery lying on a mattress in the front room doubled up like a jackknife, her face against the wall and her hands over her face; she was perfectly nude; she was in a very hysterical condition, and moaning that she had been raped. Kruvosky, who had returned, was standing behind the door, and MacDonald was sitting on a chair in the room. The Stanley girl dressed Miss Montgomery; the two were taken to the Central Emergency Hospital, where they were placed under the care of

a physician and nurse. The doctor found the Montgomery girl's vulva to be reddened, and somewhat inflamed. The girls were removed before noon that morning to the San Francisco Hospital, where a physician examined the Montgomery girl, and found her suffering from bruises over the left eye and in the temple region, and considerable swelling over the malar bone, the bruises extending over onto the upper eyelid. There were bruises on the arms, mostly on the right elbow, a small discoloration on the left wrist, several bruises on the legs, the medial aspect of the right thigh just above the knee, and the left knee, on both lower legs, the tibial surfaces of the legs, and several scratches on the feet.

On Friday, November 26th, or Saturday, November 27th, Detective Sergeant Jackson, Detective Dorman, and Officer Darling went to defendant's residence to apprehend him, but received no answer to their ringing of the doorbell. Defendant was not apprehended until Tuesday, November 30th, though the police had constantly been looking for him since midnight of the 25th. The house in which he was finally located was covered by the police, two of whom rang the bell and knocked on the door of the premises. They received no response and broke in the door. Defendant ran out and was captured on the roof of an adjoining building. He admitted to the police officers that he was trying to escape, and that he had been hiding since the night of the 25th. Subsequently the defendant and Carey were brought before the girls at the San Francisco Hospital. There Miss Montgomery twice accused the defendant of having raped her. Once he denied it. The second time he stood mute. En route from the hospital to the hall of justice, while defendant and Carey were in the police automobile, there ensued a conversation between Carey and the defendant, wherein Carey commented on the fact that Miss Stanley had noticed his diamonds, and that she did not look to be 21 years old. He further remarked, "Those blondes are my jinx. The last time I got in trouble a blonde got me into that too;" to which the defendant rejoined, "She is a fighting bitch, all right." Later the defendant declared that the Montgomery girl came prepared for what she got, and that she got it.

[1] The first ground urged by the appellant in support of his appeal is that the evidence is insufficient to sustain the verdict, in that it fails to show that Jessie Montgomery, the prosecuting witness, resisted any of the acts of the defendant, or that her resistance was overcome by force, or that she was in such a condition that she could not have resisted. In this behalf it appears from the evidence offered on behalf of the people, as already outlined, that because she refused to remove her clothes and sing and dance for the de-

fendant and his companions, and persisted in such refusal, the defendant struck her on the head, knocking her down twice; that after the second blow she was unable to get up, whereupon Kruvosky dragged her into the bathroom, threw her down, hitting her on the head, pulled off her dress, rolled her on the floor, and finally had sexual intercourse with her. During this time the defendant every once in a while would stick his head in the room and say, "Hurry up, hurry up!" and that the girl knew nothing after Kruvosky had ravished her until she found herself on the mattress in the front room. Here the defendant and Kruvosky pulled her remaining clothes off, and the former engaged in an act of sexual intercourse with her. This evidence is ample to show that the prosecutrix did resist, and that her resistance was overcome by force and violence. It is to be noted that the defendant and Kruvosky had been following professional boxing as an occupation, and that their victim was a girl 17 years of age. Immediately before her rape by the defendant she had been subjected to the most brutal treatment, rendering her unconscious, and only came to a moment before the attack which it is now insisted that she did not sufficiently resist. She herself testified, "I could not resist, because my strength was all gone. I had absolutely no strength left." It is not claimed by the defendant's counsel that she consented, or was a willing victim; and it is hardly to be expected that a person upon whom had just been inflicted a brutal bodily attack could offer a more strenuous physical resistance, the degree of which must necessarily depend upon the circumstances surrounding the act at the time and the relative strength of the persons concerned. It is a just inference from the evidence that Jessie Montgomery resisted to the full extent of her capacity. *People v. Bonzani*, 24 Cal. App. 549, 141 Pac. 1062.

[2] Complaint is also made of the ruling of the court in admitting the testimony of Jean Stanley, over the defendant's objection, to the effect that the defendant and other persons attempted to commit rape upon her, in doing which the defendant threw her on a couch and held a gun in her face, threatening to kill her unless she would submit to an act of sexual intercourse. The argument is that this was evidence of a wholly distinct and collateral offense, involving a different person, and wholly irrelevant to the charge.

It is of course, the general rule that evidence of another crime is inadmissible; but where, as here, the evidence sufficiently established a conspiracy, evidence of all acts in furtherance of the common design by any or all of the conspirators is admissible. From the statement of the facts already given, enough appears to show that the de-

fendant and his companions either expressly or tacitly formed the design to engage in acts of sexual intercourse with the prosecutrix and Jean Stanley, either with or without their consent. It is a fair inference from the conduct of the defendant and his codefendant that such a design was formed at the Stroller's Café. Reference has already been made to the whispered conversation out of the hearing of the two young women, to their leaving the café together, joining Carey and Brady immediately outside, and then riding with them and their intended victims to the Howard street shack. Here the girls and their original escorts entered by one door, while the defendant and Kruvosky entered by another, and shortly after they were all in the building they came together and proceeded jointly and severally with the attacks described which appear to have been well understood and designed.

[3] The established rule is that when a conspiracy to commit an offense of a certain class is shown each conspirator is deemed guilty of every such crime committed in furtherance of the conspiracy by any of the conspirators. *People v. Eldridge*, 147 Cal. 782, 82 Pac. 442; *People v. Schmidt*, 33 Cal. App. 426, 165 Pac. 555; *People v. Ciulla*, 187 Pac. 46.

[4, 5] The defendant assigns as error on the part of the trial court the giving of certain instructions to the jury, the first of which reads as follows:

"You are further instructed that the moral delinquency of the girl complainant, if there be any such moral delinquency, is not to be considered by you as affecting her credibility."

In this state, in cases of this character the rule is that evidence of the unchastity of the prosecutrix is admissible as bearing on the question of consent, but evidence of her moral delinquency is inadmissible as affecting her general credibility as a witness. *People v. Johnson*, 108 Cal. 289, 294, 39 Pac. 622; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9; *People v. Wilmot*, 139 Cal. 103, 107, 72 Pac. 838. However, in this case no evidence was introduced for either purpose, and while therefore we are unable to lend our concurrence to the giving of this instruction, still we do not believe, when the instructions are read in their entirety, including those charging the jury in various forms that they were the sole judges of the weight and value of evidence and of the credibility of the witnesses, that the jury could have believed that they were not at liberty to consider the conduct of the prosecutrix on the night of the offense or during the trial as affecting the value and weight of her evidence.

[6] The second of such instructions is one on the subject of flight, and was in the following language:

"I instruct you that flight itself is not evidence of guilt, but is a circumstance which you may consider in determining the issues in the case; and if there is any explanation of the flight, if there was any evidence of flight, you can take such explanation into consideration; and unless you are convinced that the explanation is satisfactory to you, you may take such evidence of flight as an indication of guilt."

The defendant argues that this instruction omits the essential qualification that in order to make flight indicative of a guilty conscience the defendant must know that he is charged with crime. The evidence clearly shows without conflict that the defendant knew that he was charged with the crime, and that he tried to escape; therefore it is not considered that the defendant was in any manner prejudiced by the instruction.

[7] The appellant also seeks a reversal of the judgment on the ground of alleged misconduct of the court during the course of the trial. On one occasion, during the direct examination of the prosecutrix, the trial judge, over the defendant's objection, propounded leading questions to her. The witness had already testified, "Kruvosky used me," and it was to remove any ambiguity from this expression that the suggestive questions were asked, the court remarking in response to the objection:

"I have a lady on the stand, and she has already indicated that she is embarrassed by telling a story of this kind. * * * I am using my discretion, because it seems to me that this lady cannot tell the story without these questions being propounded to her."

The action of the court, it is clear, is subject to no unfavorable criticism.

[8, 9] Again during the cross-examination of this witness counsel for the defendant claimed that she hesitated in answering one of his questions, and he requested that the record show that she hesitated; upon which the court remarked that she had not hesitated; and a few minutes later, after discussion, the court said: "That is a matter of argument. Some people hesitate so they may be sure." The witness had testified that she had identified the defendant three or four days after the assault, and she was then asked if she would not swear that it was not five days afterwards. It was as to the last questions that the defendant claims the witness hesitated. We cannot conceive upon what ground the defendant's counsel desired that the record should show the alleged hesitation, since the fact, if it existed, was before the jury; and its record, if one were made, would be useless to the court, for whose benefit the record is prepared, since the length of time taken by a witness to consider what answer he should give to a question would not aid this court in deciding the questions of law presented to it upon an appeal; nor can we understand

how the remark of the court, that persons sometimes hesitate in order to be sure—which is an obvious fact—prejudiced the defendant. It does not appear that the court was making an unfair comment upon the evidence, nor, as further claimed, that the remarks of the court were designed to enhance the credibility of the witness.

[10] At another point in the cross-examination of the same witness counsel for defendant, during a discussion of a question propounded by him, was told by the court that he was on a "fishing excursion." This expression often encountered in nisi prius trials, described accurately what defendant's counsel was engaged in. It was not used offensively, and the employment of the expression, while it might jar the sensibilities of counsel, is far from constituting misconduct, it not appearing that the defendant's rights were in some way prejudiced thereby. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 276.

[11] The next complaint is that the court declared two answers of this witness to amount to the same statement. At one place in her cross-examination the witness, respecting the identification of the defendant at the hospital where she and her companion were being treated, said that after the defendants had left the room she remarked (referring to Miss Stanley): "Well, I didn't hear her say anything about Murphy." A few minutes later she revised her testimony in this particular, and said that Miss Stanley had identified the defendant at the hospital as one of the men who had treated her so roughly in the Howard street shack. In a discussion upon the subject the court remarked, "It is the same statement."

In this respect the court was in error, but it amounted to nothing, for right then and there it was in effect conceded that the two answers were at variance, and the witness explained it by saying that when she first answered the question she had not recollected what had been said by Miss Stanley, but that a moment later, her memory being refreshed, she corrected her testimony. Statements by the court like this, if they exercise any influence upon the jury, help, rather than hurt, the defendant.

[12] Counsel for the defendant states that one of the worst instances of misconduct on the part of the court occurred during the cross-examination of Miss Stanley. It had been shown that both of the young women, a few days after the occurrences at the shack, had identified the brother of defendant, K. O. Kruvosky, known in the record as "Bevo" Kruvosky, as one of their assailants, and had afterwards admitted that they were mistaken in such identification. The part of the cross-examination in respect to which it is claimed that the court was guilty of misconduct, is as follows:

"Q. Did you identify any one as a party who was in this Howard street house upon this night and subsequently say that your identification was wrong? A. Yes.

"Q. Please relate that.

"The Court: Q. Who was it that you identified, Miss Stanley? A. K. O. Kruvosky.

"Mr. Spagnoli: Q. You identified K. O. Kruvosky, and you made a mistake; is that correct? A. Edward Kruvosky's brother.

"Q. I don't know who his brother is. Will you tell me his name? A. I don't know his first name.

"Q. Now, do you mean to tell me you misidentified K. O. Kruvosky; is that the idea?

"The Court: Now I am going to have this witness informed on that matter. I think she is entitled to it. The court knows from questions you have propounded to other witnesses here today that the man you have in mind is Bevo Kruvosky.

"Mr. Spagnoli: I have no one in mind, if your honor please.

"The Court: I am not going to have this witness confused.

"Mr. Spagnoli: I don't know who this witness misidentified.

"The Court: Q. Do you know the man who is in custody now—Kruvosky—Miss Stanley? A. Yes; I do.

"Q. Is that the man you identified, and subsequently said he was not the man? A. No.

"Q. Who is the man? A. It is Bevo Kruvosky."

By this excerpt from the record the witness appeared to be laboring under no confusion, and needed no assistance or protection; but in any event her misidentification of one of the defendants lost none of its force, it is clear, by the action of the court.

[13] Nor does it appear from the record, as claimed by the defendant, that his right of cross-examination of this witness was unduly curtailed. At one place in the cross-examination it does appear that counsel stated that he was taken by surprise as to a portion of the testimony of Miss Stanley; that he was tired from the long day and night sessions of the court, and asked permission to finish the cross-examination of the witness at another time. This request was denied, and he was asked if he had any further questions, to which he replied: "We have nothing further at this time." It does not appear on what subject he wished to further cross-examine her, nor did he subsequently recall this witness for further cross-examination, as the court intimated might be done upon a proper showing. We do not think that the defendant's complaint of undue curtailment of cross-examination can be predicated upon this state of the record.

[14] Complaint is next made that the court refused defendant a continuance in order to enable him to prepare for the cross-examination of Corporal Suttman, a witness for the people. At the conclusion of the direct testimony of this witness, defendant's counsel,

addressing the court, said that he had been taken by surprise, and that he desired an opportunity to consult with his client before cross-examining the witness. The court permitted the witness to be withdrawn, and two other witnesses for the prosecution were called and examined, which concluded the case for the people, with the exception of one professional witness, who would, it was said, be in court the following morning. Thereupon the court directed counsel for the defendant to commence the defense, or proceed with the cross-examination of Suttman. Defendant declined to proceed with his defense until the case for the people was closed, and insisted that under all the circumstances of the case and the lateness of the hour he should not be required to proceed with the cross-examination of Suttman until the next day. The court finally accorded counsel for the defendant 10 minutes to consult his client, after which the cross-examination was taken up. There is no showing that the defendant was prejudiced in his defense by the refusal to grant further delay.

[15] Finally, the defendant complains of the refusal of the trial court to grant a continuance under the following circumstances: Having examined several witnesses his counsel desired to place upon the witness stand three others who, although subpoenaed, were not present in court. Two other of defendant's witnesses, however, were present, upon which showing the court refused defendant's request for a continuance, the sole ground of which apparently was his desire to examine his witnesses in a prearranged order, and he was given one minute in which to place his next witness upon the stand. He thereupon took the stand as a witness in his own behalf. Later, two of these three witnesses appeared in court and were examined. They both testified that, although they lived near the Howard street shack, they heard no screaming or outcry upon the night of the occurrences upon which the present charge is based. The third witness did not appear, and could not be produced; but upon counsel stating that he expected to prove by her that she had not heard any screams or outcry or noise of women on the night in question, the district attorney offered to stipulate that this witness, if produced, would so testify; but counsel for the defendant replied "we don't want any admissions. We want to prove it by the witness."

It does not appear that the refusal to postpone the case deprived the defendant of the

benefit of any testimony, or that the disarrangement of the order planned for the calling of his witnesses resulted in any prejudice to the rights of the defendant. At the time of the requested continuance the court had been in session only a little over an hour. And here, as in many instances throughout the trial, it appears clear that the defendant sought to delay the progress of the trial without any very good reason in law therefor. The remarks of the court hereinabove referred to are typical of a number of others now claimed as misconduct for the first time in appellant's reply brief.

[16] None of the incidents, or all of them, upon which the charge of misconduct on the part of the trial court is laid, afford any sufficient foundation therefor; and this was probably the view taken by the defense at the time, for no assignment of error with respect to them was then made. It has long been the rule in this court that a claim of misconduct on the part of the district attorney or the trial judge will not ordinarily be considered on appeal unless the complaining party has promptly called the attention of the court to the alleged impropriety and assigned misconduct thereon. The reason for this rule is that the court should be given the opportunity to correct the irregularity or to prevent any prejudicial effect if that be possible. *People v. MacDonald*, 167 Cal. 545, 551, 140 Pac. 256. Much of the trouble during the trial between the court and counsel for the defendant was occasioned by the manifest desire of the court on the one hand to expedite the trial of the defendant as much as possible, and by counsel on the other hand to gain delay, claiming at times that by reason of the long night and day sessions of the court he was exhausted, and at other times that he had not had sufficient opportunity to prepare for the direct and cross-examination of witnesses or to prepare proposed instructions for the jury. But assuming, as earnestly urged, that the court was impatient, and frequently unjustly rebuked counsel, still it is quite certain that we cannot hold, as claimed, that the court was hostile to counsel and the defense, and that the attitude of the court toward both was such as resulted in an unfair trial to the defendant.

No further questions are presented.

Judgment and order are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 488

(200 P.)

PEOPLE v. MacDONALD. (Cr. 974.)

(District Court of Appeal, First District, Division 1, California. July 12, 1921.)

1. Criminal law — § 619—Consolidation of indictments held not error.

Under Pen. Code, § 954, providing that the court may order consolidated for trial two or more charges of different offenses of the same class of crimes or offenses, a consolidation of charges of rape and of the infamous crime against nature, where both offenses were committed on the same person, and both offenses are included in title 9, Pen. Code, as crimes against the person and public decency and good morals, was not error.

2. Criminal law — § 166(1)—Consolidation of charges held not prejudicial.

The consolidation of charges of rape and the infamous crime against nature was not prejudicial as admitting evidence of other crimes of rape which defendant claimed would have been excluded from the separate trial of the second offense, where the crimes were all committed as a part of a general orgy of crime.

3. Criminal law — § 372(1)—Admission of evidence of another crime committed by defendant held not error.

In a prosecution for rape and the infamous crime against nature, the admission of evidence of an attempt at rape by defendant on another woman at about the same time was not error, where the acts were so interrelated as to form a continuous series in which each act and offense was a part of the *res gestæ* as to all concerned in the commission of the crimes.

4. Criminal law — § 126(1)—Denial of motion for change of place of trial held not error.

It was not error to deny a motion for change of place of trial on account of prejudice against defendant in the mind of the public, where a panel of 12 qualified jurors was obtained from a full and fair *voir dire* examination of 36 persons, and where the court had before it information concerning the public mind from trials of the defendant's associates in connected crimes.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Allan MacDonald was convicted of rape and the infamous crime against nature, and appeals. Affirmed.

Joseph McInerney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Matthew Brady, Asst. Dist. Atty., and Stanislaus A. Riley, Deputy Dist. Atty., both of San Francisco, for the People.

RICHARDS, J. This is an appeal from a judgment of conviction and from the order denying motion for a new trial of the defend-

ant upon an indictment by the grand jury, of the city and county of San Francisco, returned on December 1, 1921, charging the defendant with the crime of rape, and also upon an indictment by said grand jury, returned December 29, 1921, charging said defendant with having violated section 286 of the Penal Code, defining the infamous crime against nature, both offenses being charged to have been committed against one Jessie Montgomery. On motion of the district attorney, and over the objection of the defendant, these two charges were consolidated, and thereafter came to trial on January 10, 1921. Upon the first trial thereon the jury disagreed, and was discharged. Thereafter, and on January 14, 1921, the defendant moved for a change of place of trial of the cause to another county, upon the ground that a fair and impartial trial could not be had in the city and county of San Francisco. This motion the trial court denied, and on January 17, 1921, the matter came on for retrial before a jury, which, at the conclusion of said second trial, found the defendant guilty of the offenses charged in said indictments. A motion for a new trial was denied, whereupon the defendant has prosecuted this appeal.

[1] The appellant's first contention is that the trial court erred in its order consolidating the two charges against the defendant for the purposes of the trial. The court in so doing relied upon the provisions of section 954 of the Penal Code, which reads in part as follows:

"The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated."

We are of the opinion that the court committed no error in the consolidation of the charges embraced in these two indictments and of their trial together. The two offenses were charged in these separate indictments to have been committed upon the body of the same person. They belong, in our judgment, to the same class of offenses. They are crimes against the person and against public decency and good morals, included in title 9 of the Penal Code. *People v. Warriner*, 37 Cal. App. 107, 173 Pac. 489.

[2] The chief objection which the appellant urges against the consolidation of these two charges against the defendant, and of their trial together, is based not so much upon the substance of the indictments as upon the events of the trial, his contention being that the evidence adduced thereat showing the defendant to be guilty of having committed the

infamous crime against nature discloses that such offense, if committed at all by him, was committed after the several crimes of rape which he was charged with having aided and abetted had been fully consummated; and that this being so, the evidence as to such other crimes would have been inadmissible against the defendant had the charge of the infamous crime against nature been separately tried. Upon the whole record, however, we cannot sustain this contention, since it sufficiently appears therefrom not only that the crimes of rape committed by the other persons upon the person of Jessie Montgomery, which this defendant was charged with having aided and abetted, were committed in the course of a general orgy of passion and lust in which the defendant took throughout a sufficiently guilty part, but that one of these very crimes of rape perpetrated by one of his associates in the general course of these bestial crimes was practically coincident in its commission with the particular crime against nature with which the defendant was charged. We can therefore see no material prejudice which the defendant sustained by the consolidation and trial together of the charges embraced in these two indictments.

[3] The next contention of the appellant is that the trial court committed prejudicial error in the admission of the testimony of one Jean Stanley as to an offense in the nature of an attempted rape committed by the defendant against her, and which was not embraced in either of said indictments. In the case of *People v. Murphy*, 200 Pac. 484, this day decided by this court, we have set forth with much of detail the evidence as to the occurrences at the place and on the occasion when the several offenses with which the defendant herein was charged in these two indictments were shown to have taken place. That the acts which the defendant himself committed and the acts which were done or attempted by his associates in the debaucheries of that night were so interrelated as to form a continuous series of offenses, in which each act and offense of each perpetrator was part of the *res gestæ* as to all concerned, we entertain no doubt, and, this being so, the testimony of Jean Stanley as to the defendant's brutal and libidinous approaches was admissible, not as proof of another and distinct crime, but as a part and parcel of the series of continuing offenses which went to make up the sordid tragedy in which this defendant played at times an active and at other times a sympathetic part.

[4] The appellant's next contention is that the trial court erred in denying his motion for a change of place of trial, supported, as it was, by affidavits showing an aroused state

of public feeling over the commission of the offenses with which the defendant and his associates were charged. It does not appear that any counter showing was made on behalf of the prosecution, but it does appear that the trial court had before it, through reference in the defendant's showing, the records of the other recent trials of the defendant's associates in the perpetration of the outrages, as a result of which these two indictments against him were presented; and from these records it appeared that no particular difficulty had been experienced in procuring juries to try the defendants in those other cases; but a more significant and controlling state of facts going to show that the discretion of the trial court in the matter of granting or denying this motion was not abused, is to be found in the proceedings immediately following its denial; for it appears that a panel of 12 qualified jurors was actually obtained from a very fair and full voir dire examination of 36 persons, during the course of which the defendant found but two prospective jurors subject to challenge for cause, one of whom was dismissed upon such challenge, and which examination shows no undue state of either passion or prejudice pervading either the courtroom or the minds of those called for jury duty in the case. It is true that the defendant used all of his peremptory challenges before the final juror was obtained, but it does not appear, either from the examination of said final jurymen or of any other prior jurymen, that any cause existed for the exercise of any further peremptory challenges as to any of them, or that the 12 jurors finally accepted and sworn were not only entirely satisfactory to the defendant, but were not also in all respects qualified to afford him a fair and impartial trial. *People v. Schafer*, 161 Cal. 573, 119 Pac. 920; *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599.

Under these conditions and in the light of these cases, we think that it has not been shown that the trial court abused its discretion in refusing the defendant a change of place of trial, or that the defendant was not afforded a fair and impartial trial before the trial court. Counsel for the appellant expressly disclaims any imputation of unfairness, prejudice, or partiality on the part of the trial judge, and, this being so, we feel that the appellant has suffered no prejudice through the denial of his motion for a change of place of trial. We do not deem any other points urged by the appellant worthy of serious or extended discussion.

Judgment and order are affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 377

BURR v. GARDELLA et al. (Civ. 2304.)

(District Court of Appeal, Third District, California. June 30, 1921. Hearing Denied by Supreme Court Aug. 29, 1921.)

1. States 101—Subcontractor's bond to be construed in light of contracts.

A bond of a subcontractor on a state job will be construed in arriving at the scope of the obligations by the light both of the agreement between the contractor and the subcontractor and the contract between the contractor and the state.

2. States 101—Subcontractor may be required to execute bond.

A subcontractor in cases of contracts for the performance of public work may be required by the contractor to execute to him the bond provided for in St. 1897, p. 201, as a matter of protection to his own bondsman, as well as to himself.

3. Principal and surety 97—Surety favored in law.

A surety is favored in law, and any act by the obligee in a bond which is injurious to his rights will operate as an exoneration of his obligations as such surety, under Civ. Code, § 2840, subd. 2, and section 2819.

4. Principal and surety 117—Premature payments to contractor release sureties only pro tanto.

Where premature payments are made to a contractor the effect thereof does not necessarily release the contractor's sureties from their obligations as such, but only from that part of the contractor's default that may be made up of such premature payments.

5. Principal and surety 117—Payments to contractor held not premature.

Under a contract expressly providing that claims of creditors of subcontractor must be paid when due and payable, and that contractor should retain 25 per cent. of amount earned by subcontractor, held that payments to the subcontractor for the purpose of satisfying creditors were not premature as to the subcontractor's surety, even though it was impossible to retain the 25 per cent. provided by the contract.

6. Principal and surety 161—Evidence held to show payments to contractor were not premature.

In an action by contractor against surety on bond of subcontractor, evidence held to show that payments made by contractor to subcontractor were not premature.

7. Principal and surety 193—All sureties entitled to security acquired by cosurety.

All the sureties on the bond of contractor are entitled to the benefit of any security for the performance of the principal obligation acquired by any of his cosureties at any time after they have entered into the contract of suretyship, under Civ. Code, § 2849.

8. Judgment 256(2)—Findings held insufficient to support judgment.

In an action by a contractor against subcontractor to recover for money advanced for

rent of motortruck, a mere finding that defendant was adjudged a bankrupt pending the trial, considered in connection with concession of counsel that plaintiff was not, as matter of fact, included among the creditors of defendant in his petition, is wholly ineffectual for any purpose, and in no manner or measure adds any support to a judgment in favor of defendant.

9. Sales 456—Instrument held a conditional sale with characteristics of lease.

A transaction between a contractor and a subcontractor, evidenced by a written instrument, concerning a motortruck, held to constitute a conditional sale, possessing, however, the characteristic of a lease.

10. Sales 479(9)—Conditional seller of motortruck held entitled to compensation under conditional sale contract.

Where vendee under conditional sale contract failed to pay installments on a motortruck, and used the same for some time, held that seller was entitled, on retaking the truck to some compensation or damages for vendee's breach, and that the measure of compensation or damages is fixed by Civ. Code, § 3311, subd. 2.

On Hearing in Supreme Court.**11. Principal and surety 81—Subcontractor's sureties liable for damages for breach of contract to pay installments on truck purchased from contractor under conditional sale contract.**

Where subcontractor purchased a motortruck from contractor under a conditional sale contract, and failed to pay installments, and the truck was retaken by the seller, the seller was entitled to recover from sureties of the purchaser for the use of the truck the reasonable value of such use during the time purchaser was actually using it in the performance of the contract with the seller, and rental agreed on in the contract for sale of the truck was immaterial.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by P. L. Burr against L. Gardella and others. Judgment for defendants, and plaintiff appeals. Reversed in the District Court of Appeal, and hearing denied in Supreme Court.

R. H. Countryman, of San Francisco, for appellant.

George F. Jones, of Oroville, for respondents.

HART, J. The plaintiff, in the month of June, 1914, entered into a contract with the state of California, through and by its department of engineering, whereby the former agreed to construct a portion of a state highway in Butte county "between Lindo Channel, one and one-half miles north of Chico, and the northerly county boundary—division 3, route 3, section D." On the 15th day of April, 1915, the plaintiff and the defendant

Keith made and entered into a written agreement, by the terms of which said Keith, for a certain specified consideration, was to haul and transport or carry from Cana, or "any other point on the line of the Southern Pacific Railroad or Northern Electric Railroad," where the State Highway Commission may deliver the same, certain materials (mineral aggregate) necessary to be used in the construction of said portion of said state highway by the plaintiff under his contract with the state of California. Among the provisions of the contract between plaintiff and Keith is the following, after specifically setting forth the sums to be paid to and received by said Keith for the transportation and delivery of said materials as provided therein:

"Said payment shall be made five days after said first party shall receive from said Highway Commission his respective payments according to the terms of said contract between said first party and said Highway Commission for deliveries of said mineral aggregate; provided, however, that at least twenty-five per cent. of said respective payments due said second party shall be retained by said first party for the period of thirty-five days after the completion of this contract."

The contract also provides for the retention by the first party of an amount in addition to the said 25 per cent. sufficient to meet any claims growing out of said contract as to which stop notices may be served either upon the party of the first part or the Highway Commission. It is also provided in said contract that if the second party shall fail to comply with the terms of said contract the first party may take entire charge of the work of delivering and distributing "said mineral aggregate, and charge the entire cost to said second party." The second party agreed to furnish all necessary equipment and labor to perform said work at his own cost and expense, and also to give a bond conditioned for the faithful and complete performance of the terms of said contract.

The sureties on the bond given by defendant Keith for the performance of said contract are the defendants L. Gardella, Ames Vaughan, and J. R. Vaughan. The sum to which said sureties bound themselves on said bond was \$2,000, and the condition of the obligation was that the party of the second part would faithfully perform all the terms of the contract. The action here is against said Keith for \$2,036 and against the sureties on said bond for \$2,000, the sum in which the sureties became bound on their bond.

The complaint is in 4 counts, to wit: (1) That, in performing the contract between plaintiff and defendant Keith, the latter became indebted to the plaintiff in the sum of \$911.36, "as and for a balance due for and on account of work, labor done and perform-

ed, and materials furnished by this plaintiff to and for said defendant Keith, under said contract;" (2) that the defendant Keith, as principal, and the bondsmen on his surety bond, agreed to pay or secure the payment of all claims for labor, materials, and supplies furnished "for hauling and transporting from Cana or any other point on * * * said mineral aggregate to the points designated;" that, in performing the said contract between plaintiff and defendant, "said defendant F. M. Keith became indebted to this plaintiff in the sum of \$1,125 for and on account of the agreed rental of a certain motor truck called a 'Knox' truck;" that "said motortruck was rented by said plaintiff to said defendant at the agreed or stipulated price of \$250 per month; that said defendant used said motortruck for 4½ calendar months at said agreed rental of \$250 per month, making a total sum of \$1,125;" that "said truck was used by said Keith in the performance of said contract" between him and plaintiff; (3) that defendant Keith, in performing said contract between him and plaintiff, became indebted to the latter in the sum of \$911.36 "for and on account of moneys paid, laid out, expended, loaned, and advanced to and for said defendant Keith by this plaintiff, at the special instance and request of said defendant Keith;" (4) that plaintiff rented the Knox motortruck above mentioned to defendant Keith, to be used in the performance of the said contract between Keith and plaintiff, that Keith so used said truck for the period of 4½ calendar months, and that "the reasonable value of the use of, and the reasonable rentals for said Knox truck is and are now, and during all of the times herein mentioned has and have been, the sum of \$250 during each calendar month."

The complaint alleges that for a valuable consideration the said defendants, Gardella, the two Vaughans, and Keith, executed as sureties the bond in question here.

The defendants filed separate answers—that is, the defendant Keith filed an answer and the other defendants filed a joint answer as sureties on said bond. Keith's answer specifically denied that there was anything due plaintiff under the contract to which they were parties, and also, as to the claim of Burr, as alleged in his complaint, that said Keith was indebted to him in the aggregate sum of \$1,125 as rental for the use of the Knox truck mentioned in the complaint, pleaded and set out in *hæc verba* a written agreement, dated May 24, 1915, whereby, so he averred, the plaintiff sold to him said truck for the sum of \$1,500, said agreement being in the following language: "\$1,500.00. Chico, Cal., May 24, 1915.

"For value received I promise to pay to the order of P. L. Burr the sum of fifteen hundred

and no/100 dollars in installments of two hundred and fifty and no/100 dollars, each, due on the 25th day of each month, commencing on, and the first payment due June 25th, 1915, and a like amount due on the 25th day of each month thereafter until the principal sum is fully paid, all principal, to bear interest at the rate of 7 per cent. per annum, payable monthly. Should the interest not be so paid, it shall become a part of the principal and thereafter bear interest at the same rate. Should default be made in payment of any installment of the principal or interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States at Chico, California. F. M. Keith.

"The consideration expressed in the foregoing promissory note, is the value of the following property leased and delivered to the maker thereof, by payee, to-wit: 1 Knox auto truck, truck No. 4337.

"Upon the payment of said note as provided, the lessors agree upon the receipt of one dollar, to sell, and to deliver a bill of sale of said property to said lessee, and until such payment, then the title and ownership thereof remain in the lessors and assigns. Upon failure to pay said note as provided, said lessors may take possession of said property without process of law, and the amount paid on said note shall be retained by them as and for the rent of said property. In the event of destruction of the property herein referred to lessee agrees to pay any balance remaining due upon the above note in full."

The answer alleges that—

The "defendant was not able to pay and made no payments of the installments of purchase price provided for in said agreement or promissory note, and that thereafter, and on or about the 1st day of September, 1915, plaintiff, exercising the option provided for in said agreement, took possession of said truck and ever since has had and now has possession thereof."

In their joint answer, the sureties, Gardella and Ames and J. R. Vaughan, admitted the execution of the bond by them and the execution of the subcontract between Burr and Keith, but denied, on want of information and belief, that there was anything due Burr from Keith under said bond or said subcontract. As to the claim of plaintiff of rental for the use of the 1 Knox truck, they set up as a defense thereto the agreement for the purchase of said truck, the allegations of their answer in that respect being the same as those contained in the answer of Keith. They set up the further special defense that the bond was drawn in compliance with the terms of the said subcontract, and executed for the purpose of guaranteeing or assuring the full and faithful performance by Keith of the terms of said subcontract, and alleged that the plaintiff violated the terms of said contract in that he paid to said Keith, or on his account, prior

to the expiration of the period of 35 days after the completion of said contract, more than 75 per cent. of the payments due from him (plaintiff) to said Keith under said contract—

"and that the said P. L. Burr did not retain 25 per cent. of said respective payments for the period of 35 days after the completion of said contract, or for any part or portion of said period."

The court found that the special defenses set up in each answer were sustained by the proofs, and that there was nothing due from the defendant Keith under any of the counts of his complaint.

Besides the findings on the issues submitted by the pleadings the court made the following finding, the subject-matter thereof not having been pleaded or made an issue:

"That since the above-entitled action was commenced, the defendant, F. M. Keith, has been adjudged a bankrupt and discharged from the payment of his debts in the United States District Court in and for the Northern District of California; that the order declaring said F. M. Keith a bankrupt was made on the 11th day of January, 1918, and that a duly certified copy of said order is filed in this court."

As a conclusion from the findings the court adjudged that plaintiff was not entitled to judgment as against any of the defendants, and accordingly rendered judgment "that plaintiff take nothing by his action as against defendants or any of them," etc.

This appeal is brought here by the plaintiff from said judgment.

The bond executed to plaintiff by defendants contains this provision:

"The condition of this obligation is such that if the above-bounden F. M. Keith, * * * shall pay or satisfactorily secure the payment of all labor, materials, and supplies furnished for hauling and transporting * * * mineral aggregate to points designated, in connection with the contract of P. L. Burr in Butte county, Cal., in accordance with the terms and conditions of the contract, dated the 5th day of April, 1915, a copy of which is or may be hereto attached as forming a part hereof, and as required by the provisions of an act of the Legislature, approved March 27th, 1897, entitled 'An act to secure the payment of the claims of materialmen, mechanics, or laborers employed by contractors upon state, municipal or other public works,' and the acts amendatory thereof, and shall, in all things stand to and abide by, and well and truly keep and perform the covenants and agreements contained in the said contract and any alteration thereof made as therein provided, on part to be kept and performed, at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the said P. L. Burr * * * as therein stipulated then this obligation shall become and be null and void; otherwise to remain in full force and virtue."

[1] The said bond and the scope of the obligations of the bondsmen thereunder must be considered and construed by the light both of the agreement between the plaintiff and the defendant Keith, and the contract between the plaintiff and the state, and also in view of the law relating to such contracts.

The agreement between the plaintiff and Keith, immediately following a reference in the preamble to the contract between the plaintiff and the state, reads in part, as follows:

"Now, therefore, subject to the terms and provisions of said contract and pursuant to the terms and provisions thereof, and in order to comply therewith, it is agreed by and between the parties hereto as follows"

—and then follows a specification and description of the work to be done thereunder by Keith. The contract between plaintiff and the state, among other things, provides, as of course the law requires, that plaintiff—

"will pay all bills for labor, material and supplies contracted for by him, on account of the work herein contemplated, when same become due and payable," etc.

It is further provided in said contract that the state, by and through its engineering department, may at its option and at any time retain out of any amounts due the contractor sums sufficient to cover any unpaid claims arising against the contract by reason of the contract, and, furthermore, may at its option and at any time pay any such unpaid claims out of the amounts so retained, upon sworn statements of such claims filed with the engineering department.

Said contract also contains a provision to the effect that, unless the work called for thereby is in all respects finished or completed before the expiration of 250 consecutive days, Sundays excepted, from the date of approval of said contract by the Attorney General, damage will be sustained by the state of California, and that it is and will be difficult and impossible to ascertain and determine the actual damage which the state will sustain by reason of such delay, and it is therefore "agreed that said contractor will pay to the said Department of Engineering the sum of \$50 per day for each and every day's delay beyond the time herein prescribed, in finishing the said work"; and it was further agreed by the contractor that the "Department of Engineering might deduct the aggregate amount of such penalty from any money due or that may become due said contractor under this contract."

It should be added that the agreement between the plaintiff and Keith contained the following among its other provisions and terms:

"Under no circumstances shall said second party remove any equipment from said work

until he shall have fully performed all work to be done hereunder and fully performed all the terms hereof, and any and all equipment of said second party may be used by said first party free of cost in carrying out the terms and provisions hereof, and the work to be done hereunder."

As stated, the above provisions of the two contracts involved herein became and are essential parts and of the very essence of the obligation to which the sureties by their bond subscribed and so bound themselves.

From the answer of said sureties and the findings of the court it becomes readily manifest that the ground upon which the sureties claim to be exempt from liability upon their bond is that the plaintiff, in violation of the requirement of his contract in that particular, failed to retain for a period of 35 days after the completion of said contract 25 per cent. of all payments becoming due to Keith thereunder, it being the contention that the result of such failure was to impair the rights of said sureties as such.

[2] Under the authorities, there can be no doubt but that a subcontractor, in cases of contracts for the performance of public work, may be required by the contractor to execute to him the bond provided for in the statute of 1897. St. 1897, p. 201; French v. Powell, 135 Cal. 636, 68 Pac. 92; Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 589, 163 Pac. 702. This the contractor may require as a matter of protection to his own bondsmen, as well as to himself, and to the end that the work to be done by the subcontractor will be according to the plans, specifications, and conditions upon which the original contract was let and accepted.

[3] It is true that the rule is that a surety is favored in law, and that any act by the obligee which is injurious to his rights will operate as an exoneration of his obligations as such surety. Civ. Code, § 2840, subd. 2; Bateman Bros. v. Mapel, 145 Cal. 241, 78 Pac. 734; 3 Sutherland on Damages (3d Ed.) § 735; Dunne Inv. Co. v. Empire State S. Co., 27 Cal. App. 208, 214, 50 Pac. 405, 411. In other words:

"A surety may stand upon the strict letter of his bond, and * * * where the principal has, without the consent of the surety, materially violated the terms of the agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond." Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. 856.

This rule is stated in section 2840, subd. 2, and section 2819 of our Civil Code. The section first named reads:

"A surety is exonerated—

"1. In like manner with a guarantor;

"2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety

or inconsistent with his rights, or which lessens his security."

Section 2819 reads:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, are in any way impaired or suspended."

[4] It may first be observed that, if there were premature payments made by Burr, the effect thereof would not necessarily be to release the sureties from their entire obligation as such, but only from that part of the subcontractor's default that may be made up of such premature payments. *Siegel v. Hechler and Southwestern Ins. Co.*, 181 Cal. 187, 183 Pac. 664. But we are unable to perceive from the evidence where premature payments were made by the plaintiff in this case. The subcontract provides that—

"As full compensation for all services rendered by said second party under the terms hereof, the said second party shall receive from said first party the sum of one and fifty one-hundredths dollars for each unit of said mineral aggregate sufficient to construct one concrete cubic yard. Said payment shall be made according to the estimates of the engineers of said Highway Commission."

The contract then provides, as we have already shown, that—

"Said payment shall be made five days after said first party shall receive from said Highway Commission his respective payments according to the terms of said contract between said first party and said Highway Commission for deliveries of said mineral aggregate."

[5] It will be observed that the precise total amount to become due Keith could not be foretold or specified in the contract, for the reason that what that amount might be was contingent upon the amount of work that he performed under the contract. But it is undoubtedly true that what the contract intended to say with respect to the retention of the 25 per cent. was that that percentage of the payments made from time to time as they became due by plaintiff to defendant should be retained. Of course, it cannot be said that that provision does not involve a vital element of the agreement, the arbitrary or unnecessary violation of which would have the effect of producing a material deviation from the contract, either pro tanto, amounting only to a departure therefrom, or in toto, amounting to an alteration thereof, according to the extent of such violation; yet, a contract such as we have here, founded as it is upon the statute, is supposed always to intend, as the statute clearly contemplates, that claims accruing against the contractor in the performance of the contract must be paid

whenever they fall due, and so become payable, whether prior or subsequent to the expiration of the 35 day period, after the completion of the contract. Indeed, the contracts involved herein, as we have shown, contain in express language such a provision, and the provision is only in harmony with the proposition that those that become the creditors of a contractor under such a contract as we have here are not bound by the contract, and cannot be compelled to postpone the enforcement of their claims beyond the time at which they may agree with the contractor that they shall be paid.

Of course, sureties upon a bond given for the proper execution of the terms of such a contract undertake their obligation with full knowledge of this proposition, and their obligation as such no less requires them to stand good for the faithful execution of the terms of the contract in that particular than for any other vital provision thereof. Therefore, where, as we think the uncontradicted testimony of the plaintiff shows to be so in this case, the payments made were according to the requirement of the contract as to when certain payments should be made, and were within the terms of the contract, and would consequently have to be made at some time, either by Keith or the plaintiff or, to the extent of their liability, by the sureties, we do not think the payments so made are, in fact, premature within the fair and reasonable contemplation of the statute and the contract. In other words, since the contract expressly provides that claims of the creditors must be paid when due and payable, it cannot be held that, if such payments are required to be made prior to the expiration of the 35 days after the completion of the contract, and it becomes necessary for the contractor to pay them, and it is impossible, from the extent of such obligations, to retain the 25 per cent. provided by the contract, the payment of them under such circumstances is such a violation of the terms of the contract as to affect or change or impair the rights of the sureties, either in whole or in part. *Bateman Bros. v. Mapel*, 145 Cal. 241, 243, 78 Pac. 734, *supra*; *Hand Manuf. Co. v. Marks*, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; *Siegel v. Hechler et al.*, 181 Cal. 187, 183 Pac. 664, *supra*.

[6] The testimony respecting the payments by plaintiff and the times at which they were made comes entirely from him, and, while it is not altogether clear and satisfactory as to the time and extent of all the payments made, it sufficiently shows, we think, that payments or advancements made by him on the contract prior to the completion of the work, or while it was in progress, were not only within the terms of the contract, but were in extinguishment, by actual payment or by guaranteeing payment, of claims accruing against Keith in the performance of the

contract. His testimony discloses this situation: That both the contract with the state and the subcontract were practically completed about the 1st day of December, 1915; that Keith, a short time prior to the completion of the subcontract (it is not made to appear precisely how long before) abandoned it, and that plaintiff, in pursuance of the stipulation to that effect in said contract, himself took charge of the work and completed the contract; that, while Keith was still actually engaged in the performance of the contract, it became necessary, in order that the performance of the contract might be proceeded with, for plaintiff to pay, and he did pay, certain claims arising against Keith in the performance of the contract amounting to the sum of \$911.36 in excess of the total sum which became due to Keith under his contract.

The plaintiff filed and served a bill of particulars showing in detail or by items the sums aggregating the amount so paid, and the bill was introduced in evidence. This document upon its face shows that during the progress of the work, and long before the expiration of 35 days after the completion of the contract, a large number of bills were paid by plaintiff to Keith's creditors having claims of labor bestowed upon or materials and supplies furnished for use in the performance of the contract. The plaintiff, in giving this testimony, explained that, while some of the items set forth in the bill of particulars represented actual payments made by him to persons furnishing either labor or material or equipment necessary for the execution of the contract, there were other items incorporated therein that did not represent actual payments or advancements of money to Keith or his creditors, but merely notations of instances where he had previously obligated himself to the payment of certain claims of persons which had been contracted by Keith in the performance of the contract.

The plaintiff made an attempt, while testifying, to segregate and so point out the items representing actual payments and those representing his unexecuted personal obligations to pay to certain claimants money due from Keith for labor and materials furnished the latter for the performance of the contract, but the attempted segregation was not sufficiently specific and definite to make it clear how much of the aggregate amount of money so paid out by plaintiff was actually paid out or advanced prior to the completion of the contract, or how much of the amount due Keith, if any, he retained for a period of 35 days after the completion of the contract. As stated, the plaintiff testified that it was necessary for him to pay these claims or personally stand good for them in order that the work under the contract might be prosecuted and completed with the expedition required by the contract with the state. Plaintiff's testi-

mony further shows that, but for his payment of such of the claims as he did actually pay, and the fact that he assumed personal liability for other claims, which, prior to the abandonment of the contract by Keith, became due and payable, but not then paid, a serious delay in the completion of the contract would have occurred. He further testified (and, as stated, nowhere is his testimony as to payments made by him contradicted) that claims against Keith, growing out of the contract, and aggregating the sum of \$1,367.60, were not paid until after the completion by him of the contract. It does not appear from his testimony just how long after the completion of the contract some of said claims were paid, but it is thus made to appear that all said bills involved legitimate claims arising in the performance of the contract, being necessarily incurred in the proper execution of the terms thereof; and it likewise is further made to appear that some of said claims were not satisfied until after the lapse of a period of a year after the completion of the contract.

The sureties, as we have seen, bound themselves to stand for the faithful performance of the subcontract, not only according to its terms, but also according to the terms and conditions of the contract between plaintiff and the state. Time was of the essence of the latter contract. It had to be completed by the time designated therein, and as seen, default by the contractor (plaintiff) in so completing it meant the imposition upon him of a penalty of \$50 for each day of the period during which his contract remained uncompleted after the time specified for its completion. It was therefore a duty required of him by his contract with the state, and a duty which the sureties bound themselves to stand sponsor for, to see that the subcontract was not so delayed in its completion as to result in the delay of the completion of the state's contract beyond the appointed time; and if it became necessary, as it appears from the testimony, to have become, to prevent delay in the completion of his contract with the state, that he should pay in full the claims against the subcontractor arising from the performance of the contract, and which were due and payable when made, and prior to the expiration of the period of 35 days after the completion of said contract, such course was not only legally proper, but was as much in the interest and to the benefit of the sureties as in his own interest and to his own benefit.

The conclusion following from the foregoing considerations is that the advancements made by the plaintiff for the purpose of paying legitimate claims growing out of the performance of the contract by Keith, whensoever such claims might have been paid, they all being within the terms of the contract, and due and payable when so paid, were in substantial pursuance of the contracts in-

volved herein and therefore not at variance with the obligation undertaken by the sureties that the subcontract should be performed according to the terms and conditions of both contracts. It cannot, therefore, properly be declared that such payments or advancements constituted acts "which naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessen his security."

The allegation of the complaint that the sureties entered into their undertaking for a valuable consideration, while not wholly sustained, was shown to be in part true. Moreover, it is a fair inference from the record that one of the sureties was responsible, through his own voluntary act, for the payment by plaintiff of one of the claims accruing against Keith and arising out of the performance of the subcontract, and also that the same surety was likewise responsible for delaying to some extent the completion of said contract.

It was admitted by one of the sureties, Ames Vaughan, that, during the progress of the work by Keith under the subcontract, he received from Keith two motortrucks which the latter was using at the time in the performance of the contract, and kept and used them for approximately 4 weeks. Although Ames declared that one of the trucks was turned over to him by Keith to secure a book account which the latter had with the former, he (Ames) admitted that he sold or traded in said truck for another, receiving or being allowed therefor the sum of \$500, which amounted to \$300 in excess of the total of said book account. He admitted at the trial that he still had that sum in his possession. He further admitted that the other truck was used by him in transporting goods or merchandise from one point to another, and that he derived therefrom considerable revenue. The exact amount does not appear. The plaintiff testified that the taking of these trucks from the work delayed the prosecution and completion thereof, and that he so informed the sureties by letter, and requested a return of the trucks to the possession of Keith, so that he might the better proceed with an expeditious execution of the terms of his contract. A copy of the letter referred to was addressed to and received by each of the sureties, and all said copies were introduced and received in evidence.

Said Vaughan further admitted that he authorized and gave his consent to the payment by plaintiff before the contract was completed of a claim against Keith for \$457, arising out of the latter's performance of the contract.

[7] It thus plainly appears that the sureties, all of whom are entitled to the benefit of any security for the performance of the principal obligation acquired by any one of his cosureties at any time after they have en-

tered into the contract of suretyship (Civ. Code, § 2849), had in their possession some security, and it is further clear that some delay in the prosecution of the contract to completion was occasioned by the act of Ames Vaughan in taking and so causing to be withheld from use for several weeks in the work required to be done by Keith under the contract the motortrucks referred to. Moreover, it will be observed that in permitting said Vaughan to remove the trucks referred to from the work required to be done under his contract Keith violated an express provision of said contract forbidding the removal of any equipment from said work until he should have performed the same, or all the terms of said contract. But, waiving all these matters, we repeat that for the other reasons hereinabove expressed there was not effected by the advancements or payments made by plaintiff under the subcontract, above considered, a departure therefrom, and much less an alteration thereof, within the purview of its provisions or the contemplation of the law regulating the performance of the terms of such agreements.

As to the defendant Keith, it is to be remarked that his testimony in rebuttal of that of the plaintiff to the effect that he (Keith) was indebted to the plaintiff in the sum of \$911.36 in excess of the total amount earned by Keith under the contract seems to be pregnant with an admission that he is indebted to plaintiff in some amount. When asked by his attorney whether he owed plaintiff the sum mentioned as a result of the subcontract Keith replied: "No, sir; I don't think there was that due him." This was the only testimony offered by or received on behalf of the defendant upon that question, and it seems to us that his answer was tantamount to saying that, while the precise amount stated was not due plaintiff, there was, nevertheless, some amount still owing to plaintiff and arising out of the contract in question. At any rate, the answer of the witness does not rise to the dignity of an absolute or positive denial of some indebtedness. It would follow that the plaintiff was entitled to recover some amount from Keith, unless Keith, at the time of the trial, had been discharged from his debts, including any that he might owe to Burr, through due proceedings in bankruptcy, as the court found was the fact. Thus we are led to the consideration of the finding of the court that the defendant Keith had been so discharged at the time of the trial.

It appears from the record that there was pending at the time that the present action was called for trial another action between Burr as plaintiff and Keith as defendant, which action was numbered 7630. On the calling of this case for trial, counsel for defendants stated to the court that Keith had filed a petition in voluntary bankruptcy in the

federal court for the Northern district of California, to which counsel for plaintiff replied: "I understand in the petition he does not recognize Mr. Burr as a creditor." Mr. Jones, attorney for the defendants, then stated that he did not have the petition or a copy thereof in his possession, and that, if the plaintiff was not included in the schedule in the petition naming the creditors of Keith, it was an oversight, whereupon counsel for the plaintiff said: "I suppose, as long as he is a bankrupt, a continuance is good." Thereupon the case of *Burr v. Keith* (No. 7630), was continued and the present case proceeded with. The trial of the present action commenced on the 26th day of October, 1917. The answer did not set up the alleged bankruptcy of Keith as a defense to this action.

There was therefore no issue upon that proposition submitted by the pleadings.

It appears, however, that on May 13, 1918, long after the trial of this action was concluded, and before findings were made and judgment rendered and entered, the defendants filed with the record of this action two certain papers, copies of which are incorporated into the record here. One of these papers purports to be an order of the United States District Court for the Northern District of California, made on the 11th day of January, 1918, upon a petition previously filed by the defendant Keith to be adjudged a bankrupt, referring the matter to Richard Belcher, Esq., United States commissioner at the city of Marysville, for such proceedings therein as are required by the acts of Congress relating to bankruptcy. The other paper purports to be a copy of an adjudication by said United States District Court that said Keith was a bankrupt, and that he be discharged from all debts and claims which were made provable against his estate under the bankruptcy acts which existed on the 16th day of October, 1917. These papers were not, as is manifest, regularly introduced in evidence in this case. It, however, appears to be the position of counsel for the defendants that, the certified record of the discharge of Keith from all debts and claims against his estate having been filed, with the record in the case, although subsequent to the trial, the court below was authorized thereupon to take judicial notice of such discharge. As has been shown, at first there seemed to be some doubt in the minds of counsel whether the debt which Burr claimed was due him from Keith was included in the schedule of liabilities as set forth in the petition of Keith to be adjudged a bankrupt. Later on, however, and during the progress of the trial of this action, counsel for the defendants practically conceded that Burr's claim was not included in said schedule; but he argued that, while Burr's claim was not so included, he nevertheless had actual knowledge of the pendency of the petition of Keith before the latter

was adjudged a bankrupt and discharged from his debts.

Section 17 of the federal Bankruptcy Act, as it existed on the 11th day of January, 1917, provided as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." U. S. Comp. St. § 9601.

[8] The counsel for the defendants declares that the failure to include the claim of Burr in the schedule of debts of Keith was due to the fact that Keith did not recognize himself as a debtor of Burr, or, in other words, that he did not consider that he was indebted to Burr in any sum whatsoever. There is no evidence in the record to support that statement. But, be that as it may, assuming, without deciding, that the court below was authorized to take judicial notice of the discharge in bankruptcy of Keith upon the record as it is presented here, and further assuming that it was true that Burr had actual knowledge of the filing of the petition of Keith to be declared a bankrupt prior to the time at which he was so adjudged and discharged from his indebtedness, the proposition remains that the court failed to find that Burr did have such actual knowledge, and therefore the mere finding that Keith was adjudged a bankrupt, considered in connection with the concession of counsel that Burr was not, as a matter of fact, included among the creditors of Keith in his petition, is wholly ineffectual for any purpose, and in no manner or measure adds any support to the judgment in favor of the defendant Keith.

[9, 10] We think that the plaintiff was entitled to some compensation for the Knox motortruck which he let the defendant Keith have to be used in the work to be done under the subcontract. There is some discussion in the briefs as to whether the instrument whereby said truck was transferred to the possession of Keith involved a conditional sale or only a lease of the property. Our own opinion is that the transaction, as evidenced by the written instrument, constituted a conditional sale, also possessing, however, the characteristic of a lease. The intention of the vendor undoubtedly was that it should be a sale to Keith, and to protect his rights in the transaction Burr caused to be inserted in the agreement a provision to the effect that, in the event that the installments provided for in the agreement were not all paid, the possession of the property, the title to which remained in him at all times, should be returned to or taken by him, and that any installments which might in the meantime have been paid should be treated as rentals for the use of the truck. But, what-

ever the proper technical characterization or the legal nature of the instrument may be, it is certainly true that, at least morally, the plaintiff was entitled to compensation for the use of the truck, and we know of no reason why he should not be legally entitled to such compensation. While the right to retain the installments, should any have been paid, was in the nature of a forfeiture, we nevertheless think that, since there was a breach of the agreement by the vendee in the matter of the payment of the installments, the plaintiff is entitled to some compensation or damages for such breach, and that in such case the measure of compensation or damages is as is fixed by section 3311, subd. 2, of the Civil Code. See *Matteson v. Equitable Mining & Milling Co.*, 143 Cal. 436, 438, 77 Pac. 144. In *Ruling Case Law*, vol. 24, p. 785, the rule is stated as follows:

"Though the seller cannot, after retaking possession, maintain an action for the price, he may treat the default of the buyer as a breach of the contract of purchase, and maintain an action for damages, as in case of the breach of other executory contracts of sale by a buyer."

In the footnotes of said volume, page 786, a number of cases are cited supporting the text. Of course, it is true, as the defendant Keith contends, that in such a transaction the vendor is not entitled to both the return of the property conditionally sold and the full price at which it was agreed to be sold. But it does not follow from that proposition that where, as here, there has been a violation by the vendee of the provision for the payment of installments, the vendee having used the property to his own advantage and benefit, the vendor should not be entitled to compensation by way of damages for the breach of the agreement.

For the reasons herein stated, the judgment is reversed and the cause remanded.

We concur: FINCH, P. J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [11] The petition for rehearing is denied.

We think it proper to say, in addition to what is said by the District Court in its discussion of the point last mentioned in its decision, that the compensation which Burr is entitled to recover of the sureties for the use of the truck in question is limited to the reasonable value of its use during the time Keith was actually using it in the performance of the subcontract, and that the rental agreed on in the contract between Burr and Keith for the sale of said truck is not the measure of the value of such use, and is wholly immaterial to the inquiry.

That contract was forfeited, and in effect rescinded. The value of the use is to be ascertained in the same manner as if Burr had loaned Keith the truck for use in performing the subcontract in consideration of the payment by Keith to Burr of the reasonable value of its use.

All concur.

53 Cal. App. 497

MEER v. CERATI et al. (Civ. 2234.)

(District Court of Appeal, Third District, California. July 13, 1921. Hearing Denied by Supreme Court Sept. 8, 1921.)

1. Pleading $\S$ 310—Defective allegation aided by lease annexed to complaint.

In an action by a landlord for the tenants' failure to sow the land with rice, as they had agreed, allegation of the complaint that defendant tenants did not cultivate the premises, and did not sow one-third thereof, or any part, to rice, as in the lease provided, the lease being expressly made a part of the complaint, and annexed thereto as an exhibit, was sufficiently aided by the lease itself to overcome the effect of the general demurrer, even if defective in form; when a written instrument is by sufficient reference in a pleading made a part thereof, such instrument becomes as much a part of the pleading as though it had been incorporated verbatim into the body of the pleading.

2. Pleading $\S$ 403(3)—Complaint of landlord aided by tenants' answer.

In an action by a landlord against his tenants for failure to cultivate and sow part of the land to rice as agreed, complaint, if wanting in sufficient facts, held expressly aided by defendants' answer as to breach of the lease by failure to cultivate and plant the lands as provided therein, etc.

3. Pleading $\S$ 428(3)—Defect in complaint cured by reception of evidence without objection.

In an action by a landlord against his tenants for their failure to cultivate part of the land and sow it to rice, as they had agreed, if the complaint was deficient in its failure to allege that defendant tenants agreed to plant the land to rice, or to any crop, such defect was cured by the reception in evidence at the trial without objection by defendants, and also the reception into the record without objection of testimony that defendant tenants had failed to comply with its covenants and terms.

4. Landlord and tenant $\S$ 331(3)—Landlord's action for tenants' breach by not planting crop not premature.

Where tenants agreed to cultivate part of the land and plant it to rice, the lease being for the crop season of 1919, commencing January 4, action for the tenants' breach brought July 5, 1919, a date which is, as matter of common knowledge, far beyond the time for seasonal planting of either rice or oats, did not effect a premature bringing of the action.

5. Landlord and tenant — 331(2)—Measure of landlord's damage from tenants' failure to crop stated.

Under Civ. Code, § 3300, the measure of damages to a landlord from his tenants' failure to crop the land is the amount which will compensate the landlord for all detriment proximately caused by the tenants' failure, or which, in the ordinary course of things, would be likely to result therefrom.

6. Evidence — 520—Expert testimony of value of crops in action by landlord against tenants for failure to raise crop admissible.

In an action by a landlord for his tenants' failure to raise a crop of rice on part of the land, testimony given by experts as to the probable yield of rice on the lands in question for the year involved was competent.

7. Damages — 28—Prospective profits lost through breach of contract recoverable.

Where loss of prospective profits is the natural and direct consequence of a breach of contract, they may be recovered; and he who breaks a contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages.

8. Landlord and tenant — 331(2)—Lease held not to fix landlord's damages from tenants' breach by failing to raise crop.

Lease obligating the tenants to raise a crop on part of the land and giving the landlord a lien to the extent of \$1,000 on the entire crop which might be produced, as security for his share of the crop until such share should be delivered to him as provided, *held* not to have fixed the damages to which the landlord would be entitled in case of failure of the tenants to execute the lease by raising a crop.

9. Evidence — 323(4)—Court justified in accepting tabulated statement of market price as tending to establish the actual price.

In a landlord's action for his tenants' breach by failure to raise a crop of rice on part of the land leased, trial court was justified in accepting, as tending to establish the market price of the rice at the point where defendants were required to deliver the landlord's share, a tabulated statement of prices at the point where defendant tenants were obligated to deliver.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by John H. Meer against C. M. Cerati and another, copartners. From judgment for plaintiff, defendants appeal. Affirmed.

Martin Stevens and A. Caminetti, Jr., both of San Francisco, for appellants.

J. M. Inman, of Sacramento, for respondent.

HART, J. This action is by the plaintiff to recover damages in the sum of \$2,500, alleged to have been suffered by him from the alleged breach by the defendants of a certain instrument in writing whereby the

plaintiff let or leased certain premises for and during the crop season of the year 1919 to defendants.

The cause was tried by the court, sitting without a jury, and judgment for damages in the sum of \$2,310 was awarded plaintiff. The defendants appeal from said judgment under the alternative method.

By the said instrument the plaintiff leased to the defendants certain land embraced within what is known as the Watt's Nicolaus Acres, Sutter county, and consisting of 98.98 acres, for the cropping season of the year 1919. The portions of the writing which are particularly pertinent to the inquiry here read as follows:

"That they (lessees) will in due and proper season sow said premises to approximately one-third or more to rice, and the remainder thereof to oats, and will harvest the same at their own cost, charge, and expense, as soon as the same is suitable for harvesting. That they will, immediately upon harvesting the same, as and for the yearly rental of said premises, deliver to said party of the first part at railroad station at East Nicolaus, one-third part of all oats crops and one-fourth part of all rice crops raised upon said demised premises. That the portion thereof sowed to rice shall be kept free from water grass and other noxious weeds; that said second parties shall furnish and pay for all water used, and pay all other expenses connected with the growing of all the crops on said premises. * * * And it is mutually covenanted and agreed that until such delivery shall be made as aforesaid, the party of the first part shall have a lien and charge upon the entire crop of grain to the amount of \$1,000 gold coin, estimated and fixed, and for the purpose of securing said party of the first part for the use and rental of said premises yearly and every year, as the value thereof, the party of the first part reserves the right, to enter upon the premises at any time to make examination of the premises and crops. And if he shall at any time deem himself insecure and unsafe in the matter of the rental, he may take immediate possession of the leased premises to secure or harvest the crop and may dispose of the same by sale or otherwise, accounting to the parties of the second part for any excess realized by him over and above the rental or use of said premises; and all expenses incurred or paid to secure, harvest and make sale of the crop."

The complaint alleges:

"II. That on the 4th day of January, A. D. 1919, plaintiff and defendants entered into one certain lease, a copy of which lease is hereto annexed, marked 'Exhibit A.' and by reference made a part of this complaint.

"III. That pursuant to the terms of said lease, defendants entered into possession of the premises described therein, and are now, and at all the times herein mentioned have been, in continuous possession of said premises.

"IV. That defendants did not cultivate said premises and did not sow one-third thereof, or any part thereof, to rice as in said lease provided, and that defendants did not plant the

remainder or any part of said premises to oats as in said lease provided, and did not plow or plant said premises or any part thereof to rice, oats, or to any other crop, and that the season for planting said crops or any of them has passed, and it is now too late to successfully put in any crop upon said premises.

"V. That by reason of the failure of defendants to conform to the terms of said lease by planting said crops as therein provided, plaintiff has been damaged in the sum of \$2,500."

To the complaint the defendants interposed on the general ground a demurrer, which was overruled.

Answering the complaint, the defendants deny that they were at the date of the commencement of this action, or at any time before or since have been, in the possession of the lands and premises "in said complaint referred to, or any part or portion thereof"; admit that they did not cultivate said premises and did not plant any said lands to rice or oats, or to any crop whatsoever; but set up as an excuse for not so cultivating and planting said lands the fact that the plaintiff, having at the time of the making of said lease agreed with defendants to furnish and provide the demised premises with sufficient wells to irrigate the same for rice growing, wholly failed to keep or carry out said agreement, with the result, there being no other source or sources from which the necessary water could be obtained for irrigating the same for rice-growing purposes, that it was impossible to grow or produce any rice thereon; that upon said lands there was but one well, but it was totally inadequate, in the condition in which it was then, and at all times, properly to irrigate said lands or any material portion thereof; and—

"Plaintiff declined and refused to increase the capacity of said well or bore or dig any other wells, or in any way to provide a water supply for defendants in cropping said lands."

The answer states, by way of further excuse for the failure of defendants to cultivate and plant said lands as provided in the agreement of lease, that, although said lease bears date January 4, 1919, as a matter of fact it was not executed until about the middle of February, 1919, after which date the condition of the weather was such, due to rainstorms, that the said lands—

"could not be plowed or cropped until a date entirely too late to permit the growing thereon of any crop; as a result nothing was grown upon said lands but a crop of hay of approximately 35 tons, of which plaintiff received approximately 25 tons."

Upon these averments, the answer finally charges that the failure to grow a rice crop or any crop upon said lands during the term of said lease "was due wholly to the fault of plaintiff." The agreement of lease having been entered into at a time when it was

too late to sow oats on the lands, the plaintiff at the trial waived all claim for damages for the failure of the defendants to plant the lands to oats.

The defendants claim that they are entitled to a reversal of the judgment for these reasons: (1) That the complaint does not state a cause of action because it fails to allege in the body thereof that the defendants agreed to plant the land to rice or to any crop; (2) that the evidence does not support the findings; (3) that the evidence adopted by the court as the basis for fixing the damages awarded is "too speculative, uncertain, and conjectural" to constitute a legal criterion for the damages allowed; (4) that the lease itself provides for and fixes the amount which shall be paid to plaintiff by defendants as rental for the land in case no crop was planted thereon; (5) that the action was prematurely brought; and (6) "that the decision is against law, and that the measure of damages adopted by the court was erroneous."

[1] 1. The order overruling the demurrer was not erroneous. The lease is by express averment in the complaint made a part thereof, and is annexed thereto as an exhibit. The pleading, as will be observed, then alleges that defendants "did not cultivate said premises, and did not sow one-third thereof, or any part thereof, to rice, as in said lease provided," etc. This allegation, even if defective in form, was sufficiently aided by the lease itself to overcome the effect of a general demurrer. The general rule is that when a written instrument upon which the plaintiff declares or the defendant bases his defense is by sufficient reference in the pleading made a part thereof, such instrument becomes as much a part of the pleading as though it had been, *in hæc verba*, incorporated into the body of the pleading. *Lambert v. Haskell*, 80 Cal. 612, 22 Pac. 327; *Georges v. Kessler*, 131 Cal. 183, 63 Pac. 466; *Ward v. Clay*, 82 Cal. 506, 23 Pac. 50, 227. See, also, the concurring opinion of Mr. Justice Temple in *Hibernia Sav., etc., Soc. v. Thornton*, 127 Cal. 575, 60 Pac. 37; *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 198, 86 Pac. 193. In the last-named case, Mr. Justice Shaw so states the rule in the following manner:

"The rule that a written instrument upon which a cause of action is founded may be pleaded either by setting forth its substance according to its legal effect, or by incorporating a copy in the body of the complaint, or by attaching thereto, by a proper reference, a copy of such instrument, as the pleader may choose, is thoroughly established in this state"—citing a number of cases, among which are those above cited.

The most that can be said of the complaint in this particular is that it is defective in form—that is, defective in the statement of the fact sought to be alleged. In *Estate of*

Cook, 137 Cal. 184, 191, 69 Pac. 968, 971, it is said that "if the allegation be defective it may be aided by an express reference to an exhibit for that avowed purpose." We must construe the language of the complaint here making the lease a part thereof as making it a part of that pleading for all the purposes of a pleading.

The cases cited by the appellant—to wit, *City of Los Angeles v. Signoret*, 50 Cal. 298, *Burkett v. Griffith*, 90 Cal. 532, 541, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997, and *Hayt v. Bentel*, 164 Cal. 680, 130 Pac. 432—are different in the facts from this case.

In *Los Angeles v. Signoret*, the action was for the enforcement of a lien for an assessment on a lot in the city plaintiff levied for the construction of a sewer. The complaint merely alleged that the lien accrued in favor of plaintiff by reason of facts set out in a notice and claim of lien, recorded in a certain designated book in the recorder's office of Los Angeles. There were no averments in the complaint that the requisite jurisdictional steps under the statute had been taken by the governing body of the plaintiff to create and enforce a lien. The notice of lien, however, contained a recital of the various steps required for that purpose, and upon said notice and its recitals the pleader relied, having made the notice a part of the complaint. The court held that the jurisdictional facts should have been expressly pleaded in the complaint. The specific reason upon which the ruling was founded is not given in the opinion; but we can readily perceive why such strictness in pleading the facts in such a case should be required, since the action is virtually for the enforcement of the payment of a tax upon the property of an individual, and the proceedings culminating in the levy of the assessment and the lien are in invitum, and must therefore be affirmatively shown to have been followed in substantial strictness with the requirements of the statute authorizing the work and the levy of an assessment therefor upon the property affected.

In *Burkett v. Griffith*, the action was for damages against defendant for maliciously disparaging or slandering, by certain false statements, the plaintiff's title to certain property in Los Angeles county. The leases whereby the plaintiff acquired his interest in said property were attached to and by proper reference in the complaint made a part thereof. The complaint itself contained no allegations disclosing the nature or extent of plaintiff's leasehold interest, or the terms of his option to purchase—

"Or what were the covenants of his leases, or the nature of his rights thereunder, nor has he alleged that the covenants or the option are those which are contained in the exhibits."

It was held that, in the absence from the body of the complaint of those and certain other indicated allegations of fact, it could not be determined whether the plaintiff had in fact been damaged by the alleged defamatory statements relative to his title to whatever interest he had in the property supposed to be affected thereby. There is, however, some general language in the opinion in that case which might be regarded as lending support to the position of the appellant here; but we are justified in saying that, if by the use of the general language referred to it was the intention to hold that the rule as therein applied is to have general or indiscriminate application in cases where the contents of an exhibit attached to and made a part of the complaint are relied upon as stating some of the facts essential to the statement of a cause of action, the opinion in that case has not in that particular been followed by the subsequent cases dealing with a like question, some of which are cited above.

In *Hayt v. Bentel*, the action was to recover back certain installments paid by plaintiff to defendant under a contract for the sale of a certain lot, containing a provision that, on default by plaintiff in the payment of any installment, the defendant might, at his option, declare the whole of the purchase price due, re-enter and take possession, and retain as rent all moneys paid by plaintiff as installment payments on the purchase price. A defective title to the property was discovered which was at all times known to exist by defendant and unknown to plaintiff until just prior to the serving of a notice of rescission of the contract by plaintiff on defendant. The contract was annexed to the complaint, and by reference made a part thereof. The point was made by defendant that—

"Since, under the contract, the plaintiff was entitled to possession of the premises, her notice of rescission was ineffectual for want of an offer to restore such possession."

But to this point the court well replied that there was no allegation either in the complaint or answer that plaintiff ever did take or receive possession, and of course the contract itself could not show that fact.

In *Ahlers v. Smiley*, the action was for damages for the breach of a contract by which the defendants agreed to buy ice from plaintiffs for the term of two years at a price per ton stipulated in the contract. Previously to the institution of said action, plaintiffs brought suit and therein obtained judgment for an injunction enjoining defendants from purchasing ice from other persons than plaintiffs during the term of their contract. In the later action, plaintiffs alleged in their complaint the filing of the complaint, the answer thereto, the findings and judg-

ment in the action for injunctive relief, and attached copies of all the papers constituting the judgment roll therein to his complaint for damages. The contract was not set out in the latter complaint, "nor was it therein alleged that the plaintiffs ever executed or made any contract whatsoever to supply defendants with ice." Obviously, under such circumstances, it could not well be said that the contract, even though a part of the judgment roll in the injunction suit, was pleaded in the later suit either directly or as an exhibit by proper reference.

[2] But there are two other answers to the point that the complaint, for the reason explained, is wanting in sufficient facts. The first of these is that the answer itself, as will be noted from the above reference to its contents, practically makes the question whether the defendants agreed to cultivate and plant the lands to the crops mentioned, as provided by the lease, an issue by directly admitting that "they did not sow one-third or any thereof (the premises described in the lease) to rice," and that they did not "plant any of said lands to oats, or to any crop whatsoever," following which admission was the statement of facts purporting to justify such failure. It is perfectly clear from the nature of the defense thus set up in the answer that the pleader, when drafting his answer, regarded the complaint as sufficiently clear and explicit to enable him to answer all the vital issues it sought to submit, as he seems to have had no difficulty in meeting both negatively and affirmatively every essentially issuable fact that could arise in the case in any state of the pleadings. See *Dennis v. Crocker-Huffman Co.*, 6 Cal. App. 58, 61, 91 Pac. 425. Indeed, the answer, as to the breaching of the lease by failure to cultivate and plant the lands as provided therein, is, as above indicated, in the nature of a plea by way of confession and avoidance—that is, an admission of the obligation resting on defendants to so plant the lands, the breach of said obligation, and an asserted valid excuse for not executing it. Thus a case of "express aider" in pleading is presented. *Cohen v. Knox*, 90 Cal. 266, 275, 276, 27 Pac. 215, 13 L. R. A. 711; *Donegan v. Houston*, 5 Cal. App. 626, 632, 90 Pac. 1073.

[3] The second answer to the point is that, conceding the validity of the charge that the complaint is deficient in the respect pointed out by defendants, the same is cured by the reception in evidence at the trial, without objection by the defendants, of the lease, and also the reception into the record without such objection of testimony that the defendants had failed to comply with its covenants and terms. See *Cohen v. Knox*, 90 Cal. 266, 275, 276, 27 Pac. 215, 13 L. R. A. 711, *supra*; *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Boyle v. Coast Imp.*

Co., 27 Cal. App. 714, 720, 151 Pac. 25; *Millar v. Millar*, 175 Cal. 797, 805, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

[4] 2. The contention that this action was prematurely brought is without merit. The term of the lease, as expressly provided therein, was "for the crop season of 1919," commencing on the 4th day of January of that year. The words "crop season" must be construed with reference to the kind of crops to the growing of which on the lands the defendants were by the lease restricted, to wit, oats and rice. These were the crops for the special growing of which the plaintiff leased the lands to the defendants. The complaint was filed on July 5, 1919, which, as is known as a matter of common knowledge, was far beyond the time for the seasonal planting of either rice or oats. The "cropping season" of 1919, so far as the planting of such crops was concerned, was entirely at an end when the action was brought, and, the defendants having then already breached the covenant as to the planting and growing of rice, there then accrued to plaintiff, at least *prima facie*, a right of action for the breach.

3. The evidence, both as to damage and damages, consisted in the main of the opinions of persons who had had a number of years' experience in rice growing, a part of which was in the immediate vicinity of the premises in question. The evidence is practically without conflict upon the proposition that, in the immediate locality where the demised lands are situated, the first year's yield of rice upon land suitable to such production, when the season is of average propitiousness for such purpose, is or has been almost invariably greater in bulk or more extensive in quantity than are the yields of succeeding years. The explanation of this is in the fact that, from the use of the great amount of water required to make that cereal grow and thrive, there usually follows a heavy growth in the rice fields of grasses or weeds, indigenous to the soil, the effect of which is to prevent, in a disastrous measure, the proper growth and development of the rice plant. It is also believed that such condition is partly due to the fact that intermingled with the rice seed, in some instances, are seeds from which develops an exotic plant or weed, inimical to the growth of rice, and, like all useless things, prolifically spreads itself over the rice fields. The opinions of the witnesses were therefore based upon the theory that, since the lands had never been planted to rice prior to the year 1919, and were consequently not handicapped for rice growing by the unfavorable conditions referred to, they would probably have that year yielded a fair average crop—that is, such a crop as might confidently be expected from lands of the same quality and

character under the conditions existing with reference to said lands in the year 1919.

It is not necessary to detail herein the testimony of the witnesses referred to. It will be sufficient merely to give herein a general summary of their testimony. They testified that they had been engaged in the growing of rice for five, four, and three years on lands situated in near proximity to the lands in question, and which, as to the character of the soil, both as to quality and contour, were in all respects substantially the same as the lands in question; that there had been in some years yields of rice on their lands varying in quantity from 32 to 60 or 70 100-pound sacks to the acre. Some had produced 32 such sacks only; others had obtained a yield of 60 sacks or more; and others had produced 40 and 50 sacks. The larger yields were in years when all conditions for rice production were fairly good. These same witnesses testified that they were well acquainted with plaintiff's lands, referred to in the lease, and with conditions generally thereabouts in the year 1919; that said lands were suitable for rice growing, and that, taking into consideration the climatic conditions in the year 1919, and what lands similarly situated under like conditions had produced, declared it to be their opinion that 33 acres of said lands, which constituted approximately one-third of those leased to the defendants, ought to have produced, if properly cultivated and planted to rice, from 40 to 50 100-pound sacks to the acre.

For the purpose of showing the prevailing market prices of rice in the year 1919, the plaintiff introduced in evidence a printed or typewritten tabulated statement, prepared by the Rice Growers' Association at Sacramento. This statement, the admission of which in evidence for the purpose stated was expressly consented to by counsel for defendants, subject, however, to an objection on the sole ground that, as applied to any yield of rice per acre which the court might determine the land would have returned, it would increase the amount beyond the sum of \$1,000, which, as he contended, was the amount of damages to the recovery of which the plaintiff was limited by the lease itself in case of a failure to plant and grow the crops specified in the instrument, showed the varying market prices of rice for different qualities during the months of December, 1919, and January, February, March, and April for some year which is not specifically named in the table, but which we think we may assume was for the year 1920. The prices as so shown ranged, according to quality and time, from 6.45 cents to 7.50 cents per pound. This table, then, if not objectionable as evidence upon the single ground upon which defendants objected thereto, stood before the trial court as an element of the general criterion by which said court was to be guided

in determining the extent of the damage and the consequent pecuniary loss suffered by plaintiff from the breach of the lease.

[5] The measure of damages in a case of this character "is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300.

[6, 7] Under all the authorities, the testimony given by the experts as to the probable yield of rice on the lands in question for the year 1919 was undoubtedly competent for that purpose. Indeed, the only and the very best character of evidence for the establishment of the fact of loss of future profits in a case such as the one here must of necessity, as a general rule, come from the testimony of experts or persons who, from long experience in the same line of business, have acquired such a knowledge of the results of the operations of such business as to enable them to state with at least approximate accuracy what, in the way of profits under given conditions, the future potentialities of the business may be. It is, of course, to be conceded that prospective profits, as damages, are incapable of being shown with that accuracy with which the ordinary questions of fact can be established. Expert testimony, especially that from which the court or jury must determine what will be the probable profits of the business in the future, is not always or even generally the most satisfactory. But, with all these disadvantages with respect to proof in cases of this character, it is still the law that prospective or future profits may be the basis of a recovery. Manifestly, to recover future profits as damages, it must be shown that the loss in that particular was the direct result of the act or omission of the party from whom recovery of damages therefor is sought. In other words, if the alleged future profits were entirely collateral to the subject-matter of the contract alleged to have been broken, and not consequences flowing in a direct line from the breach of such contract, they will be rejected as not constituting a proper basis for a recovery. But, as is said in *Shoemaker v. Acker*, 116 Cal. 239, 245, 48 Pac. 62:

"Where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages."

See, also, *Sutherland on Damages* (2d Ed.) §§ 64, 72, 107, 120; *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *United States v. Behan*, 110 U. S. 344, 4 Sup. Ct. 81, 28 L. Ed. 168; *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479; *Hale v. Trout*, 35 Cal. 229; *Stoddard v. Treadwell*,

26 Cal. 308; *Cederberg v. Robison*, 100 Cal. 98, 99, 34 Pac. 625; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 85, 108 Pac. 885; 8 Ruling Case Law, §§ 62 and 63, pp. 501, 503. Of course, the damages claimed in this case are based upon future profits which were the natural and direct consequences of the breach of the contract, and not collateral to the subject-matter thereof, and the plaintiff was entitled to recover such damages as the court below could justly find from the evidence taken before it, and of which we have given above a statement in substance, that he had suffered through the breach of the contract by the defendants. And we cannot say upon the record before us that the amount awarded is not a just admeasurement of the damages which the plaintiff actually sustained.

[8] 4. The claim that the lease itself fixes the damages to which the plaintiff would be entitled in case of the failure of the defendants to execute the terms of the instrument is devoid of force. The provision of the lease upon which the proposition is founded is that which gives to the plaintiff a lien to the extent of \$1,000 upon the entire crop which might have been produced on the lands as security for his share of the crop until such share should be delivered to him as provided by the writing. Immediately following that provision in the lease is one whereby the plaintiff was authorized, as further security for his rights under the agreement, and in case he should deem himself "insecure and unsafe in the matter of rental," to take immediate possession of the premises, harvest the crops, and sell the same, accounting to the defendants for whatever they might be entitled to.

Reading these two provisions together, it is to our minds manifest that the provision for the \$1,000 lien was not intended for the purpose of providing for liquidated damages for default in carrying out the terms of the lease, but was, in effect, intended only to operate as a mortgage to secure plaintiff for his share of whatever crops that might be grown on the lands. In other words, we do not think that, in inserting in the lease the provision for the lien, the fact of the probable failure of the defendants to cultivate and plant the crops as agreed was in the minds of the parties, or that the lien provided for should be referable to such an event. Indeed, the language of the provision in question does not square, either in language or effect, with section 1671 of the Civil Code, providing for agreements for liquidated damages for the breaking of contracts. Said section reads:

"The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it

would be impracticable or extremely difficult to fix the actual damage."

There is, as is to be noted, no express reference in the provision of the lease as to the lien to a breach of the instrument. The section of the Code might be applicable to a case of this kind because there is, as we have shown, more or less difficulty to be encountered in such a case in fixing actual damages for a breach of the agreement; but when it is the intention to invoke and apply its provisions in a contract to which they may be pertinent, particularly to a contract (as the one here) damages for the breach of which are not altogether incapable of ascertainment, such intention should be disclosed by language which can leave in the mind little doubt thereof, lest the injured party might be foreclosed from showing a much greater amount of damage than the agreement would limit him to.

[9] 5. We cannot say from the record as it is presented to us that the amount allowed by the court as the value of the rice did not represent the then market price of East Nicolaus, at which point the defendants were obligated to deliver the plaintiff's one-fourth share of the crop. Under the lease the defendants were to plant, grow, and harvest the rice and deliver plaintiff's part thereof at the place just named, at their own expense, and, as also shown, the finding as to the value of the rice for the year 1919 was predicated upon the tabulated statement of prices above referred to. That statement did not show the particular market or markets where the prices therein given could be obtained; nor did the defendants show or attempt to show that fact; and, since they claimed as a deduction from the price allowed the cost of marketing the rice, we think it was, under the circumstances, incumbent upon them to do so. At any rate, as the only evidence made available to the court upon the question of the price or value of the rice was that afforded by the statement referred to, and, as that statement showed that rice was selling in the market at 7 cents per pound, we think the court was justified in accepting it as tending to establish the market price of the rice at the point where the defendants were, under their agreement, required to deliver it. *Telander v. Tujunga Water & Power Co.*, 185 Pac. 504.

6. The last point to which attention may be given involves the proposition that it was the duty of the plaintiff to show by pleading and proof that he did not and could not rent the premises to be used for other purposes for the remainder of the year 1919 after the lease had been breached and it was too late to plant the land to rice. The point is made for the first time on this appeal, it not having been raised in the court below, as it could have been, either by demurrer

or on a motion for a new trial, or by both. But we think a reply to the point lies in the fact that the answer expressly admitted the first part, and did not deny, which, in pleading, is the equivalent of admitting, the italicized part of the allegation:

"That the season for planting said crops or any of them has passed, *and it is now too late to successfully put in any crop upon said premises.*"

But it is perhaps true that, since it may be assumed that the premises as they then stood were suitable only for agricultural purposes, they were of some value for pasturage purposes, and as to this it is to be said that the plaintiff, when testifying, admitted that he had rented them temporarily for the pasturing of sheep in the month of November, 1919, and after the defendants had surrendered possession of the lands, and that he received for such pasturage the sum of \$25. It seems, though, that the sheep were largely "pastured" from a quantity of loose hay which had been cut by the defendants on the premises, the same having been left there by them as plaintiff's share thereof. But, even if it be answered that it was the duty of the court to reckon the \$25 as in diminution of the judgment to that extent, yet, as that item is to be considered by this court in determining whether the judgment should be reversed, it may, when compared to the size of the judgment, justly be disregarded on the doctrine of *de minimis non curat lex*.

There are some other objections to certain findings, but they do not, in our view, merit special notice.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 493

In re SCHAEFFER'S ESTATE.

BARNETT et al. v. SCHAEFFER.

(Civ. 3854.)

(District Court of Appeal, First District, Division 1, California. July 13, 1921.)

1. Appeal and error ⇨631—Printing of record of trial court held not necessary.

Under Code Civ. Proc. §§ 953a, 953c, providing that appellant may file a request for a transcript of the testimony offered and other proceedings at the trial, and that no transcript of the record need be printed, the clerk's type-written transcript on an appeal from a decree settling the final account of an administratrix and decreeing distribution, including the verified final account, report, and petition for distribution, written oppositions and exceptions thereto, and the order and decree settling the account, directing distribution, and setting out

the findings of the court on the matter in controversy, is sufficient, and a printed record is unnecessary.

2. Limitation of actions ⇨41—Statute of limitation applies to settling off debt due ancestor by distributee of estate.

Where limitations had run against a debt due from distributee of the estate of the deceased, the debt may not be set off against the share of the distributee.

3. Limitation of actions ⇨165—Right created by statute of limitations to be protected by courts.

The statute of limitations creates a right which is to be protected as any other right, whenever it is invoked in a legal proceeding, though it pertains only to the remedy.

4. Limitation of actions ⇨36(1)—Statute of limitations applies both at law and in equity.

The statute of limitations applies equally in suits in equity and in actions at law.

5. Courts ⇨200—Court sitting in probate has only the jurisdiction conferred by statute.

The superior court, when sitting in probate, is vested only with the limited jurisdiction conferred upon it by statute.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Proceeding for distribution of the estate of Rebecca Schaeffer, deceased. From an order settling the final account and decreeing distribution favorably to Henry C. Schaeffer, Johanna Barnett, individually and as administratrix with the will annexed, and others, appeal. Affirmed.

W. E. Rode, of Oakland, for appellants.
Clarence N. Riggins, of Napa, for respondent.

WASTE, P. J. Certain of the heirs and devisees of Rebecca Schaeffer, deceased, and the administratrix, appeal on a question of law alone from the order and decree settling the final account of the administratrix, and decreeing distribution of the residue of the estate. The respondent makes a preliminary objection and seeks a dismissal in the absence of a printed record.

[1] The appeal is prosecuted under the alternative method. The transcript, prepared in the manner prescribed by section 953a of the Code of Civil Procedure, is properly authenticated by the clerk. It includes, among other papers, the verified final account, report, and petition for distribution, the written opposition and exceptions thereto, the order and decree settling the account, and directing distribution, which sets out the findings of the court upon the matter in controversy. It was not necessary that the record be printed. The enumerated papers, constituting the ordinary judgment roll (Estate of Gamble, 166 Cal. 253, 255, 135 Pac. 970), are properly presented in the typewrit-

ten "Clerk's Transcript," (Code Civ. Proc. §§ 953a, 953c; Supreme Court rule 7 [32 Sup. Ct. vi]). The appellants have printed in full in the appendix to their brief, as required by the Code, the portions of the record which they desire to call to the attention of the court, in presenting the point to be considered on this appeal. Nothing more was required. The cases relied upon by the respondent to support his contention were rendered inapplicable by the amendment to section 953a, adopted by the Legislature in 1915. *Silvers v. Grossman*, 192 Pac. 534.

Rebecca Schaeffer died testate, leaving four children, who were made devisees under the will. When the estate was in condition to be closed, the administratrix with the will annexed filed the final account and report of her administration, together with a petition for final distribution. As shown by the account, the property to be distributed consisted of quite a large amount of cash, one United States Liberty Bond, two notes and mortgages, and a claim against Henry C. Schaeffer, this respondent, for \$790, alleged to be due for rent. One of the notes secured by mortgage also represented an indebtedness of respondent. In the petition for distribution the administratrix asked that the total indebtedness of said Henry C. Schaeffer, including the claim for rent, be offset against and deducted from his distributive share of the estate, which was somewhat in excess of the estate's demand against him. The respondent filed written objections and exceptions to the account and petition for distribution, in which he denied that the sum of \$790, or any amount, was due from him to the estate for rent, and interposed the bar of the statute of limitations against the claim. He resisted the prayer for a deduction of that amount from his distributive share of the estate.

At the hearing it was stipulated, and the decree settling the final account and of distribution recites, that in 1912 the respondent was indebted to Rebecca Schaeffer, the deceased, in the sum of \$790 for rent, that the indebtedness has never been paid, that a written acknowledgment or promise to pay the same has never been given, and that the indebtedness was barred by the statute of limitations at the time Rebecca Schaeffer executed her will, and at the time of her death. The lower court sustained the position of the respondent. It distributed the assets of the estate to the persons entitled, but refused to deduct the indebtedness for rent from respondent's distributive share. It is from that portion of the order and decree that this appeal is prosecuted, presenting for our consideration, as the single question of law, the effect of the bar of the statute of limitations upon the right of the court, sitting in probate, to deduct an indebtedness from the distributive share of the debtor in his ancestor's estate.

[2] It is, of course, the well-settled general rule, with certain exceptions, that when the residue of the estate consists of money a debt due from a distributee to an estate, and forming a part of the assets of the estate, may be properly set off against the distributive share due such debtor, whenever it can be done without injustice to the parties. *Estate of Gamble*, supra, 166 Cal. 257, 135 Pac. 970; 18 Corp. Jur. pp. 383, 384; 11 R. C. L. § 276. As to debts barred by the statute of limitations, it is the rule in some jurisdictions that they may be deducted, and in others that they may not. 18 Corp. Jur. supra. The question has never been considered by the appellate courts of this state, so far as we can ascertain, but we incline to the side of those jurisdictions which hold that the interposition of the statute of limitations is as effective as a bar to any such action, in a proceeding in probate on distribution, as it would be in an ordinary legal action to recover the amount of the indebtedness alleged to be due. The authorities which hold to the contrary refuse, for the most part, upon broad equitable grounds, to accord the right and privilege to a distributee of an estate to interpose the bar of the statute of limitations on distribution, which he would have in an action brought against him by the testator, if living, or by the personal representative of the decedent's estate.

[3, 4] We see no just reason for making such a distinction. It was long ago held in this jurisdiction that the statute of limitations is to be regarded as one of repose, the benefit of which cannot be taken from one without his consent. *McCarthy v. White*, 21 Cal. 495, 502, 82 Am. Dec. 754. It avails in suits in equity equally with actions at law. *Grattan v. Wiggins*, 23 Cal. 16, 34; *Lux v. Haggin*, 69 Cal. 255, 267, 4 Pac. 919, 10 Pac. 674. The defense of the statute is a privilege personal to the debtor, and whenever in any legal proceeding it is invoked by the debtor, the court is compelled to recognize it as a defense. *Bates v. Gregory*, 89 Cal. 387, 398, 26 Pac. 891. The right to invoke the bar of the statute is as much to be protected as any other right that a man has. The fact that the defense pertains to the remedy does not alter the case. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate. *Board of Education v. Blodgett*, 155 Ill. 441, 450, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348.

[5] The lower court, sitting in probate in the instant case, was vested only with the limited jurisdiction conferred upon it by statute. *Martinovich v. Marsicano*, 137 Cal. 354, 356, 70 Pac. 459. It may not be seriously contended that it had any greater power in this matter than it would have possessed if in the exercise of its legal or equitable jurisdiction. The real purpose of the petition was, and its only effect, if granted, would

be, to enforce collection of the debt in question. The proceeding was therefore clearly analogous to an action at law for the same purpose. It follows that, under the stipulated facts, the trial court properly held that the statute of limitations barred, not only the remedy of the appellants, as the heirs and personal representatives of the testatrix, but the right to collect the debt as well. It therefore properly refused to offset the amount against respondent's share of the estate. *Hesley v. Shaw*, 120 Ill. App. 92, 100; *Boden v. Mier*, 71 Neb. 191, 199, 98 N. W. 701; *Allen v. Edwards*, 136 Mass. 138; *Milne's Appeal*, 99 Pa. 483, 490; *Richardson v. Keel*, 77 Tenn. (9 Lea) 74, 78.

The decree is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

186 Cal. 731

KLOKKE INV. CO. v. LISSNER et al.
(L. A. 6584.)

(Supreme Court of California. Aug. 26, 1921.)

1. Appeal and error ⌘909(4)—Decree of distribution to person raises presumption of legacy or sole heirship.

That a note and mortgage were distributed to a person by a decree of distribution raises a presumption that she was the decedent's sole heir, or the legatee of that portion of the estate.

2. Descent and distribution ⌘76—Wills ⌘733(1)—Legatee has title to note and mortgage of ancestor at latter's death subject to debts, etc., which becomes absolute on distribution.

Title to a note and mortgage vested in one who was either a legatee thereof or sole heir, at the death of the testator, subject to the payment of debts and expenses of administration, and the carrying out of the will, and when not needed for those purposes title became absolute on distribution.

3. Executors and administrators ⚡106—Release of mortgage by executrix of estate held valid.

Where a mortgage belonging to an estate was released by the executrix, upon giving another mortgage, which was distributed by the decree of distribution, the release of the first mortgage, although made without an order of the court, was binding on the executrix and, after distribution of the entire estate, was absolute and beyond attack.

4. Escrows ⚡8(1)—Holder of released mortgage delivered in escrow holds as agent of one paying mortgage.

Where a mortgage was released and delivered in escrow, to be held until certain parties gave another note and mortgage instead, after performance of these conditions, the holder had custody as agent of the parties who gave the mortgage and note to secure the release of the first mortgage, and not for the mortgagee.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Klokke Investment Company, a corporation, against Meyer Lissner and others to foreclose a mortgage. From a judgment for plaintiff, all defendants except one, R. Lewis, appeal. Affirmed.

See, also, 39 Cal. App. 717, 179 Pac. 728.

Ray Howard and Joseph L. Lewinsohn, both of Los Angeles, for appellants.

Oscar Lawler and W. W. Butler, both of Los Angeles (John M. Hall, of Los Angeles, of counsel), for respondent.

SHAW, J. This is an appeal by all the defendants except one, R. Lewis, from a judgment against the defendants for the foreclosure of a mortgage executed by the defendants Meyer Lissner and Ermine Lissner, his wife, on January 2, 1915, for the sum of \$85,000, with interest. The mortgage was made to Johanna E. Klokke, executrix of the estate of Ernst F. C. Klokke, and was by her duly assigned to the plaintiff.

The only answer embraced in the record on appeal is that of Louis M. Lissner. The other answers were omitted upon a stipulation of all parties that the allegations of that answer present all the facts material to the defense of the other defendants.

The defense set up in said answer is that the mortgage and note sued on were given without any consideration. The facts upon which this defense rests are alleged to be as follows: On June 2, 1912, one C. B. Youngken and W. E. McVay executed to Ernst F. C. Klokke a note for \$85,000 and a mortgage to secure the same on the property described in the complaint, due January 2, 1915. In the year 1914 Klokke died and Johanna E. Klokke was duly appointed executrix of his estate and she qualified as such executrix. After the said Youngken and McVay mort-

gage became due, Meyer Lissner and wife executed to Johanna E. Klokke, as executrix as aforesaid, the note and mortgage in suit, in consideration of the release and cancellation by said executrix of the said note and mortgage given by Youngken and McVay, as aforesaid. This, of course, was on its face an adequate and sufficient consideration for the note and mortgage of Lissner, if the release and cancellation of the previous note and mortgage were valid and effectual. The answer further avers that said executrix was not, by the will of Ernst F. C. Klokke, empowered to release said mortgage; that she never obtained any order of the court in probate empowering her, as executrix or otherwise, to release or cancel said mortgage; that she afterwards rendered her final account as executrix of the estate, in which she returned the Youngken and McVay note and mortgage as part of the assets of said estate; that the account was settled accordingly; that a decree of distribution of the estate was thereafter duly made, whereby said Youngken and McVay note and mortgage were distributed to her as legatee under said will; that said Youngken and McVay note and mortgage were never actually delivered up, surrendered or canceled; that said Johanna E. Klokke is still the owner and holder thereof; that she elected to and did retain the same and repudiated the said note and mortgage of Lissner and wife sued on herein; and that the prior mortgage of Youngken and McVay still remains a lien on the property in favor of said Johanna E. Klokke, to the prejudice of said defendant.

The findings below were to the effect that the consideration of the note and mortgage sued on was the satisfaction and cancellation of said Youngken and McVay note and mortgage; that a release thereof was executed by Johanna E. Klokke as executrix as aforesaid, and delivered by her to the Title Insurance & Trust Company in escrow, to be by them surrendered and canceled upon the execution and delivery of the note and mortgage sued on, and that this was done accordingly, but that the custody of the said Youngken and McVay mortgage was retained by said Trust Company, and that in November, 1915, said executrix filed her final account and petition for distribution in said estate; that said account did not show said note and mortgage sued on as an asset of said estate, but did include said Youngken and McVay note and mortgage as an asset thereof, but that the note and mortgage sued on was distributed to Johanna E. Klokke by the decree of distribution in said estate; that the Youngken and McVay note and mortgage had been previously satisfied and canceled as aforesaid and that the said account and said decree were erroneous in so far as they included the prior note and mortgage as assets of said estate, and that Johan-

na E. Klokke is not now, and was not when the action was begun, the owner or holder of said Youngken and McVay note and mortgage, or either of them, and that the same do not constitute a lien or incumbrance upon the property described therein. It should be added in explanation that it is conceded that both of the said mortgages covered the same property. It is also conceded that the will did not expressly authorize said executrix to satisfy or release said prior mortgage, nor did she as executrix obtain any order of court giving her such authority or approving the same.

The briefs of the parties are devoted mainly to the discussion of the question whether or not an executrix could lawfully extend the time on a note belonging to the estate, or take a new mortgage and note as consideration for the release of a mortgage belonging to the estate, where the new mortgage extends the time of payment beyond that given by the original mortgage, unless the will itself gives such authority, or authority is obtained from the court having jurisdiction of the estate in probate. We do not think these questions are necessary to the decision of the case.

[1-3] The fact that the note and mortgage sued on were distributed by the court below to said Johanna E. Klokke upon the decree of distribution of said estate raises the presumption that she was the sole heir of the decedent, or the legatee of that portion thereof. The decree itself is set forth in the bill of exceptions, and it shows that all the assets of the estate were distributed to her. The legal title to the Youngken and McVay mortgage therefore vested in Johanna E. Klokke at the time of the death of Ernst F. C. Klokke, subject to administration. This means that the complete title to said note and mortgage vested in her at his death, except so far as resort thereto was necessary for the payment of the debts and expenses of administration and for the carrying out of the provisions of the will. The result of the administration, as disclosed in the findings, shows that resort to said note and mortgage was not necessary for either of these purposes. Consequently her title became absolute upon such distribution. Under these circumstances, the release by Johanna E. Klokke of the original note and mortgage became binding upon her personally, whether binding upon the estate or not. When the administration was closed and the note and mortgage taken in satisfaction thereof were distributed to her, whatever title the estate may have had by reason of any defect in her power for the satisfaction of the original note and mortgage, passed to her as the sole successor to the estate. The result is that she is estopped from ever setting up or claim-

ing any benefit whatever from the Youngken and McVay mortgage and from attempting in any way to enforce the same. By the facts found in this case the defendants are fully protected against any prejudice on account of any defect that may exist with respect to the release executed by Johanna E. Klokke as executrix of the estate of Ernst F. C. Klokke. The questions argued with respect to her power in the premises might have been of some importance if they had arisen and become applicable prior to the final settlement of said estate, but when upon such settlement she succeeded to the full ownership of all of the said estate, including any shadow of technical force left in the original note and mortgage, as well as the note and mortgage sued on, taken in lieu of the original, and thereupon assigned the new note and mortgage to the plaintiffs, she thereby ratified the release of the prior mortgage, and those questions ceased to be of any importance.

[4] The evidence makes it very clear that there is no merit in the defense pleaded. When the old mortgage was released it was delivered to the agent of Lissner in exchange for the new note and mortgage, and that agent thereafter held custody of the old note and mortgage as agent for Lissner, not for Mrs. Klokke. They were, in legal contemplation, delivered up to him. The note was not negotiable and it was not possible for any person to use it to the injury of Lissner or those interested under him. Upon the settlement of the estate and the distribution of everything to Mrs. Klokke, the satisfaction became absolute and beyond attack. The technical conditions which defendants now claim imperiled their rights and threatened them with a double payment of the debt had ceased to exist before this suit was begun, and the defendants would be presumed to have had notice thereof, since the facts were either within their knowledge, or matters of public record. The original debt has never been paid. If the defense were held good, the defendant would escape payment altogether.

We are not to be understood as intimating that, under the circumstances of this case as above shown, the release of the old note and mortgage and the surrender of the note would not have been binding upon the estate, even before the close of the administration, since it did not cause the estate any prejudice other than the extension of the time of payment, and the only persons interested consented thereto. *Maddock v. Russell*, 109 Cal., at pages 423, 424, 42 Pac. 139.

The judgment is affirmed.

We concur: SLOANE, J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; WILBUR, J.

186 Cal. 718

(200 P.)

Ex parte GIRARD. (Cr. 2393.)

(Supreme Court of California. Aug. 24, 1921.)

1. Licenses $\S$ 18½, New, vol. 12A Key-No. Series—Trustees doing business under declaration of trust and issuing certificates of interest held a "company," within the Corporate Securities Act.

Where four persons engaged in business under a declaration of trust making such persons trustees, and as such trustees sold unit interests in the business to persons for whom they carried on the business and held title to the property in trust, and to whom they issued unit certificates transferring to the holder a proportional interest in the property held by the trustees in pursuance of the trust, the sale of such unit shares without a permit from the corporation commissioner held violative of the Corporate Securities Act (St. 1917, p. 673), as amended by St. 1919, p. 231, the business constituting a "company," within such act, in view of section 2, subds. 3-5, 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Company.]

2. Constitutional law $\S$ 240(1) — Corporate Securities Act held not unconstitutional, as discriminating between sales of securities by trustees under wills and those under other instruments.

The Corporate Securities Act (St. 1917, p. 673), as amended by St. 1919, p. 231, permitting trustees created by a will or by an order of court in a judicial proceeding to sell securities issued by such trustees without a permit from the corporation commissioner, while forbidding the sale of such securities without such permit in the case of a trust created under an instrument executed between individuals, held not unconstitutional by reason of such discrimination.

3. Constitutional law $\S$ 48—Statute not held unconstitutional for discrimination, unless there is no rational doubt as to the improper discrimination.

A court will not declare a law unconstitutional in the matter of discrimination, unless there is no rational doubt that it improperly discriminates between persons similarly situated.

In Bank.

Application by G. S. Girard for writ of habeas corpus. Petition denied.

A. J. Bledsoe, of San Francisco, for petitioner.

SHAW, J. The petitioner alleges that he is unlawfully imprisoned by the sheriff of the county of Los Angeles upon a warrant of arrest issued out of the justice court of Los Angeles township upon a complaint which fails to charge a public offense. The complaint charges that the Crystal & Colored Glass Company was a company of which four persons, namely, Mayer, Marshall, Stevenson,

and the petitioner, Girard, were trustees, and that neither said company nor any of said trustees thereof had obtained any permit from the commissioner of corporations to issue or sell any of the securities of the company or any shares, interests, or rights into which the capital stock or property of the said company and the rights of stockholders and members thereof were divided, or to sell any instrument issued or offered to the public by said company and trustees evidencing any right to a share in the profits or earnings or distribution of assets of the business of said company; that said Mayer, Marshall, Stevenson, and Girard did then and there willfully, unlawfully, knowingly, and feloniously, and for a valuable consideration, direct and aid in the issue and sale of, and execute and sell, shares, interests, and rights into which the capital stock and property of said company and the rights of members and holders thereof were divided, and a certain instrument offered to the public by said company, evidencing a right to participate and share in the profits, earnings, and distribution of assets of the business of the company to wit: To John Phillips 1,000 unit interests, to William Phillips 1,000 unit interests, to Earl Fulton 500 unit interests, and to John Blaine 1,000 unit interests, in consideration of the sum of \$300 paid by William Phillips, \$300 by John Phillips, \$100 by Earl Fulton, and \$150 by John Blaine, contrary to the statute, etc.

The complaint attempts to state a cause of action under the provisions of the act known as the "Corporate Securities Act," in common parlance known as the "Blue Sky Law," enacted in 1917, as amended in 1919. Stats. 1917, p. 673; Stats. 1919 p. 231. Section 2 of the act declares that "the word 'company' includes all domestic and foreign, private corporations, associations, joint stock companies, and partnerships, of every kind, and also trustees, as hereinafter defined" (subdivision 3); also that "the word 'trust' as used in this act includes all voluntary trusts, as the same are defined in the Civil Code, expressly created by or declared in an instrument in writing, other than a will or judicial writ, order, decree, or judgment, to carry on any business or to secure the payment or repayment of money" (subdivision 4), and that "the word 'trustee,' except as hereinafter used in subdivision 9 of this section, includes only persons or companies executing trusts as hereinbefore defined" (subdivision 5). Subdivision 9 of the section refers only to trustees of a testamentary trust or trust established by judicial decree. It has no bearing on the character of trust here in controversy. The act further provides that "no company shall sell," except for delinquent assessment, as provided for sales of stock under the Civil Code, "any security of

its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do" (section 3). The act creates a state corporation department and provides for the appointment of a commissioner of corporations to perform the duties prescribed in the act. Section 13 provides that every company which shall directly or indirectly issue or cause to be issued any security contrary to the provisions of the act shall be punishable by a fine not exceeding \$10,000. The petition alleges that the Crystal & Colored Glass Company is a common-law trust company existing and organized in pursuance of a declaration of trust filed for record with the county recorder of Los Angeles county on March 31, 1921, that it is not incorporated, and that the sole claim of the prosecution in the case is that the sale of the unit interests provided for in said declaration of trust constitutes a violation of said Corporate Securities Act.

Said declaration of trust is to the effect that it constitutes an agreement between the said four trustees above named—

"for the purpose of enabling the holders of trust shares hereunder to distribute the advantages and risks of their investments from different securities and business enterprises in a way ordinarily possible to investors, and to that end hold as a common or joint investment for the common or equal benefit of the shareholders ratably according to their several holdings of unit shares the real or personal property transferred or conveyed to, vested in, or acquired by the trustees under this agreement, and to invest and reinvest such money and funds as may be paid to the trustees or be realized by them from the disposition of shares issued hereunder in such manner and in such business enterprises, securities, and real or personal property as under the terms of this instrument shall be permissible and in the judgment of the trustees * * * shall tend to enhance the value of the shares issued hereunder as investments."

The trustees thereby declare that they will hold all property acquired by them as trustees in trust for the benefit of the holders of the certificates of shares issued as evidence of interests, in accordance with the terms of the agreement. The name of the trust is declared to be "the Crystal & Colored Glass Company." The trustees are given power and authority "to issue common shares representing unit interests of no par value." It provides that negotiable certificates for 26,000 units are to be issued to the four trustees named above in equal quantity; each trustee to receive 6,500 unit shares, evidenced by certificates which, as above stated, are to be negotiable. Each unit certificate had the effect of transferring to the holder thereof a proportional interest in the property held by the trustees in pursuance of the trust.

[1] The offense described in the complaint was the sale of these unit interests to the different persons therein mentioned for the

prices therein stated, without having received from the commissioner of corporations any permit so to do. It will be seen, from the above definitions of the words "company," "trust," and "trustees," that the Crystal & Colored Glass Company comes precisely within those definitions, and constitutes a company within the meaning of the act, and of the provisions thereof, forbidding such company to sell securities of its own issue without a permit. The charge is that the four trustees made the sales set forth in the complaint. A sale of unit shares or unit interests as described in the said declaration of trust without a permit from the corporation commissioner is without doubt a violation of the act.

[2, 3] The defendant argues that the law is unconstitutional for the reason that it is discriminatory, in that it permits trustees created by a will or by an order of court in a judicial proceeding to sell securities issued by such trustees without a permit, while forbidding it in a case of a trust created under an instrument executed between individuals such as that here under consideration. We are satisfied that there is no just ground for declaring this to be an improper discrimination. We cannot declare a law unconstitutional in the matter of discrimination, unless there is no rational doubt that it improperly discriminates between persons similarly situated. We must presume that the Legislature made inquiry to determine whether or not there were evils which required regulation, and that upon such inquiry it was ascertained that the mischief sought to be corrected was being done under the form of trusts created by private individuals, and not under the form of testamentary trusts or trusts declared in judicial proceedings.

The trust here involved is a striking example of the practices which the Legislature intended to prevent. The corporation commission is required to investigate concerning the assets of such a trust, and to refuse to permit it to do business unless upon such investigation he finds that the proposed plan of business is not unfair, unjust, or inequitable, and that the company intends to fairly and honestly transact its business and that the securities it proposes to issue and the methods to be used in disposing of the same are not such as in his opinion will work a fraud upon the purchaser. Conceding that the business intended to be done would be legitimate and lawful, it is evident from the experience of mankind that it is of a character which renders it justly subject to regulation, as much so as that of the corporations towards which the law is principally directed. The provisions regarding companies, trusts, and trustees were inserted in the act for the evident purpose of preventing evasions such as would follow if the operation of the act was confined to corporations alone.

So far as the question of discrimination is

concerned, it may be safely assumed that very few testators will ever conceive the idea of creating a trust such as that here under consideration, and such as are described in the Corporate Securities Act, for the purpose of having business of that kind carried on after their death. The fact that no provision is made for the regulation of such testamentary trusts does not render the law discriminatory or unjust toward those institutions to which it applies. The principle involved is the same as that applied in *Ex parte Spencer*, 149 Cal. 401, 86 Pac. 897, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105, where it was claimed that legislation prohibiting the employment of minors in certain trades was discriminatory. The court said:

"The power to forbid their employment in certain occupations and not in all, depends on the questions whether or not any appreciable number of children are employed in the callings not forbidden, and whether or not those callings are injurious to them, or less injurious than those forbidden. If certain occupations are especially harmful to young children, and others are not so, there can be no serious doubt that it is within the power of the Legislature to forbid their employment in one class and permit it in the other. The difference in the results would justify the classification with a view to the difference in the legislation."

And the court proceeds to hold that these questions of fact were for the legislature to ascertain and determine and that—

"If any rational doubt exists as to the soundness of the legislative judgment upon the existence of the facts, that doubt must be resolved in favor of the legislative action, and the law must accordingly be held to be valid in these respects."

To the same effect, see *San Luis Obispo v. Murphy*, 162 Cal. 593, 123 Pac. 810, Ann. Cas. 1913D, 71, where it was said that—

"The Legislature may have reasonably concluded that the cases in which a charge is made by a personal surety on an official bond are so inappreciable and insignificant in number that, in reality, the surety corporation bonds 'compose the entire class' as to which there is a premium or charge for the risk assumed by the surety, and such a conclusion would warrant the limitation of the provisions of the act to such bond."

So in the present case, the Legislature may have concluded that the evils which might occur from the administration of a testamentary trust or trust declared by judicial decree or order were so insignificant and inappreciable, and the mischiefs arising from the other trusts described in the act which are forbidden to issue securities without a permit comparatively so great, that the latter comprise the entire class to which legislation should be directed.

For these reasons we have concluded that

there is no merit in the application for the writ.

It is ordered that the petition for habeas corpus be denied.

We concur: SLOANE, J.; SHURTLEFF, J.; WILBUR, J.; LENNON, J.

186 Cal. 724

TRAVIS GLASS CO. v. IBBETSON.
(L. A. 6609.)

(Supreme Court of California. Aug. 26, 1921.)

1. Creditors' suit $\S$ 8(5)—Judgment creditor may maintain statutory action for conversion of property of judgment debtor.

Under Code Civ. Proc. $\S$ 720, permitting action against a person alleged to have property of the judgment debtor to be brought by a judgment creditor, whose judgment is unsatisfied, an action may be maintained against defendant for converting property belonging to the judgment debtor, since the purpose of the statutory proceedings supplementary to execution is the same as that of the original creditor's bill in equity, to enable the creditor to reach property which could not otherwise be made to contribute to the payment of the judgment.

2. Evidence $\S$ 594—Finding of trial judge held not error, though evidence not directly contradicted.

Where defendant's evidence was to the effect that property of a judgment debtor taken by him was given to him for the purpose of selling, and to apply the proceeds on a debt owed to him by the judgment debtor, but this testimony was impaired by defendant's testimony in another suit that the property was taken by him under a chattel mortgage, the finding of the trial court that the goods were wrongfully sold by defendant is not error, since the trial judge or jury is not required to find in accordance with evidence merely because it may be uncontradicted.

3. Creditors' suit $\S$ 18—Defense that owner of goods converted owed defendant more than their value held insufficient.

In an action by a judgment creditor for the conversion of property of the judgment debtor, the defense that the judgment debtor owed defendant more than the value of the goods taken is not sufficient, since it would not have been a successful defense in an action for conversion by the judgment debtor.

4. Judgment $\S$ 670—Suit held not determined by former suit between same parties over same subject-matter, where plaintiff sues in different capacity.

Although a former suit between the same parties involving the same subject-matter was brought by plaintiff, claiming ownership of converted property, plaintiff may maintain a suit as a judgment creditor against a converter of property belonging to his judgment debtor, since in this suit the capacity in which plaintiff sues is different than in the first suit.

5. Creditors' suit ☞14—Showing of insolvency of judgment debtor held sufficient.

A stipulation to the effect that plaintiff had obtained judgment against a judgment debtor, and that no part had been paid, and that execution had been issued and returned unsatisfied, is sufficient showing of the insolvency of the judgment debtor in an action against a converter of goods belonging to the judgment creditor.

6. Creditors' suit ☞46—Findings of trial court as to value of property held warranted by evidence.

A finding in a judgment creditor's suit that the value of converted property was in excess of \$926.44 was supported by evidence where defendant sold the property for \$857.57 and plaintiff had sued the judgment debtor for purchase price of the same property and recovered judgment for \$1,108.05.

7. Appeal and error ☞1033(9) — Ruling of court as to value of property held not prejudicial where different ruling would have resulted in larger judgment against appellant.

Ruling of court to the effect that the value of property established at another trial was conclusive as to the value of the same property in the present trial was not prejudicial where the adoption of another view by the court would have resulted in a larger judgment against defendant.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Travis Glass Company, a corporation, against R. E. Ibbetson. From judgment for plaintiff, defendant appeals. Affirmed.

J. Wiseman Macdonald, of Los Angeles, for appellant.

J. W. Falkner, of Los Angeles, for respondent.

LENNON, J. The present creditors' suit for conversion is the outcome of a succession of events, which began when the Travis Glass Company, a corporation having its principal place of business in the city of Clarksburg, W. Va., sold a carload of milk bottles to the Eureka Dairy Company, a partnership of Los Angeles, Cal. Upon the arrival of the bottles in Los Angeles, in the month of April, 1918, R. E. Ibbetson, acting as agent for the Eureka Dairy Company, directed that they be delivered to the Pacific Commercial Warehouse, which direction was complied with by the railroad company. Shortly thereafter the Eureka Dairy Company discontinued business. On June 5, 1918, Ibbetson sold the bottles for \$500, plus freight, amounting to \$357.57, which sum he has ever since retained in his possession. The Travis Glass Company, having received nothing in payment for the bottles, commenced an action for the purchase price against the firm Eureka Dairy

Company and the individual members thereof, and, on June 28, 1919, recovered judgment in the superior court of Los Angeles county in the sum of \$1,108.05, with interest from December 12, 1918, at 7 per cent. per annum, and costs. An execution on this judgment was issued to the sheriff of Los Angeles county and a copy of the execution was delivered by the sheriff to R. E. Ibbetson, as garnish-ee, but the execution was returned, and remains wholly unsatisfied. Subsequently, in proceedings supplementary to execution under section 717 et seq. of the Code of Civil Procedure, Ibbetson was examined in court concerning any debts or property owing by him to the Eureka Dairy Company or the members of said company, and in particular concerning the sale of the milk bottles on June 5, 1918. It appearing for this examination that Ibbetson claimed an interest in the bottles, and the proceeds thereof adverse to the Dairy Company, the Travis Glass Company instituted the present action against him, wherein the trial court rendered judgment in favor of plaintiff, from which defendant appeals.

[1] The action is brought pursuant to section 720 of the Code of Civil Procedure, which authorizes an action by a judgment creditor against the judgment debtor's debtor, or, more exactly, which permits a judgment creditor whose judgment remains unsatisfied to maintain an action against a person alleged to have property of the judgment debtor, or to be indebted to him, when such person denies the debt or claims an interest in the property adverse to the judgment debtor. In the present action plaintiff seeks to reach an alleged claim of the Dairy Company for conversion by the defendant Ibbetson in selling the bottles and failing to account for the proceeds. Counsel for defendant contends that the findings of the trial court fail to support the judgment in favor of plaintiff, for the reason that they reveal that, at the time of the claimed conversion, title to and possession of the property in question were in a person other than plaintiff, to wit, the Eureka Dairy Company. Stated otherwise, defendant's contention is to the effect that the statute providing for the recovery by a judgment creditor of property or debts due his judgment debtor does not extend to him the right to maintain a suit for conversion of property belonging to the said debtor. *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976. Since, however, the purpose of these statutory proceedings supplementary to execution is the same as that of the original creditor's bill in equity—namely, to enable the creditor to reach property which could not otherwise be made to contribute to the payment of the judgment—the statutory proceedings should be given an operation at least as broad as that of the

creditor's bill. Accordingly, inasmuch as claims arising from torts committed on the property of a judgment debtor were within the reach of the judgment creditor under the old equity proceeding, it has been held that such claims may constitute the basis of a suit by a judgment creditor under section 720 of the Code of Civil Procedure. *Staples v. May*, 87 Cal. 178, 191, 25 Pac. 346; *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197. It follows that the present suit for conversion is maintainable by plaintiff in its capacity of judgment creditor.

[2] The point is also made in defendant's behalf that two witnesses the defendant and a stenographer in his office, testified without contradiction that the Eureka Dairy Company delivered the bottles to defendant Ibbetson, requesting him to sell the same and apply the proceeds on a debt then owing from the Dairy Company to said Ibbetson. Upon the authority of *Rauer v. Rynd*, 27 Cal. App. 556, 150 Pac. 780, it is asserted that the delivery of the bottles with instructions to sell and apply the proceeds in payment of an indebtedness constituted a sale to defendant Ibbetson, and that it clearly appears from the proven facts that defendant's disposal of the bottles was pursuant to authority from the owner, and therefore lawful. The trial court found that no such authority existed, and that the goods were wrongfully sold by defendant, evidently disbelieving the evidence relied upon by defendant. It may be stated that a trial judge or jury is not required to blindly believe a witness, nor to find in accordance with his statements merely because his testimony is uncontradicted or unimpeached by the party against whom he testifies. *Murphey v. Virgin*, 47 Neb. 692, 66 N. W. 652.

"The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." *Davis v. Judson*, 159 Cal. 121, 128, 113 Pac. 147, 150; *Blanc v. Connor*, 167 Cal. 719, 141 Pac. 217; *Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509.

The accuracy of the testimony in question in the instant case was not entirely unimpaired, for, while defendant testified in the present case that he sold the bottles upon the request of the Dairy Company, repeatedly denying that they were covered by a chattel

mortgage which he held on certain personal property of the Dairy Company, it appears from evidence introduced by plaintiff's attorney that, in another proceeding concerning the said bottles, defendant emphatically asserted that he had acquired title to the same by purchase under a foreclosure of the above-mentioned mortgage. It was proper for the trial court to consider this confusion with respect to defendant's claim to the bottles in determining the credibility of the testimony concerning defendant's authority to sell.

[3] As a second and separate defense, defendant set forth that, at the time of the alleged conversion, the Eureka Dairy Company, was indebted to defendant in a sum in excess of the price obtained for the bottles, and that this indebtedness remains wholly unpaid. The trial court found that it was unnecessary to make specific findings as to the existence or nonexistence of this indebtedness, for the reason that it did not constitute a defense to plaintiff's action for conversion. Defendant assigns this as error, claiming that, while the indebtedness might not be the basis of a counterclaim (Code Civ. Proc. § 438), it would nevertheless constitute a valid defense to plaintiff's suit for conversion. It is true that in a judgment creditor's suit the defendant may plead any defense which he may have against the judgment debtor. *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 Pac. 242, 132 Am. St. Rep. 81; *Bonte v. Cooper*, 90 Ill. 440. But the alleged indebtedness would constitute no defense against the judgment debtor in this case. It is essential to the orderly administration of the law that a person be prevented from obtaining payment of a claim by the unlawful seizure of the property of his debtor, and, consequently, as a general rule the taking of property without authority or consent is neither warranted nor excused by the fact that the owner is indebted to the person taking the property. *Murphey v. Virgin*, supra. Since the existence of the indebtedness would have constituted no defense to an action by the owner of the property for the conversion thereof there is no apparent reason why it should operate as a valid defense in a suit by the judgment creditor of the owner. In this respect the facts of the present case are similar to those in the case of *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86, 75 N. W. 531, where it was held that the fact that the defendant had applied the proceeds of the converted property to a debt owed by the judgment debtor was no defense to a creditor's suit for the conversion.

[4] *Res adjudicata* is another defense advanced by defendant which cannot be sustained. On July 10, 1918, shortly after the sale of the bottles by defendant, and prior to the recovery of plaintiff's judgment against

the Eureka Dairy Company, plaintiff brought a suit directly against defendant Ibbetson and others for the conversion of the bottles. Judgment was rendered in favor of defendants and against plaintiff. It is claimed that the judgment in that action is a bar to the present suit. It is a familiar rule that identity of issues and of parties is indispensable to a valid plea of *res adjudicata*. In this connection, identity of parties means not only that they must be identical in person, but that the capacity in which they appear must be the same. Code Civ. Proc. § 1908, subd. 2; 23 Cyc. p. 1237. Consequently, although the subject-matter of the suits is the same, the present suit is not barred by the former one, for the plaintiff is suing in a different capacity in the second action. In the first action for the conversion of the bottles, plaintiff relied entirely upon its own interest therein, but it was determined that the title and possession had passed to the Dairy Company before the sale by defendant. Thereafter plaintiff recovered a judgment against the Dairy Company, and in the present action sues in the capacity of creditor, relying solely upon the title of the Dairy Company, its debtor, whose rights were not adjudicated in the first suit.

[5] Two specifications of insufficiency of evidence remain for consideration. It is claimed that there was no evidence in support of the finding to the effect that the Dairy Company was insolvent. However, it was stipulated that plaintiff obtained judgment against the said company, in the sum of \$1,108.05 and \$10 costs, no part of which had been paid, and that execution had been issued and returned unsatisfied. Upon this particular phase of the case that is the only showing required of plaintiff to enable him to maintain the suit. *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50.

[6, 7] Defendant also attacks the valuation of the bottles in controversy. The trial court found that the value of the bottles was, in reality, in excess of the sum of \$926.44. This finding was warranted by the evidence, for the price for which the bottles were sold by plaintiff, as well as the sum received by defendant, was evidence of value. *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729; *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957. It was held, however, that the sum of \$926.44 must be accepted as the value of the bottles for the purpose of this suit. This holding was made upon the theory that, although the present suit was not barred by plaintiff's former suit for conversion, nevertheless the finding of the court in the former suit as to the value of the bottles was controlling in the present case. It is unnecessary to determine whether the valuation in the former suit was binding upon the plaintiff herein, whose position is predicated upon the rights of

a judgment debtor wholly unrepresented in the former suit. It is clear that, had the court not adopted this view of the case, the judgment against defendant would have been for a larger sum than it actually was.

Even assuming that the court erred in adhering to the former valuation, any error that may have been committed in this respect resulted favorably to defendant, and is of no avail to him on this appeal. *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Abdullah v. Abdullah*, 194 Pac. 511.

The judgment is affirmed.

We concur: SHURTLEFF, J.; SLOANE, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

188 Cal. 661

HALE v. GARDINER et al. (L. A. 6598.)

(Supreme Court of California. Aug. 19, 1921.)

1. Pleading ⚡350(3)—Motion for judgment on pleadings admits truth of answer only for purposes of motion.

A motion for a judgment on the pleadings admits the truth of the answer for the purposes of the motion only.

2. Pleading ⚡165—Affirmative allegations of answer deemed denied.

Under Code Civ. Proc. § 462, the affirmative allegations of the answer are deemed denied, and all affirmative matters by way of replication are deemed to have been pleaded by plaintiff.

3. Pleading ⚡229—Utmost liberality allowed in amending pleadings to conform to truth.

The utmost liberality is allowed in amending pleadings to conform to the truth and to allow a party to escape from the effects of ill-advised allegations of law or fact.

4. Pleading ⚡350(3)—Defendants allowed to amend answer on plaintiff's motion for judgment.

If it appears, on plaintiff's motion for a judgment on the pleadings, that the defendants have failed to fully or correctly state their defense, they should be allowed to amend their answer.

5. Pleading ⚡350(3)—Court, having admitted amendment of answer on plaintiff's motion for judgment on pleadings, erred in giving defendant judgment on theory that plaintiff's motion admitted truth of answer.

Where the court, on denial of plaintiff's motion for judgment on the pleadings, allowed defendant to amend answer, and in addition thereto set the case down for trial on the issues raised, it was error for the court to render judgment for the defendant at the time fixed for the trial, on the theory that the plaintiff, by the motion for judgment on the pleadings, had admitted the allegations of the answer, since the granting of leave to amend and the

acceptance of the privilege was in effect a finding by the court that the answer was insufficient as it stood, and that the motion was well taken, and an admission by the defendants of the insufficiency of their answer.

6. Bills and notes *§*92(1)—Note held based on a good consideration, though proceeds were to be used by a corporation instead of the maker.

A note, given to procure funds to be used in the promotion of a proposed corporation, held based on a good consideration, though the corporation, and not the maker, was to use proceeds; the advance of the money by the payee being sufficient to support the promise to pay.

7. Bills and notes *§*484—Payee's agreement to substitute other note for note sued on no defense, in absence of allegation of tender of other note.

In payee's action on a note executed by defendant to procure funds wherewith to promote a proposed corporation, the payee's agreement to substitute for such note the note of the corporation held no defense, in the absence of an allegation that the note of the corporation was ever tendered to the payee.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by R. M. Hale against John M. Gardiner and others. Judgment for defendants, and plaintiff appeals. Reversed with directions to enter judgment for plaintiff.

J. P. Chandler and Howard W. Wright, both of Los Angeles, for appellant.

Henry M. Willis and George W. Bishop, both of Los Angeles, for respondents.

WILBUR, J. Plaintiff brought suit upon a promissory note executed by the defendants March 30, 1917, payable one year after date. The complaint stated a cause of action. Defendants answered, admitting the allegations of the complaint. After admitting the making of the note and its nonpayment, defendants allege that the note was made in connection with the formation of a corporation and in pursuance of a written agreement, a copy of which is attached to and made a part of the answer. It is alleged that in pursuance of this agreement the plaintiff advanced \$2,000 for expenses in connection with the organization of the new corporation, of which sum the defendants received \$200 for work in connection with such organization. It is alleged that the corporation was duly organized, and named the Pacific Public Service Corporation. The written contract provided that upon the incorporation of the company the corporation would substitute its promissory note with like terms and conditions and in like amount, and that such substituted note should be in lieu of the note signed by the defendants; that upon the organiza-

tion of the corporation a resolution was passed whereby the corporation accepted the obligation represented by the note, and authorized and directed its president and secretary to execute and deliver to the plaintiff a new note of the same tenor upon his surrendering and canceling the note of the defendants, "or at the option of said plaintiff that the president and secretary of the company were authorized and directed to indorse said original note of defendants in the name of the company." The corporation ever since the 2d day of May, 1917, has been ready, able, and willing to execute and deliver to plaintiff said company's note in substitution for the note of defendants, "but that plaintiff has not presented to said company or to its officers said note of defendants." Said note of said company has been duly executed by its duly authorized officers, and is ready to be substituted for defendant's note held by defendant upon defendant's surrendering and canceling the same." It is further alleged in the answer:

"That no part of said sum of \$2,000 was received by the defendants, or any of them, for their own use and benefit, and that all of said sum was expended solely for the use and benefit of the corporation aforesaid 'Pacific Public Service Corporation.' That the defendants and neither of them have received no consideration for the said note."

The plaintiff moved for a judgment on the pleadings on October 17, 1919, and the motion of plaintiff was denied by the following order:

"Motion of plaintiff for judgment on pleadings, J. P. Chandler and H. W. Wright representing plaintiff, and H. M. Willis and G. W. Bishop, representing defendant, is denied. Leave is granted to amend answer."

In pursuance of said leave on October 23, 1919, the defendants filed an amendment to their answer as follows:

"The defendants allege that they received no consideration for the promissory note mentioned and set forth in plaintiff's complaint, and that neither of them received any consideration for the said note."

At the time fixed for the trial the following order was made by the court:

"Defendant having moved the court for judgment herein on the ground that a motion for judgment on the pleadings on behalf of the plaintiff had heretofore been presented and denied, it is ordered that said motion for judgment for defendant be, and the same is hereby, granted, and that plaintiff take nothing herein."

Thereupon judgment was rendered against the plaintiff and in favor of the defendants for costs. The reason for the giving of the judgment was stated therein, and for that reason we quote its recitals:

"The defendants objected to any further trial of said cause, and moved the court to order judgment to be entered, adjudging that plaintiff take nothing by reason of said action, upon the ground that theretofore the plaintiff, having duly made and submitted a motion for judgment on the pleadings, had thereby duly submitted the said cause for final decision and determination, and, said motion having been duly denied, that said cause was thereby determined against said plaintiff, and that judgment should be entered against the plaintiff and in favor of defendants; and said objection and motion having been duly argued and submitted for consideration, and the court having fully considered the same, thereafter, on the 27th day of April, 1920, the court duly sustained said objection and allowed the said motion, and ordered that judgment be entered herein, adjudging that plaintiff take nothing by reason of said action. * * *

[1, 2] The theory upon which judgment was rendered against the plaintiff is that the plaintiff's motion for a judgment on the pleadings admitted the allegations of the answer to the effect that there was no consideration for the note, and because of this admission that the defendants were entitled to a judgment on the pleadings. Thus the motion of the plaintiff for a judgment for \$2,000, interest and costs, is converted into a motion by the defendants or by the court for a judgment against him for costs. The fallacy in this theory lies in the fact that a motion for a judgment on the pleadings admits the truth of the answer for the purposes of the motion only. Under our system of pleading the affirmative allegations of the answer are deemed denied, and all affirmative matters by way of replication are deemed to have been played by the plaintiff. Section 462, Code Civ. Proc.; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630.

Plaintiff's motion for a judgment on the pleadings being denied, his implied replication would at once be restored to its full effect. If plaintiff's motion be deemed to have the effect of a joint motion by both parties for a judgment on the pleadings, if, after the denial of plaintiff's motion, we take up the consideration of the defendants' motion, by the same process of reasoning we would have defendants admitting the truth of the allegations of the implied reply; hence their motion should also be denied, and still further, following the reasoning by which defendants secured judgment in the court below, the admission of the truth of the implied replication would entitle the plaintiff to judgment after the denial of the defendants' implied motion.

[3-5] However, litigation should not be disposed of on any such technical considerations. A litigant should not be compelled to secure the judgment of the court upon a debatable question of pleading at the expense of losing his case if the court differed in its

conclusion from the contention of the party. Courts are not instituted or maintained to enable shrewd attorneys to practice legal gymnastics, but to administer justice. The utmost liberality is allowed in amending pleadings to conform to the truth, and to allow a party to escape from the effects of ill-advised allegations of law or fact. *Crosby v. Clark*, 132 Cal. 1, 63 Pac. 1022; *Jamison v. Hyde*, 141 Cal. 109, 113, 74 Pac. 695. If it appears on plaintiff's motion for a judgment that the defendants have failed to fully or correctly state their defense, they should be allowed to amend their answer. On the other hand, if the plaintiff's motion is not well taken it should be denied, and the case set down for trial on the issues raised. In this case both of these things were done, but the court, instead of trying these issues, erroneously ordered a judgment upon the theory that the plaintiff had admitted the truth of the answer on the hearing of the motion for judgment, and thus converted the order denying the motion into an order for judgment for defendants. This was erroneous, not only for the reason above stated, but also because on the hearing of the motion the granting of leave to defendants to amend, and the acceptance of the privilege so accorded was in effect a finding by the court that the answer was insufficient as it stood, and that the motion was well taken, and an admission by the defendants of the insufficiency of their answer. The leave to defendants to amend was general, and it would hardly be contended that the plaintiff in advance admitted the truthfulness of whatever the defendants might thereafter state in the amendments. Logically, the order of the trial court should have been: "Motion granted unless the defendants amend their answer within 10 days." The denial of the motion was intended solely as a convenient method of disposing of the motion, in the light of the proposed amendment. It is stated in the brief that the purpose of allowing the amendment was to enable the defendants to correct a double negative by affirmatively denying that there was any consideration for the note. If the motion of plaintiff was predicated upon the fact that the answer, because of the inadvertence of the pleader, admitted a consideration when it was intended to deny such a consideration, it would be obviously unjust to base a judgment herein upon the theory that the plaintiff by his motion admitting that there was a consideration for the note, thereby admitted that there was no consideration for it. The fact is that the plaintiff never admitted, for any purpose or at any time, that there was no consideration for the note.

[6, 7] There is, however, a more persuasive reason for a reversal of this judgment than yet stated. Plaintiff was entitled to a judgment on the pleadings as they stood both before and after the amendment to the answer. The affirmative allegations of the an-

swer show that the plaintiff advanced \$2,000 upon the promissory note. There was full consideration for the note, and the fact that the consideration was used to promote a proposed corporation, instead of by the defendants, is of no significance. The consideration for defendants' promise was the advance of the money by plaintiff. The answer contained an allegation that there was an agreement to substitute the note of the corporation for that of the defendants. But there was no allegation that such a note was ever tendered to the plaintiff. The agreement was, in effect, one on the part of the plaintiff to accept payment either in money or by a note of the corporation. Suit was not brought until the defendants' note was due, at which time the substituted note of the corporation would also have been due. Furthermore, the contract between the plaintiff and the defendants provided as follows:

"In the event that the project outlined in this contract is not approved by the Railroad Commission there shall be no liability of first party to second party further under this contract except to see that second party is repaid the promissory note of the first parties given to second party, and that second party receives return of such funds as remain in the escrow in the Los Angeles Trust & Savings Bank."

And it is alleged in the answer "that the permit asked of the California Railroad Commission by said company was not granted," and hence the obligation of the defendants to pay the note still existed.

The respondents rely upon the decisions of the Supreme Court of Washington in *State ex rel. Murphy v. Brown*, 83 Wash. 100, 145 Pac. 69, and *State ex rel. Brown v. Superior Court*, 87 Wash. 524, 151 Pac. 1126, to sustain the procedure adopted in the trial court. It is sufficient to say that the system of pleading in the state of Washington differs from ours, for in that state the plaintiff is required to reply to the affirmative allegations of the answer, otherwise the truth of such allegations are deemed to be admitted by the plaintiff (section 277, R. & B. Annotated Codes and Statutes of Washington), and in default of such reply the defendant may move for a judgment on the pleadings (section 278, Id.). Consequently the decisions cited have no application to our system whereby the allegations of the answer are deemed to be denied by plaintiff.

The same is true as to the decisions cited by respondent from Nebraska. *Scotfield v. State National Bank*, 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412; *Boldt v. First National Bank*, 59 Neb. 283, 80 N. W. 905 (*Cobbey's Annotated Statutes of Nebraska*, §§ 1111, 1134, 1261). The text in 31 Cyc. 606, relied upon by the respondent, must be construed in the light of these authorities as applicable to those states in which the failure of plain-

tiff to file a reply to the defendants' answer operates as an admission of all new matter pleaded in the answer, and not to this state, where such matter is deemed denied and all affirmative allegations by way of defense thereto are deemed to be pleaded. This implied pleading is as much a part of the pleadings in the case as the written pleadings filed with the clerk, and therefore to be considered when any affirmative action is taken against the plaintiff.

The respondent cites *Vassault v. Kirby*, 1 Cal. Unrep. Cas. 668, as the only California case sustaining the position of the trial court. The opinion in that case was concurred in by only two of the five Justices of the Supreme Court, and hence is not authority.

Defendants have had two opportunities to present an answer, and in both instances have shown by their answer that plaintiff is entitled to a judgment. We can see no reason why judgment should not be ordered for plaintiff, with costs and attorney's fees.

Judgment reversed, with order to the trial court to enter judgment for the plaintiff for \$2,000, with interest, attorney's fees, and costs.

W concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; LENNON, J.; SHURTFLEFF, J.; LAWLOR, J.

186 Cal. 679

MOROPOULOS v. C. H. & O. B. FULLER CO. et al. (L. A. 6545.)

(Supreme Court of California. Aug. 24, 1921.)

1. Conspiracy — Must result in unlawful act or injurious act by unlawful means.

A conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or some injurious act by unlawful means.

2. Conspiracy — Allegations of conspiracy to defraud insufficient unless connected with facts showing acts unlawful or wrongful.

In an action for conspiracy to defraud, allegations that defendants entered into a conspiracy, and that various acts were done for the purpose of defrauding plaintiff, were insufficient, unless connected with a showing of facts showing that such acts were wrongful.

3. Partnership — One partner cannot assign leasehold or other operating assets.

Under Civ. Code, § 2430, specifying authority of a partner, one member of a firm cannot assign leasehold premises, or other operating assets without which the business cannot be carried on, and such attempted transfer is a fraud on the nonconsenting partner, and, as to the latter's interest, void as against a purchaser with notice.

4. Conspiracy ⚡18—Complaint held to sufficiently plead ouster of partner and conversion of firm business.

Complaint in a partner's action against third persons for conspiracy to appropriate a partnership business, alleging ouster of plaintiff by defendants, who came into possession of property used in the firm business, in pursuance of alleged conspiracy with plaintiff's partner, held to state a cause of action.

5. Action ⚡38(4) — Complaint for damages for wrongful ouster from leased premises held to state but one cause of action.

Though a complaint for damages for wrongful ouster from partnership premises, the lease of which was wrongfully assigned to defendants by plaintiff's copartner, contained allegations relating to the acquisition and foreclosure by defendants of mortgages on chattels on such premises, executed to them by such copartner, and their purchase of such chattels at foreclosure sale, which might have been stricken out as irrelevant and immaterial, though matters of inducement, but one cause of action was alleged, namely, the wrongful ouster of plaintiff from his business, thus depriving him of the lease, growing crops and further profits, where all the damages alleged pertained, not to the taking or conversion of personal property covered by the mortgages, but to the partnership rights in the use and possession of the real property, and were set out as separate items of damages arising from a single tort, for which plaintiff may recover such damages as will compensate him for all the detriment proximately caused thereby. Civ. Code, § 3333.

6. Partnership ⚡296(1)—Partner wrongfully ousted from leased premises following fraudulent assignment of lease by copartner dissolving firm may sue for restoration or for damages.

A partner wrongfully ousted from partnership premises following his copartner's wrongful assignment of the lease thereon, may sue for restoration to possession or for damages personally suffered, he, despite the dissolution of the partnership by his copartner's fraudulent act, being entitled, as the remaining member of the firm, to continue in possession and operation of the partnership business, and to retain its assets, at least for such time as would permit the business to be closed out in conformity with the copartnership agreement.

7. Partnership ⚡296(1)—Partner wrongfully dispossessed following copartner's fraudulent assignment of lease dissolving firm need not join latter as plaintiff in suit for restoration or damages.

A partner wrongfully dispossessed from the partnership premises following his copartner's fraudulent assignment of the lease thereon, dissolving firm, whether he sues for restoration to possession or for damages, need not join such copartner as a party plaintiff, the partnership having been dissolved by the latter's action in assigning his interests and attempting to wreck the business, and the rights

running to plaintiff being personal, either as an individual or as the sole remaining member.

8. Partnership ⚡296(1)—Partner dispossessed following copartner's fraudulent assignment of lease, dissolving firm, need not join latter as defendant in suit for damages.

In an action by a partner for damages for wrongful ouster from partnership premises, the lease to which was fraudulently assigned by his copartner, dissolving firm, the nonjoinder of such copartner did not constitute a failure in parties defendant, though he was a joint tort-feasor, since it is not necessary to make all the parties to a tort defendants in an action for damages.

9. Partnership ⚡296(2)—Complaint held to allege partnership right to leasehold as partnership asset.

In an action for damages for wrongful ouster of a partner from premises leased by plaintiff's copartner, the lease having been fraudulently assigned by the latter, dissolving the firm, the complaint which set out the partnership agreement as an exhibit recited possession of the leasehold by such copartner, and that the partnership was formed to "carry on the business rendered necessary by the ownership of the above properties, and to farm and crop the said lease," and also alleged that by such agreement it was intended that plaintiff and his copartner should farm the land leased and conduct a dairy business thereon, and that the agreement was to continue until termination of the lease, sufficiently alleged the copartner's right to the use of the leasehold as a partnership asset, a formal assignment of the lease to the firm not being required.

10. Conspiracy ⚡20—Partner ousted following copartner's wrongful assignment of lease can recover only damages inuring to himself individually.

In an action for conspiracy to wrongfully oust a partner from leased premises, following his copartner's wrongful assignment of the lease, plaintiff can recover only such damages as would inure to himself individually, since, if he retained the business and carried it on under the terms of the partnership agreement, he could be held to an accounting to his former partner or his assignees for their proportion of the net profits or remaining assets.

11. Pleading ⚡193(8)—Complaint not demurrable because of demand for greater damages than plaintiff entitled to.

That plaintiff prayed for exemplary damages or any other relief to which he was not entitled was not ground for demurrer.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John E. Moropoulos against the C. H. & O. B. Fuller Company and others. From a judgment of dismissal, plaintiff appeals. Reversed.

Jas. W. Bell; of Los Angeles, Geo. H. Scott, of Santa Ana, and Jas. McLachlan, of Los Angeles, for appellant.

U. T. Clotfelter and E. T. Lucey, both of Los Angeles, for respondents.

SLOANE, J. The plaintiff appeals from a judgment of dismissal by the superior court of the county of Los Angeles, after the sustaining of demurrer to his third amended complaint, without leave to amend. Appellant makes no point on the refusal of permission to amend, and stands on the sufficiency of the complaint.

The action was brought to recover damages arising from an alleged conspiracy between the defendants and one Peter Karales, not joined as a party to the suit, in which it is charged that the parties so conspiring had wrongfully and fraudulently appropriated and destroyed a partnership business theretofore existing between the plaintiff and said Karales. The facts alleged upon which the cause of action rests are pleaded substantially as follows:

That one Peter Karales was the owner of a four years' leasehold interest in a valuable tract of farming and dairy land in the county of Orange, under a lease executed to him on the 15th of December, 1916.

That on the 30th of December, 1916, the plaintiff and Karales entered into a contract of copartnership to carry on the business of dairy farming, during the term of such lease in which it was agreed that the plaintiff would put into the business certain dairy stock, and Karales would give the use of the leasehold premises.

That immediately upon the execution of said agreement of copartnership the parties thereto entered upon said leased premises and commenced the farming thereof and the operation of said dairy business, and that between the date of the partnership and May 8, 1917, the plaintiff planted about 240 acres of said lands to sugar beets, and established a dairy business thereon which yielded a monthly profit of about \$1,000, and planted 150 acres in barley and oats.

That prior to the copartnership, to wit, on the 11th day of October, 1916, Karales had purchased from the defendants in this action certain horses and mules, and about 78 head of cows, for \$6,500, and had secured the payment therefor by chattel mortgages on personal property on said leased premises, the use of which property was included in the partnership agreement subsequently entered into.

That thereafter on or about the 31st of March, 1917, as alleged in the language of the complaint—

"Said defendants conspired with said Karales to defraud the plaintiff out of the premises and business hereinbefore described, and in pursuance thereof said Peter Karales assigned the

said lands to one Steve Karales, and caused the same, together with said assignment, to be recorded at said date in the office of the recorder of Orange county in said state, and thereafter, and on April 7, 1917, pursuant to said conspiracy to defraud the plaintiff, the said Peter Karales and Steve Karales assigned said lease to the defendant, C. H. & O. B. Fuller Company, as additional security for the payment of the sum of money hereinbefore referred to as secured by chattel mortgages, and the further sum of \$1,000 alleged to be due the said Steve Karales from Peter Karales, which the defendants agreed to pay; and that immediately thereafter, and in further pursuance of said conspiracy, the defendants began foreclosure proceedings under said chattel mortgages in the superior court of the county of Orange in said state against plaintiff and said Peter Karales, alleging default in payment of three months' interest."

That judgment was entered in said action of foreclosure on May 1, 1917, for the sum of \$6,855.80.

That thereupon plaintiff procured from one R. E. Ibbetson sufficient money as a loan to satisfy said judgment of \$6,855.80 and to pay said \$1,000 owing to Steve Karales, and that in consideration of the payment of said amounts defendants "assigned and transferred said judgment and said lease to the said Ibbetson for the use and benefit of the plaintiff."

That thereafter, on May 8, 1917, a sale of said chattels under said judgment of foreclosure was made by the sheriff of said Orange county at which Ibbetson bid the amount of said judgment for the purpose of obtaining clear title thereto as security for his loan to plaintiff. That the defendants, who were also present at said sale, bid a sum in excess of that offered by Ibbetson, and, their bid not being raised, "the said chattels were thereupon sold by said sheriff to the said defendants." The complaint further alleges in this connection "that the bid of said defendants was in pursuance of said conspiracy with the said Peter Karales to defraud the plaintiff, and in furtherance of said scheme," and that plaintiff was unaware of said conspiracy, and had therefore arranged with said Ibbetson for only sufficient money to pay off the liens on the property sold.

That Peter Karales and Steve Karales immediately following said sale, pursuant to said scheme to defraud plaintiff, made another assignment and transfer of said lease to an agent of defendants, and it was thereafter assigned to the defendant, Pioneer Ranch Company.

That thereafter the defendants took possession of the leased premises, ousted and ejected plaintiff from the possession, installed Peter Karales as their employee and manager, and proceeded to operate the business of the ranch to the plaintiff's damage in various sums aggregating \$34,500 from loss of use and occupation of the premises, beet crop,

hay, and oats, and plaintiff demanded judgment for that amount, together with \$10,000 punitive damages and costs.

If plaintiff has stated facts under which he may maintain this action, the gist of such cause of action is contained in the last above paragraph. The preceding part of the narrative fails to set up any wrongful acts of the defendants. The plaintiff, by the foregoing averments, attempts to allege a conspiracy between his former copartner and the defendants to defraud him of his interest in the copartnership business.

[1,2] Conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or of some injurious act by unlawful means. *Bouvier's Law Dictionary*; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807; *Herron v. Hughes*, 25 Cal. 555. We have in this complaint only the bare allegation that the defendants entered into a conspiracy to defraud the plaintiff, and that the various acts narrated were done for the purpose of defrauding the plaintiff. This is not a sufficient averment of fraud unless connected with a showing of facts which, if true, would support the charge that they were wrongful. There is no showing of any unlawful or wrongful act of the defendants in the alleged transaction down to and including their purchase of the chattels at the foreclosure sale.

[3,4] It may be conceded that Peter Karales, as a member of the partnership, had no right or authority to assign the leasehold of these premises or other operating assets of the firm, the use of which had been turned over to the partnership, and without which the business of the partnership could not be carried on (Civ. Code, § 2430), and that his assignment of the lease without the consent of the plaintiff was as to him a fraudulent act. But it is not alleged and does not appear that the defendants, at the time they took their chattel mortgage from Peter Karales, before the copartnership was formed, or when they received as further security for Karales' indebtedness the assignment of this lease shortly after the partnership began, had any knowledge that the plaintiff, or any one other than Karales, had any interest in this property. For all that appears, they were innocent incumbrancers in good faith for value. There is every presumption that this is true so far as the chattel mortgage is concerned. And, as to the lease, the legal title stood in Karales' name. It was not until the 21st day of April, 1917, two weeks after the lease was first assigned to the defendants as additional security, that plaintiff claims to have notified them of his copartnership agreement with Karales and his interest in the lease. So far as the foreclosure suit and judgment are concerned, the defendants, under the facts pleaded, seem to have been entirely within their rights. The plaintiff ap-

parently recognized this by borrowing the money and paying off their liens, and taking an assignment for his own benefit of the judgment and lease in the name of Ibbetson, from whom he borrowed the money. This transaction cleared the slate as to past events. The defendants had released all their claims against the partnership property, and plaintiff, through Ibbetson, held the assignments of the judgment and lease as security for the money he had been compelled to advance for his copartner's debts.

The next event in this pastoral drama was inaugurated by the plaintiff. He and his trustee Ibbetson proceeded to turn the tables on Karales by advertising a sheriff's sale under the assigned judgment at which Ibbetson was to buy in the mortgaged chattels for plaintiff, holding title in himself until the money he had advanced was repaid. Ibbetson, however, only bid the amount of the judgment, and the defendants, who appeared at the sale, raised the bid and bought in the property. This they had a perfect right to do, for aught that is shown by the pleadings. Whether or not it was done in connivance with Peter Karales is immaterial, so long as it was not a wrongful act. Up to this point no fraud or wrong is shown.

The defendants under this sale had acquired a valid title to the chattels, and become entitled to their possession. They had no right, however, to possession of the land or the partnership business. The leasehold interest which they held as security had been satisfied and assigned to the plaintiff's trustee, and the right to the use and occupancy of the land was still a partnership asset in the rightful possession of plaintiff. Defendants took no new interest as against the plaintiff under the second assignment by Peter Karales and Steve Karales, and their original assignments of this leasehold had already been turned over by them to Ibbetson, and, moreover, the defendants at this time had notice that the plaintiff was in possession under a partnership agreement with Karales which transferred the use and possession of the premises to the copartnership. Such a transfer was void against a purchaser with notice, as to the interests of a non-consenting partner. *Myers v. Moulton*, 71 Cal. 498, 12 Pac. 505.

The allegation, therefore, of the subsequent ouster of plaintiff by the defendants, and the averment that it was done wrongfully, and in pursuance of the alleged conspiracy with Karales, and that in pursuance of such wrongful and unlawful purpose they took possession of the dairy ranch, put Karales in charge, converted to their own use the growing crops, and deprived the plaintiff of any further use of the premises under this leasehold, furnishes the basis for a cause of action, and the only cause of action stated in the complaint.

[5] The pleader has adopted the narrative form of complaint permitted by section 426 of the Code of Civil Procedure, without, however, putting it in concise language, and with the addition of much surplusage. The allegations relating to the chattel mortgages might have been stricken out as irrelevant and immaterial, though perhaps some of them have their place in the complaint as matters of inducement, leading up to the unlawful entry and ouster. They were evidently not pleaded as an independent cause of action, since no damages are claimed or alleged for any taking or conversion of the personal property covered by the mortgages.

The damages alleged all pertain to the invasion of the partnership rights in the use and possession of the real property, and are set out as separate items of damage arising from a single tort. There is but one cause of action alleged; namely, the wrongful ousting of plaintiff from his business, thus depriving him of the lease, the growing crops, and future profits to his damage in the sum of \$25,000 for the use and occupation of the premises, \$5,000 for the value of his beet crop, \$4,500, the value of the hay and grain crop, and \$10,000 demanded as exemplary damages.

In such an action the plaintiff may recover as damages in an amount "which will compensate for all the detriment proximately caused" by the act complained of. Civ. Code, § 3333. In *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291, in which case the plaintiffs had been compelled by the wrongful acts of defendants to abandon their barber business in leased premises, this court sustained damages on the single cause of action, for loss of profits and established trade, loss of lease, loss of improvements on the leased premises, loss of a hot water privilege from adjacent premises, and expenses incident to removal to other quarters.

This action is to be distinguished from *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011, cited by respondents. There, there was an attempt to join causes of action arising from distinct tortious acts for injuries to property, to the person, and to the character of plaintiffs. This was in direct conflict with section 427, Code of Civil Procedure, as it then read. Here, the injuries complained of are all damages to property, and arise out of one primary wrong, the unlawful taking of the partnership assets by defendants.

[6] The plaintiff here might have brought his action after the ouster for restoration to the possession of the leasehold and the dairy business. Notwithstanding the partnership was dissolved by the fraudulent acts of the other partner, alleged in the complaint, plaintiff, as the remaining member of the firm, was entitled to continue in the possession and operation of the partnership business,

and to retain its assets, at least for such time as would permit the business to be closed out in conformity with the agreement of copartnership.

One member of a copartnership, by wrongfully violating the terms of his agreement and withdrawing from the copartnership, cannot defeat the right of the remaining members to continue in control of the property and the business. *Mervyn Invest. Co. v. Biber*, 194 Pac. 1037; *Miller v. Brigham*, 50 Cal. 615; *Page v. Summers*, 70 Cal. 121, 12 Pac. 120; *Crossen v. Murphy*, 31 Or. 124, 49 Pac. 858; Civ. Code, § 2458.

But plaintiff also had the right to submit to this wrongful appropriation and conversion of the partnership business and assets by the defendants and his partner Karales, and to bring his action for the damages personally suffered.

[7] In neither form of action would it be necessary to join Karales as a party plaintiff. The partnership was dissolved by the action of Karales in assigning his interests to the defendants and attempting to wreck the business. The rights running to plaintiff were personal, either in his individual capacity, or as the sole remaining member of the copartnership. *Parsons on Partnership* (2d Ed.) 338, 339; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522.

[8] Neither was there a failure in parties defendant by the nonjoinder of Karales. While he was a joint tort-feasor with the defendants, it is not necessary to make all the parties to the tort defendants in an action for damages. *Cooley on Torts*, §§ 124-126; *Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750.

[9] We think the complaint sufficiently alleged the right of the copartnership to the use of the leasehold as a partnership asset. The partnership agreement is set out as an exhibit, and recites the possession of this leasehold by Karales, and that the partnership is formed to "carry on the business rendered necessary by the ownership of the above properties and to farm and crop the said lease," and there is also alleged in the complaint that by said agreement it was intended that plaintiff and said Karales should farm the land in said lease and conduct thereon a dairy business, and that said agreement of copartnership should continue until the termination of said lease. A formal assignment of the lease to the copartnership was not required. Where one holding a lease of premises enters into a partnership with another, agreeing to the use and possession of the leased property in the business, a valid interest in the lease is thereby vested in the partnership. *Lamb v. Hall*, 147 Cal. 44, 81 Pac. 288; *Stitt v. Rat Portage Lumber Co.*, 98 Minn. 52, 107 N. W. 824.

[10] In the form of action elected by plaintiff he can only recover for such damages as would inure to himself individually. Had he

retained the business and carried it on under the terms of the partnership agreement he would be held to an accounting to his former partner or his assignees for their proportion of the net profits of the business and its remaining assets.

[11] In the allegation of damages the complaint is, perhaps, open to demurrer for uncertainty in this respect, but this does not happen to be one of the specifications of uncertainty set forth in defendants' demurrer. In any event, the defendants cannot be prejudiced by allegations in the complaint of greater damages than plaintiff may be entitled to recover.

The prayer for damages itself is not a part of the complaint, subject to demurrer, and the fact that plaintiff has prayed for exemplary damages, or any other relief to which he may not be entitled does not affect the sufficiency of his complaint.

We think this review of the complaint covers all the grounds of demurrer coming within the Code provisions, and requiring consideration. The complaint is inartificially drawn, and, as we have said, contains much redundant and irrelevant matter, and ambiguity and uncertainty, but the one objectionable feature was not reached by motion to strike, or the other by applicable specifications of insufficiency.

We are of the opinion that facts relating to the ouster of plaintiff and the wrongful invasion and conversion of the partnership premises and business are sufficiently pleaded, and that the facts are stated which support the averments of conspiracy between Karales and the defendants to wrongfully deprive plaintiff of his interest in the leasehold and other remaining partnership assets and business.

The judgment is reversed.

We concur: SHAW, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

186 Cal. 710

SAN BERNARDINO COUNTY SAV. BANK
v. DENMAN et al. (L. A. 6617.)

(Supreme Court of California. Aug. 24, 1921.)

1. Corporations ⚡230 — Stockholders' payment of subscription binding on creditors of corporation, though made without call.

While the agreement to purchase stock, in absence of any special agreement for a different price or time of payment, is an agreement to pay par value on call, the obligation of each stockholder to pay the balance of an unpaid subscription is a simple contract obligation to pay such amount at a time not specified, in consideration of the shares issued, so that, in absence of fraud, such a payment at any time by a stockholder to an agent of the corpora-

tion authorized to receive it is a discharge of such liability, and is binding on its creditors, though it could not have enforced such liability against one stockholder without demanding a proportional payment by all of them by means of a call; the latter rule being for the benefit of the stockholder, who may waive it at any time and pay in full or in part for his stock, provided the corporation is willing to accept.

2. Corporations ⚡230 — "Creditors' bill" to apply stock subscriptions on debt will not lie against stockholder, whose obligation was paid without call before proceedings attached.

Suit of a creditor of a corporation to have stock subscriptions applied on his debt, being merely a resort to the equitable remedy of a creditors' bill to reach assets of the debtor which cannot be got in an action at law, will not lie against one under no obligation to the corporate debtor, so that, if a stock subscription has been lawfully paid and accepted before the proceeding on the bill attached to it, the bill must fail, since equity, while it has gone so far as to hold that the creditor may compel payment without a previous call by the corporation, which cannot enforce payment, except by a call, cannot refuse to credit payments made in good faith without a call, in the absence of proof of insolvency when they were made, or prior to the suit, though payment was to a creditor on the corporate debt, or to some one other than a proper officer of the corporation, to be applied on the unpaid balance; the corporation and the stockholder, in the absence of fraud, being at liberty to effect payment in any mode they see fit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditors' Bill.]

3. Corporations ⚡230 — Stockholders' payments of running expenses on demand of manager advancing same held discharge pro tanto of liability for balance of par value of stock.

Where one of several incorporators of a theater company, to whom the entire management of its affairs was left after the theater building was completed with borrowed money, attended to all the business of the corporation by common consent of all the stockholders, and, when additional money was required, advanced the amount necessary and apportioned it to the stockholders according to their holdings, they paying their respective sums on his demand, with the understanding that such payments constituted a credit on the balance due on their subscription liabilities, such payments operated as a discharge pro tanto of the stockholders' obligation to pay the balance of the par value of their stock, binding on the corporation and the court in an action to collect and apply the unpaid subscription on the claims of a creditor of the corporation.

In Bank.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Suit by the San Bernardino County Savings Bank against A. C. Denman, Jr., and another. Judgment for plaintiff, and defendants appeal. Reversed.

H. C. Beach, Janeway & Beach, and Edgar G. Pratt, all of Los Angeles, for appellants.
W. J. Curtis and McNabb & Hodge, all of San Bernardino, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff. The complaint states a cause of action in favor of the plaintiff as a creditor of a certain corporation known as the San Bernardino Theater Company to recover of the defendants certain sums alleged to be due and unpaid upon their subscriptions to the capital stock of said Theater Company, and to have said sums applied in satisfaction of the debt owing by said Theater Company to the plaintiff. The answer denied the liability, and denied that any money was due or unpaid upon the stock subscriptions of the defendants.

The court found that the stock was of the par value of \$100 per share; that the defendant Denman was the owner of 136 shares thereof; that Fisher owned 34 shares; that only \$38.03 had been paid on each share, and that the remainder, \$61.97 per share, was due and owing from each of them upon the number of shares owned by them respectively. Judgment was rendered in favor of the plaintiff against each defendant for the amount due from him on said stock, but not to exceed from either or both the amount of \$7,854.97 and interest, found to be due from said Theater Company to the plaintiff.

Evidence was given tending to show that, in addition to the sum of \$38.03 paid on each share, as found by the court, the said defendants had paid for the benefit of the company other sums, which, by an agreement among the stockholders, were to be considered as paid upon the stock subscriptions of the said defendants. These additional sums were not allowed by the court as a credit upon the said stock subscriptions. The principal point argued in the briefs is the question whether or not these several payments, or any of them, should have been credited as payment upon the stock subscriptions.

The Theater Company was incorporated on January 17, 1903, with a capital stock of \$75,000, divided into 750 shares, at \$100 a share. Seven persons subscribed for stock and became members of the corporation, taking one share of stock each and paying full value therefor, and they were all elected directors, and Denman was elected president. About the same time they each contributed money, amounting to some \$8,575, for the purpose of buying a lot in San Bernardino as a site for a theater building which the company was organized to construct and carry on. With this fund a lot was purchased by the defendant Denman, which was by him conveyed to the corporation. At the time of said conveyance all of the remaining 743 shares of stock were issued to him. The

plan was to raise the money necessary to erect the proposed building by sales of the corporate stock. In pursuance of this plan he transferred to each of the other six incorporators 34 shares of the stock, keeping 34 shares himself, and returned to the corporation 505 shares. In effect, the transaction amounted to an issue to each stockholder of 34 shares in consideration of his contribution to the purchase money of said lot. As the lot was found to be of the value of only \$8,575 at that time, the transaction amounted to a payment of \$36.03 per share upon each share of stock so issued to the respective incorporators. It was found impossible to sell other shares of the stock. Thereupon it was determined to borrow \$15,000 and erect a theater building on the lot with the money. Accordingly the plaintiff loaned to the company \$15,000, taking its note for that amount and a deed of trust in the nature of a mortgage upon the property to secure the same. With this money the building was erected. Something like a year was occupied in these transactions. The stockholders all understood that the 34 shares so issued to them, respectively, were not fully paid up, and that the balance was to be paid in afterwards, if necessary, for the carrying on of the enterprise.

At or about the time the deed of trust was made, the defendant Denman acquired the shares of three others of the original incorporators, and thereby became the owner of 136 shares of the stock issued as partly paid. In October, 1904, a call for \$2 per share on the stock was entered in the minute book of the company and was voluntarily paid, thus making up the \$38.03 which the court found had been paid on the stock. The enterprise did not prove successful, and contributions became necessary from time to time for the purpose of paying interest to the plaintiff and for other expenses.

The corporation business was transacted in a very informal manner. Meetings of the directors were held occasionally up to September 20, 1906, after which date there were none. A minute book was kept, in which was entered the proceedings at these meetings. The company had no office and kept no regular books of account, nor any other books, except a book of stock certificates, showing the issuance and transfers thereof. The business of the corporation was managed entirely by the defendant Denman as president by the original election and as general manager by common consent. When it was necessary to have more money to keep up the expenses, he would first advance the same, and then collect from the other stockholders their proportion thereof according to their respective holdings of stock. There was evidence to the effect that it was understood between all of them that the payments so made to Denman were to be

considered as a credit upon the unpaid balance owing upon their stock subscriptions. Denman kept an account of these payments in a small book which he carried in his pocket. The book was lost before this action was begun and could not be produced at the trial. This book and the book of checks containing stubs appear to have constituted the only records made by Denman or any one else on behalf of the corporation showing the money transactions of the Theater Company. The only other account thereof, and it was not complete, was the bank account kept by the San Bernardino National Bank showing the deposits and checks made by the Theater Company.

The payments for which credits on the stock subscriptions are now claimed were, for the most part, made during the years from 1904 to 1912, inclusive. It appears that none of the stockholders at that time expected any suit by plaintiff to reach the liability on stock subscriptions, and that they did not carefully preserve their individual accounts regarding the payments. There is positive evidence that substantial sums were paid by the defendants, and that such payments were intended to apply on the subscriptions. The evidence as to the amounts so paid is not in all instances definite and clear. The court might have found a sum less than the defendants claimed. But there is no suggestion or claim that there was any bad faith, and the evidence on the subject of the payments is not contradicted. The parties concerned were all men of means; they had been friends for many years, and the enterprise was conceived and carried out for the purpose of advancing their common interests as citizens and property owners of the city of San Bernardino, as well as the interests of the general public of that city.

From the conduct of the case and the briefs of counsel it is clear that the court below, in refusing to allow credit for payments in excess of the \$38.03 on the stock subscriptions, did not go upon the theory that the evidence was too indefinite as to the amount, or was insufficient to show any payment on account of the stock, but that it refused to allow further credit for payments on the theory that the stockholders were not entitled to such credit for payments, unless they were made in pursuance of a formal call by the directors, or upon the theory that the payments were invalid as credits on the subscriptions, because they were not made to the corporation directly, but to Denman, who, it is claimed, was without valid authority to receive them for that purpose, or because they were paid to him to reimburse him for money he had already paid on the corporate debts, which was true in many instances. The evidence as to some of the payments that they were made for

the benefit of the corporation, and that all the stockholders believed, agreed, and understood that they were to be applied on the subscriptions, was uncontradicted, and unless one or the other of the last-mentioned theories is sound, the court should have allowed credit for them on the stock subscriptions.

[1] We think the court below erred if it adopted either of the supposed theories as applicable to the facts of this case. The agreement of a stockholder with the corporation to purchase its stock, in the absence of any special agreement for a different price, or a different time of payment is an agreement that he will pay the par value of the stock on call. In this case that was the agreement finally made with respect to the unpaid balance. Seven of the shares were fully paid up, and the court so found. The other shares were understood to be paid, and were in fact and in law paid up, only to the cost of the lot purchased by the corporation with the money advanced in its behalf by the stockholders prior to the purchase. This the court found to be \$36.03 per share. The obligation of each stockholder to pay the balance was, in legal effect, a simple contract obligation to pay that amount at a time not specified, in consideration of the shares issued. Payment could lawfully have been offered at any time thereafter, and if accepted by the corporation it would apply on the subscription price, and would be good against creditors seeking to reach the subscription liability.

There is nothing contrary to the policy of the law in this proposition. It is true that the corporation could not have enforced this liability against one stockholder without demanding a proportional payment by all of them by means of a call. But this is a rule for the benefit of the stockholder, and he is at liberty to waive it at any time and pay in full or in part for his stock, provided the corporation is willing to accept it. The creditors of a corporation do not stand in a position to complain of such payment, since it will inure to their benefit as much as to that of the corporation itself. The rule is the same as in the case of any other obligation to pay money on similar conditions. The rule that a call may be waived and that payment may be made at any time is a settled principle of law of corporations, although the question does not often arise for the reason that such advance payments are infrequent. In *Marsh v. Burroughs*, 1 Wood (U. S. C. C.) 468,¹ decided in 1871, a case involving payment of subscription liability for stock of a bank, the court, referring to this subject, said that when a stockholder subscribes for stock the par value of which is not paid at the time—

"it is the right of the stockholder to pay it. The mode of calling it in, prescribed by the charter (in this state, by the statute), is a

¹ Fed. Cas. No. 9,112

mere form of remedy, given to the bank to enforce the subscription, usually followed by forfeiture for nonpayment if the bank so choose. But the stockholder is not obliged to wait until a call is made upon him. He may pay in at any time."

This doctrine has ever since been regarded as settled, and the case is cited by all the text-writers who have touched on the question. 1 Cook on Cor. § 106; 4 Thomp. on Cor. (2d Ed.) § 3687. To the same effect see *In re Wyncham, etc., Co.*, L. R. 9 Ch. Div. 328. The necessary consequence is that, in the absence of fraud, a payment by a stockholder, to an agent of the corporation who is authorized to receive it, of a part or all of the sum owing by him on his stock subscription, is a discharge of that liability, and is binding on creditors.

[2] Another consideration leads to the same conclusion. The suit of a creditor to have the stock subscriptions applied on his debt is merely one instance of a resort to the equitable remedy of a creditor's bill; a proceeding in equity to reach assets of the debtor which cannot be got in an ordinary action at law. The creditor is seeking for assets of the debtor; that is, money or credits due to the debtor. He cannot reach anything that does not constitute assets of such debtor. His standing in the court must always be in the shoes of the debtor, and he can obtain no greater relief than his debtor could obtain, at least to this extent: That he cannot force payment from one who is not the debtor of his debtor. A valid obligation must exist in favor of the debtor against the party sued, or the creditor's bill will not lie against him. Hence, if the obligation once existed, but has lawfully been paid before the proceeding on the creditor's bill attached to it, the bill must fail. Equity has gone so far, when stock subscriptions are sought by a creditor of a corporation, as to hold that the creditor may compel payment through the court without a previous call by the corporation, although the corporation cannot enforce payment except by a call in some states and under ordinary conditions; but it has gone no farther, and it cannot disregard or refuse to credit payments made in good faith by the stockholder without a call.

It has been held that a payment by a stockholder of a debt owing by the corporation, which is insolvent, with the intent thereby of discharging his liability on his unpaid subscription, and which the accredited officers of the corporation did not authorize or accept, is not good in defense to a creditors' bill against the stockholder. But in this case there was no proof of insolvency at the time the greater part of the payments in question were made, nor any finding of insolvency prior to the beginning of the ac-

tion, and that principle does not apply as to them.

It is claimed, on the authority of *Welch v. Sargent*, 127 Cal. 72,² that no payment can be credited where the payment is made to a creditor upon the corporate debt, or in any case where it is not made to the proper officer of the corporation to be applied on the balance unpaid on the stock. In *Welch v. Sargent* the payment was made to a creditor in discharge of his claim against the corporation and the corporation did not agree that it should constitute a payment on the stock subscription, nor accept or credit it as such. The only person who had the intent that it should so apply was the stockholder himself. In discussing the effect of such payment on the stockholder's liability the court remarked that the stockholder's liability is an asset of the corporation which "is payable to the corporation and no one else." It is upon this remark that the respondent relies. It cannot be given the effect here claimed for it and the context shows that it was not so intended. In the absence of fraud, actual or constructive, the corporation and the stockholder are at liberty to effect a payment in any mode they see fit, either in property, or in payment of a corporate debt, or in actual cash or its equivalent. There is nothing in the opinion in that case that is contrary to these principles of the law of contracts.

[3] Coming now to the facts shown in the evidence bearing on the proposition, we find that no formal call was made in the ordinary manner. But it is clear that there was that which in substance amounted to a call. Denman was the leader of the seven persons who formed the corporation, and after its formation the entire management of its affairs was left to him. After the theater building was completed with the borrowed money, he attended to all of its business. There was no office, no treasurer, and no ordinary books of account. By common consent of all the stockholders he was authorized to perform the functions of all the officers and he did perform them without objection from any of them. He kept account of the debts and expenses accruing in excess of the receipts; he collected the rents and applied them on the interest accruing to the plaintiff and other expenses; and when additional money was required he ascertained the amount necessary and apportioned it to the stockholders according to their holdings, informed them of the amount due from them, and they paid it on his demand, with the understanding that it constituted a credit on the balance due on the subscription liability. The corporation was then a going concern, and this method of carrying on its business was satisfactory to all the persons interested. We can perceive no reason why, under all these circumstances, the payments so

made did not operate as a discharge, pro tanto, of the obligation of the stockholders to pay the balance of the par value of the stock, binding on the corporation, and likewise binding upon the court in the trial of an action to collect and apply the unpaid subscriptions upon the claims of such a creditor.

The judgment is reversed.

We concur: SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

186 Cal. 673

BUCKMASTER v. BERTRAM. (L. A. 6538.)

(Supreme Court of California. Aug. 23, 1921.)

1. Specific performance ⇨30—Contract for sale of land too uncertain as to payment of price.

Contract whereby plaintiff agreed to sell and convey to defendant, and defendant agreed to buy, five parcels of land in a certain tract in a county for \$1,000, payable "at the times and in the manner hereinafter mentioned, * * * to wit, in the form of a mortgage payable to S. and due April 3, 1919," held too uncertain as to payment of the price to be enforceable.

2. Specific performance ⇨115—Cross-complaint, failing to allege buyer willing to pay price, insufficient.

In suit to cancel a contract for the sale of land, defendant buyer cross-complaining for specific performance, the cross-complaint, which does not show that defendant buyer ever paid or offered to pay the purchase price, or is willing to pay the same if performance be decreed in her favor, is insufficient; while positive repudiation of a contract of sale by the vendor excuses the vendee from formal tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity for stating in his complaint that he is ready, willing, and able to pay the amount due from him, a requisite not complied with by an offer to pay the amount due after deducting the damages to the vendee from the refusal of the vendor to perform.

3. Vendor and purchaser ⇨342—Remedies of vendee, where vendor refuses to perform, inconsistent.

Where the vendor of land refuses to perform, the vendee has two remedies, to sue for specific performance or for damages suffered, which remedies are inconsistent, and, if one is chosen by the vendee, the other is deemed to be abandoned, wherever a change of remedy would occasion any injury to parties adversely interested in the matter, as subsequent purchasers of lots from the vendor.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by J. A. Buckmaster against Elsie May Bertram. From a judgment for plaintiff, and from an order denying her motion to vacate the judgment and enter a different judgment on the findings, defendant appeals. Judgment and order affirmed.

Eden & Koepsel, of Santa Ana, for appellant.

Lee Utley, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment, and from an order denying her motion to vacate said judgment and enter a different judgment on the findings.

The complaint alleges that on October 3, 1916, the plaintiff and defendant executed a contract in writing whereby plaintiff agreed to sell and convey to the defendant and the defendant agreed to buy five parcels of land in the Newmark tract in Orange county—

"for the sum of one thousand and no/100 dollars, of the United States, and the said party of the second part [Bertram], in consideration of the premises, agrees to pay at the times and in the manner hereinafter mentioned, to the said party of the first part [Buckmaster] the sum of one thousand and no/100 dollars, as follows, to wit: In the form of a mortgage payable to S. M. Skillman, and due April 3, 1919, or 2 years and 6 months from date of the contract, with 7 per cent. interest per annum, payable semiannually."

The contract provided that upon her failure to comply with the terms of the contract the plaintiff should be released from all obligation in law or equity to convey the property, and the defendant should forfeit all right thereto. The deed was to be made "on receiving such payments at the time and in the manner above mentioned." The prayer of the complaint was that the contract be canceled, that the defendant's title, interest, and estate to the property be "adjusted" as subordinate to the plaintiff's title, and that the defendant "be forever disbarred" from asserting any claim or title to the property.

The defendant filed a cross-complaint, which was afterwards superseded by a second amended cross-complaint. The second amended cross-complaint asked that the court state an account between the parties and give the defendant a reasonable time to redeem the same, and for judgment against the plaintiff for any balance found due on the accounting, and for specific performance of the contract on payment by the defendant of the amount found due from her, or, if it is found impossible for the plaintiff to perform his agreement, then for damages against plaintiff in the sum of \$2,000. The cross-complaint alleged the contract set up in the complaint, that on April 9, 1918, plaintiff gave notice to the defendant that he had decided to cancel the contract, and that the plaintiff has ever since refused to perform said agree-

ment, and that plaintiff had informed defendant that he had disposed of one of said lots. It is alleged that the property had greatly increased in value, and was at the time of the filing of the cross-complaint worth \$4,000.

The findings state that the agreement alleged in the complaint was executed by the parties; that plaintiff had given notice to defendant that he had sold some of the lots and had concluded to cancel the agreement; that defendant had not paid anything upon said contract; that on April 1, 1919, the lots were of the value of \$2,500; that defendant was not entitled to specific performance, because of the fact that her first cross-complaint did not claim the right of specific performance, and that after the filing thereof the plaintiff had sold parts of the property to bona fide purchasers, because of defendant's failure to claim the right of specific performance in her first cross-complaint; and that by so doing she had waived that right and was confined to her claim for damages for the refusal of the plaintiff to perform the contract. The findings declare that the defendant is damaged in the sum of \$900 by the refusal of the plaintiff to perform. Judgment was given, declaring that the defendant was estopped from seeking specific performance of the contract and that she recover of plaintiff the sum of \$900 as damages; that upon payment thereof by plaintiff all adverse claims of the defendant be declared invalid and groundless, and the plaintiff and his grantees be declared to be the owners of said property, and have their titles quieted as against all claims of the defendant.

[1] On its face the agreement is too uncertain to be enforceable by way of specific performance.

"It is elementary that specific performance will not be enforced unless the contract not only contains all the material terms, but also expresses each in a sufficiently definite manner. In *Pomeroy on Contracts*, § 159, it is said: 'An uncertain contract * * * may perhaps embrace, in a partial manner, all the material terms, but on account of the inexact, indefinite, or obscure language in which one or more of them is stated, it fails to express the intent of the parties with sufficient clearness to enable a court of equity to enforce its provisions. The specific performance of an agreement, thus uncertain, will not be decreed.' As said in 26 *American & English Encyclopedia of Law* (2d Ed.) p. 33: 'The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know what the parties agreed. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof.'" *Reymond v. Labouigue*, 148 Cal. 694, 84 Pac. 190.

The terms of the contract as to the payment of the price are so indefinite and un-

certain that its meaning cannot be ascertained. The price is definitely stated to be \$1,000, but the agreement of the defendant to pay such price is qualified and limited by the statement that it is to be paid "at the times and in the manner hereinafter mentioned," which time and manner are declared to be as follows, to wit:

"In the form of a mortgage, payable to S. M. Skillman, and due April 3, 1919, * * * at 7 per cent. interest per annum, payable semi-annually."

Does this mean that the defendant is to cause a mortgage, payable to Skillman, to be transferred or assigned to the plaintiff, who is to accept it as payment of the \$1,000, and immediately execute to her a deed, which, as appears later in the contract, is to be made "on receiving such payments, at the time and in the manner above mentioned"? Or is the defendant herself to execute a mortgage payable to Skillman for \$1,000, or some other sum, which is in some unexplained manner to inure to the benefit of the plaintiff, and to operate as payment of the price? If our first guess is correct, what is the amount of the Skillman mortgage? If either guess is correct, what land or personal property is covered or to be covered by the proposed mortgage? If the Skillman mortgage was in existence at the time, who was the mortgagor? And if it was for more than \$1,000, was its full payment necessary to constitute the payment of "said price," or would a payment of \$1,000 thereon suffice to accomplish that purpose, and when was such payment due? The execution of the mortgage to Skillman by some person other than the defendant and on other property than that described in the agreement of sale would come within the terms of the agreement as to the payment of the price. Was such performance within the intent of the parties?

The agreement answers none of these questions. Nor is any answer shown by the pleadings or findings. Possibly extrinsic facts might be proven which would render the contract sufficiently certain to enable a court of equity to decree its specific performance. But there are no allegations, either in the complaint or in the cross-complaint, nor any statements in the findings, relating to any such extrinsic facts, or indicating what they may be, and no solution of the meaning of the contract in the respects indicated is possible from anything contained in the judgment roll. On the face of the record, therefore, the defendant is not entitled to a specific performance.

[2] The cross-complaint is insufficient for another reason. It does not show that the defendant ever paid or offered to pay the purchase price, or that she is willing to pay the same if specific performance should be decreed in her favor. She alleges that she has been damaged in the sum of \$4,000 by the al-

leged repudiation of the contract by the plaintiff and certain other alleged breaches thereof, and that she is ready, able, and willing to perform the contract on her part "upon statement of an account by the court of the amount, if any," which she ought to pay to the plaintiff, and she prays for an accounting, and that a reasonable time be given her in which to pay any balance "found due on such accounting." The only accounting shown to be necessary is the ascertainment of the difference between the purchase price and the damages alleged. While the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal tender of the price as a condition precedent to an action for specific performance, it does not obviate the necessity of stating in his complaint in such action that he is ready, able, and willing to pay the amount due from him. This requisite is not complied with by an offer to pay the amount due after deducting the damages to the vendee from the refusal of the vendor to perform, from the amount of the purchase price unpaid. The vendee cannot seek damages for the refusal and specific performance in a single cause of action.

[3] Furthermore, the findings show that the first cross-complaint of the defendant sought damages from the plaintiff by reason of his repudiation of the contract and did not ask specific performance, and that during the interval between the filing of the first cross-complaint and the filing of the second amended cross-complaint, seeking specific performance, the plaintiff, relying upon defendant's election of remedy, had made sales of some of the lots, which the purchasers had bought, also relying upon such election. Where the vendor refuses to perform, the vendee has two remedies; that is, either to sue for specific performance or to sue for damages suffered from the refusal. These remedies are inconsistent and the vendee cannot have both, and if one is chosen the other is deemed to be abandoned, wherever the change of remedy would occasion any injury to parties adversely interested in the matter. *McGibbon v. Schmidt*, 172 Cal. 75, 155 Pac. 460. The findings show that both the plaintiff and his subsequent vendees would be injured by allowing the defendant to maintain the action for specific performance set up in her last amended cross-complaint. It was for this reason that the court below allowed her damages and refused specific performance. Under the circumstances she has obtained all that she is entitled to, and perhaps more.

The notice of appeal purports to state that the defendant appeals from the order denying her motion to vacate the judgment and render a different judgment on the findings. The record does not show that she ever gave notice of any such motion, nor does anything

appear from which we can determine the form of judgment which she desired to have entered upon the findings. No error in this respect is made to appear.

The judgment and order are affirmed.

We concur: SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

186 Cal. 746

STATE v. ANGLO & LONDON PARIS NAT. BANK OF SAN FRANCISCO et al.
(Sac. 3047, 3215, 3217.)

(Supreme Court of California. Aug. 29, 1921.
Rehearing Denied Sept. 26, 1921.)

Escheat § 8(1)—State statute of escheat applies to deposits in national banks.

Code Civ. Proc. § 1273, providing for escheat to the state of bank deposits unclaimed for 20 years, applies to national banks, it not being in express conflict with any federal statute, Congress not having attempted to legislate on the subject, and its operation not incapacitating such a bank from discharging its duties to the government, nor impairing its efficiency as a governmental agency; and the property rights of the depositor being created and controlled by state law, so that the sovereignty to which the escheat inures is the state, and not the United States.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the State against the Anglo & London Paris National Bank of San Francisco and others, in which there was a separate judgment against the First National Bank of Santa Barbara, the First National Bank of San Jose, and the Crocker National Bank of San Francisco, and each separately appeals. Affirmed.

Leib & Leib, of San Jose, Morrison, Dunne & Brobeck, of San Francisco, and R. B. Canfield, of Santa Barbara, for appellants.

U. S. Webb, Atty. Gen., and Frank L. Guarena, of San Francisco, for the State.

SHAW, J. This is an action by the state of California, begun in pursuance of the provisions of section 1273 of the Code of Civil Procedure, against the above-mentioned defendants and a large number of persons alleged to be depositors in said banks, to obtain a judgment against said banks, respectively, declaring that the credits of the depositors therein mentioned in the respective banks have escheated to the state of California, and directing the respective banks to forthwith deposit the same with the state treasurer. Separate findings and a separate judgment were given and entered in the case with respect to each of the three defendants

who are appellants above named. From each of these judgments the respective banks have taken separate appeals, and the same are presented in separate transcripts filed in this court. The three appeals all raise the same questions, and they will be considered together as one case.

The questions presented in these cases, with one exception, are considered and fully treated in the opinions of this court in *State v. Security Savings Bank*, 199 Pac. 791, filed on July 5, 1921 (Sac. No. 2890), and in *State v. Savings, etc., Co.*, 199 Pac. 26, filed on June 20, 1921 (Sac. No. 2922), and were thereby decided adversely to the contentions of the appellants. The facts presented in the cases now before the court are in all respects similar to those stated in the opinion in *State v. Security Savings Bank*, supra. It is unnecessary to restate those questions or to repeat the reasons given in support of our conclusions thereon. We refer to those decisions for such statement.

The one question not considered in those decisions arises from the fact that each of the three appellants in the cases now under consideration is a national bank organized and doing business under the laws of the United States. At the time the rehearings were granted from the decisions of the District Court of Appeal of the Third District on the appeals of the First National Bank of San Jose and the Crocker National Bank of San Francisco, the other cases above mentioned were pending, and the rehearings were granted, because we deemed it best to have the entire subject before this court before any decision therein should become final. With respect to the question arising out of the fact that the appellants now before the court are national banks, governed by the laws of the United States, the opinion prepared by Mr. Justice Burnett of the District Court of Appeal of the Third District on the appeal of the First National Bank of San Jose (Sac. No. 3215) is satisfactory to this court, and we hereby adopt the same as the opinion of this court. It is as follows:

"It is not disputed that the general rule is that 'the power to regulate property within the limits of the state, the modes of acquiring and transferring it, and the rules of descent and distribution of property, are subjects belonging exclusively to the jurisdiction of the state,' but appellant insists that said section 1273 of the Code of Civil Procedure has no application to deposits made in national banks, for the reason that 'the sovereign that created national banks is the United States,' that such sovereign alone has the right to enact, and has enacted, laws for the government of national banks, and that such deposits are subject to and controlled by said statutes, entirely independent of any enactment passed by the state Legislature. This is the objection, as we understand it, stated in somewhat general terms. Some more specific considerations are urged, but they are based upon the fundamental principle already stated.

Indeed appellant considers such legislation, so far as it may be said to apply to national banks, as a regulatory measure, and it is declared: 'The state has no power to regulate national banks. The regulation of national banks has always been solely within the provision of the United States, and not in any degree within the province of the state, especially when attempted regulation of the state would conflict with the laws of the United States regulations, as is the case here.'

"The extent to which said banks may be subject to state statutes has been settled in general terms by the decisions of the United States Supreme Court, although much has been left to the exercise of a wise discretion in the application of the general principle to the particular facts of each case.

"In *McClellan v. Chipman*, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461, it is said: 'Two propositions have been long since settled by the decisions of this court: First. National banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank v. Commonwealth*, 9 Wall. 362. Second. "National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the federal government to discharge the duties, for the performance of which they were created." *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283. These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.'

"It is not contended that there is any statute of the United States providing for the forfeiture of what is called inactive deposits in national banks, nor is it claimed that Congress has by any legislation limited the time within which such deposits may be checked out. Indeed, it is admitted that there is no federal statute expressly in conflict with said section of the Code of Civil Procedure. In fact, it is apparent that Congress has not attempted to legislate on this subject at all. Hence, it seems clear that the legislation herein does not 'expressly conflict with any law of the United

States,' and is therefore not required to yield to the paramount authority of the federal government because inconsistent therewith. It seems equally plain that this statute, in its operation, does not incapacitate the bank from discharging its duties to the government, nor does it in the least impair its efficiency as a governmental agency. It is not denied that the depositor could at any time while the bank is a going concern withdraw his deposits, with interest, or—what is substantially equivalent—require the same amount to be paid to him in honor of his check; nor is it doubted that he could assign his claim and thereby clothe the assignee with the same right. In either of such events it should not be deemed an interference with the proper administration of the business of the bank or an impairment of its usefulness as a governmental agency. Indeed, such withdrawal or the satisfaction of such claim would be in entire harmony with one of the primary purposes of the organization and operation of such banks and is contemplated by the very terms of the charter. That a claimant may have succeeded to the right to demand such payment otherwise than by assignment—for instance, by abandonment or forfeiture—would not, of course, render the transaction any the more a disturbance of the legitimate functions of the bank. In other words, it must be admitted that as far as this question and the interest of the bank in said deposit are concerned, it makes no difference whether the claim is presented by the depositor or by his successor by whatever title. Certain decisions have been cited to illustrate the application of this principle, to which we may briefly refer.

"Similar legislation as it relates to national banks was involved in *State v. First Nat. Bank of Portland*, 61 Or. 551, 123 Pac. 712, Ann. Cas. 1914B, 153, and it was held by the Supreme Court of Oregon 'that national banks are only exempted from state legislation to the extent that such legislation impairs their efficiency to perform the functions which they were designed to serve, and that the legislation here proposed does not have this effect.' In *First National Bank v. Commonwealth*, 143 Ky. 816, 137 S. W. 518, 34 L. R. A. (N. S.) 54, Ann. Cas. 1912D, 378, the Court of Appeals of Kentucky held that 'where a national bank in the state held real estate, not necessary to its business, for more than five years, the property was subject to escheat under the state law; it appearing that it would not impair the efficiency of the bank.' In *National Bank v. Commonwealth*, 76 U. S. (9 Wall.) 353, 19 L. Ed. 701, a state law requiring a national bank to pay the tax which is rightfully laid on the shares of its stock was upheld, the court reiterating the doctrine that such instrumentalities are exempt from state legislation only to the extent that such legislation may impair or destroy the efficiency of these agencies of the federal government. In *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181, it was held that 'a state statute is not void, which, for the purposes of taxation, requires, under a penalty for his neglect or refusal, the cashier of each national bank within the state to transmit, on or before the 15th day of April in each year, to the clerks of the

several towns in the state in which any stock or shareholders of such bank shall reside, a true list of the names of such stock or shareholders on the books of such bank, together with the amount of money actually paid in on each share on the 1st day of that month.' In *McClellan v. Chipman*, supra, legislation by the state of Massachusetts invalidating preferences made by insolvent debtors and assignments or transfers made in contemplation of insolvency was held to apply to national banks, and not to be in conflict with any statute of the United States. In *Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, it was held that a state court had the right by mandamus to enforce the right of a stockholder in a national bank to inspect the books of the corporation.

"Appellant seems to think that the tontine principle is involved in the disposition of the deposits made in a national bank; that is, upon the dissolution of the corporation the then depositors would receive the money of those absent and unknown. Our attention has been invited to no provision in the charter or by-laws of such banks or in any statute, state or federal, which gives countenance to this view. The National Bank Act (13 Stat. 99) provides that in case of the dissolution of a national bank the assets shall be used to pay the claims of the depositors, and the surplus, if any, shall be distributed to the shareholders, not to the depositors. No depositor has any interest in the deposit of another, except, of course, incidentally as he is interested in the prosperity of the bank.

"The interest of the shareholder in the deposit is not vested, but contingent upon the event that it may not be claimed by the depositor or any one representing him. The law in reference to the disposition of the assets of the national bank upon dissolution is not dissimilar to that applying to the state banks, but in neither case is there anything in derogation of the right of the depositor or his successor in interest to maintain his claim to the entire deposit. It is manifest that no depositor is required to leave his deposit in the bank indefinitely, or until the dissolution of the bank. No such obligation is expressed or implied in any provision of the statute, as far as we know. Of course, the ability of a national bank to loan money depends upon the amount of its deposits, and it might be a great advantage to such corporation for the depositors to allow their money to be so used indefinitely, but the law does not require it, nor does it impose any such duty upon any one succeeding to the interest of the depositor.

"Of all the objections made by appellant, we think only one possesses any merit. That relates to the peculiar language of the statute providing that the amount of money deposited shall escheat to the state. Appellant is undoubtedly right in the claim that deposits in national as well as in state banks become the property of the bank, and thereby is created a debt in favor of the depositor to the amount of the deposit, and it is this debt which is paid in honor of the check of the depositor. *Smiths' Cash Store v. First National Bank*, 149 Cal. 32, 84 Pac. 663, 5 L. R. A. (N. S.) 870. It

follows that the deposits mentioned in the complaint herein became a part of the actual assets and funds of the bank, and those identical funds could not, of course, escheat to the state by reason of any default of the depositor. Manifestly, the bank could not be deprived of its own funds in this summary manner without any default on its part. But while the language of the section is not very apt, it should be given a reasonable construction, and one, if possible, that will sustain, and not defeat, the law. No doubt it was the intention of the Legislature to provide that the right or claim of the depositor to such indebtedness should be forfeited or should 'escheat' to the state. It would be an impeachment of the common sense of the lawmakers to assume that they contemplated the forfeiture of the identical money that was deposited. It is not disputed that the language employed in said section is similar to that used generally in such statutes and involved in the decisions to which we have referred, and we think the reasonable interpretation is that the property affected by the escheat is the credit held by the depositor against the bank.

"We do not agree with appellant in its construction of the term 'escheat' as used in said statute. It is said that 'an escheat can be taken over by the sovereignty only in cases where the property rights existed by reason of the sovereignty which claims the escheat, or where the property has been forfeited for violation or wrong committed against some valid law of that particular sovereignty,' and that the United States of America is that sovereignty. Hence, the contention that, if there could be an escheat of the depositor's interest, it must be in favor of the United States, and not of the state. The mistake is in assuming that said property rights arise from and are governed by the federal statute. On the contrary, they are created and controlled by the state law, as the decisions abundantly show. In that respect the relation between a national bank and its depositor is placed upon the same footing as in the case of a state bank. The sovereignty, therefore, to which the escheat inures, is the state, and not the United States."

We deem it proper to repeat the statement at the conclusion of our decision in *State v. Security Savings Bank*, supra, that we express no opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer, and to say that if they have such right the judgment of the superior court would not be a bar thereto.

The judgment appealed from in each of the said appeals is hereby affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

138 Cal. 786

SIMONSEN et ux. v. L. J. CHRISTOPHER CO. (L. A. 6534.)

(Supreme Court of California. Aug. 29, 1921.)

1. Appeal and error ☞1011(1)—Finding of trial court where evidence is conflicting will not be disturbed.

Where the evidence showed that defendant's motortruck was exceeding the legal speed limit, and that plaintiff had the right of way at a street intersection, although the testimony was contradictory, a finding of the trial court that the accident was caused by the negligence of defendant, and that plaintiff was not negligent, will not be disturbed.

2. Municipal corporations ☞705(10)—Person may assume another will use care if nothing indicates contrary.

One crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger, relying on the presumption that the driver will use reasonable care and prudence, and obey the traffic laws; but if there is nothing in the situation to warn him of impending danger, he is not negligent in relying upon such assumption.

3. Municipal corporations ☞706(7)—Failure to watch for truck at street intersection not negligence as a matter of law.

Where plaintiffs, traveling in an automobile at a reasonable speed, had passed beyond the center of a street intersection, and were presumably out of the zone of danger from any vehicle approaching from the east, and were struck by defendant's motortruck, which was exceeding the legal speed limit, at a place out of the line of travel from that direction, plaintiffs were not guilty of contributory negligence as a matter of law in failing to keep watch for the truck.

4. Municipal corporations ☞705(10)—Speed of plaintiff's automobile or failure to keep lookout held not to have contributed to accident.

Where plaintiff's automobile, when struck by defendant's truck, had passed the center of a street intersection, and was beyond the line of travel for vehicles traveling in the direction the truck was traveling, the speed of the automobile or the failure of plaintiffs to keep a sufficient lookout when entering upon the street crossing did not contribute to the accident.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Louis Simonsen and wife against the L. J. Christopher Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. T. Morrow, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

SLOANE, J. This is an automobile accident collision case. The plaintiff, Louis

Simonsen, with his wife, Gussie Simonsen, was driving in a light Buick car south on the west side of Arlington street, in the city of Los Angeles. The defendant's employee was driving a delivery autotruck west on the northerly side of an intersecting street.

According to the testimony of the plaintiffs, they were driving at from 18 to 20 miles an hour at a point about 20 feet north of the intersection where they first saw defendant's truck approaching from the east at a distance of about 50 feet from the intersection, and at a speed of about 30 miles an hour. Plaintiffs had the right of way, and, having slowed down to 15 miles at the intersection, proceeded south across the street, paying no further attention to the truck. The next they knew of the truck, as they testify, was after they had passed the center of the intersection, when the truck suddenly appeared coming diagonally across the street from the northeast, and closing in upon them at a point near the southwest corner of the street intersection. Plaintiff Simonsen testified that he then swerved his car to the right, but could not avoid the collision, the truck striking his machine on the left side, about the front fender.

[1] The evidence shows that defendant's truck was being driven beyond the legal rate of speed, and that the plaintiffs had the right of way; but defendant relies upon its plea of contributory negligence of the plaintiffs for failure to keep a continuous lookout for the truck after entering upon the intersection. The trial court found that the accident was caused by the negligence of defendant, and that the plaintiffs were not guilty of contributory negligence. Under the conflicting evidence we cannot disturb this finding.

[2] As has been frequently said by this court and the District Courts of Appeal, a person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence, and obey the traffic laws; but if there is nothing in the situation to warn him of impending danger he is not guilty of negligence in relying upon such assumption. *McPhee v. Lavin*, 191 Pac. 23; *Commonwealth B. & C. Co. v. Pac. Elec. Co.* (App.) 184 Pac. 29; *Baker v. Western Auto Co.* (App.) 192 Pac. 73; *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560.

[3, 4] In this case, according to the plaintiffs' evidence, the plaintiffs had passed beyond the center of the street crossing without accident, and were presumably out of the zone of danger from any vehicle approaching from the east. We do not think they can be held guilty of negligence as a matter of law, or under their version of the

facts, because they failed to keep further watch for defendant's truck. It is claimed that they did not keep a sufficient lookout while entering upon the street crossing, and that they were driving beyond the prescribed speed limit, but obviously neither of these circumstances contributed to the accident, as the collision did not occur on the side of the street in defendant's line of travel, and the greater speed at which they made the crossing lessened the danger of their being overtaken by defendant's truck.

The place where the court found the collision to have occurred indicates that the course of the truck was in violation of the traffic laws. The driver of defendant's truck testified that he proceeded directly west on the north side of the intersection, and was run into by the plaintiffs, approaching from the north, but the trial court evidently accepted the testimony of plaintiffs as the correct history of the collision, and on such conflict of the evidence the findings of the court must be sustained.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHURTLEFF, J.; SHAW, J.; LAWLOR, J.; WILBUR, J.

187 Cal. 1

**RIO VISTA MINING CO. v. SUPERIOR
COURT OF PLUMAS COUNTY et al.
(S. F. 9769.)**

(Supreme Court of California. Aug. 30, 1921
Rehearing Denied Sept. 29, 1921.)

1. Dismissal and nonsuit — 45—Statute requiring dismissal after five years mandatory.

The provisions of Code Civ. Proc. § 583, are mandatory in the matter of a dismissal after five years after answer filed, except where the parties have stipulated in writing that the time may be extended beyond such limitations.

2. Dismissal and nonsuit — 60(1)—Extension stipulated to dates within statutory period does not prolong.

Extensions of time made or stipulated to dates for trial within statutory term of five years after answer does not operate to prolong five-year period under Code Civ. Proc. § 583, providing for the dismissal of an action for failure to bring the same to trial within five years after answer filed, even though such extensions are asked by the defendant.

3. Dismissal and nonsuit — 60(1)—Court had jurisdiction after five years from answer to try case; "stipulation in writing."

Court had jurisdiction to try a case more than five years after answer under Code Civ. Proc. § 583, although the case was continued beyond such period by the court on its own motion without request of either party, where

the long delay in bringing the cause to trial was at the repeated request and for the accommodation of the defendants, and several dates were agreed upon in writing for trial by the parties after the expiration of the five years before defendant finally moved for dismissal under the statute, parties being at liberty to treat the action as pending and within the jurisdiction of the court after such time, and the agreements of the parties setting certain dates for trial constituting a stipulation in writing within the meaning of such statute

In Bank.

Application by the Rio Vista Mining Company for a writ of mandamus against the Superior Court of the County of Plumas and the Presiding Judge thereof. Writ denied.

W. A. Dow, of San Francisco, for petitioner.

W. E. Davies and J. E. Ebert, both of Marysville, for respondents.

SLOANE, J. This matter is before this court on petition for writ of mandate to enforce the dismissal of an action for failure to bring the same to trial within five years after answer filed, as required by section 583 of the Code of Civil Procedure.

The action was brought in said superior court by one Ed Metcalf, as plaintiff, against the petitioner here, Rio Vista Mining Company, and others, as defendants. The suit was begun August 13, 1913. Various pleadings were filed, but it is conceded by the parties that the matter was finally brought to issue by a stipulated answer on September 24, 1915.

The attorney for plaintiff in this action resides at Marysville, and the attorneys for petitioner reside and have their office in San Francisco, while the action was pending in the county of Plumas. Hence, it appears that most of the negotiations herein referred to have been carried on by correspondence.

The defendant (petitioner here), claiming that the action had not been brought to trial within the five-year period under section 583, supra, moved the court for a dismissal on the 10th of March, 1921, more than five years after answer filed. The motion was denied in the superior court, and this proceeding followed.

[1] On the face of the petition the petitioner was entitled to a dismissal. The provisions of section 583, Code of Civil Procedure, are mandatory in the matter of a dismissal after five years, "except where the parties have stipulated in writing that the time may be extended" beyond the five-year limitation. *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002; *Larkin v. Superior Court*, 171 Cal. 720, 154 Pac. 841, Ann. Cas. 1917D, 670.

Respondents have set up by way of answer and affidavits certain facts upon which they rely as an extension of time for bring-

ing the cause to trial, both by way of estoppel and stipulation. It appears without dispute that the plaintiff had the cause set down for trial on several occasions, and that postponements were taken at the request and for the accommodation of the defendant (the petitioner herein) in each instance. None of these stipulated continuances, however, carried the time of trial beyond the five-year limitation.

[2] It has been settled under the rulings of this court that no extension made or stipulated to dates within the statutory term of five years operates to prolong the five-year period. *City of Los Angeles v. Superior Court*, 197 Pac. 79; *Larkin v. Superior Court*, supra.

The five-year period dating from the filing of the answer expired on the 24th of September, 1920. By stipulation of the parties the cause was last set down for trial, before the expiration of the five years, for June 22, 1920. There was a continuance granted at the request of defendants to the 12th of August. On or about the 10th of August the trial judge notified the parties that he had again continued the trial to December 8th on account of inability of the judge who was to hear the case to be present at an earlier date. This carried the date of trial beyond the five-year period, and the postponement was made on the court's own motion without the consent of either of the parties. However, no objection was made by either plaintiff or defendants, and, as the burden was upon the plaintiff to bring the cause to trial within the time prescribed by law, it may be conceded that, in the absence of further effective stipulation or waiver on the part of the defendants, the action was subject to dismissal for want of prosecution at any time on defendants' motion or by the court on its own motion.

Instead of moving for a dismissal, the defendants thereafter, about the 1st of December, 1920, notified the trial court that they could not proceed to trial on the 8th of December, for the reason that one of their principal witnesses was outside the state, and could not be present on the date named, and the court thereupon reset the hearing for March 2, 1921, and notified both parties of such postponement. Following this, as affiant, the trial judge deposes, "said affiant received a request or communication from said Powell & Dow, said attorneys for said defendant, Rio Vista Mining Company [the petitioner], requesting that affiant do continue said date or time of trial from March 2, 1921, to some time during the week commencing March 7, 1921, as an accommodation to said firm," as they were engaged in the trial of another case in San Francisco. Thereupon, "affiant informed said Powell & Dow to take said matter up with J. E. Ebert, attorney for plaintiff, for an extension of

time of trial herein," and he would appoint a new date for the trial in accordance with their agreement. Such conference was had between the attorneys for the respective parties and as a result of their meeting they agreed upon the 10th of March, 1921, as a new date of trial. Attorneys for petitioner sent to the trial judge the following telegram, signed by attorneys for both parties: "We both agree upon March 10th." The trial, pursuant to this stipulation, was again set for that date, and upon the matter coming on for hearing, the parties all being present, defendant, the petitioner here, for the first time objected to the trial of the case on its merits, and made its motion for a dismissal for failure of respondent to bring the case to trial within five years from date of filing answer.

The court denied the motion, and the trial was taken up; both parties participating in contesting the action on its merits. It is entirely clear on the face of the record that after the expiration of the five years petitioner made no move to have the case dismissed until the day finally set for trial, and that it was stipulated over the signatures of both parties that the cause be brought to trial on its merits on that day. Nothing appears in the record of any notice of objection to the trial, and the negotiations of the parties preceding the telegram clearly indicate that what they had in contemplation was a trial on the merits, in notifying the court that "we both agree on March 10th."

[3] It seems to have been conceded by counsel on both sides at the oral argument of this petition for writ of mandate before this court that, at the conference between counsel preceding the telegram, counsel for petitioner suggested that he did not think the court had jurisdiction of the case. The conduct of counsel for petitioner and the signed telegram were such, however, as to give the court jurisdiction if it could be conferred by the written consent of the parties.

There are no equities in behalf of petitioner in this matter. It is apparent that the long delay in bringing the cause to trial was at the repeated request and for the accommodation of the defendants, and that the attitude of defendants' counsel throughout was such as to lull the plaintiff into a sense of security as regards the provisions of section 583, Code of Civil Procedure. The question resolves itself into the bare legal proposition as to whether the mere lapse of five years before trial deprived the court of jurisdiction to thereafter try the case, even by consent of the parties. We do not think it did. If the parties had appeared in court at the final date set and voluntarily tried the case without objection it will hardly be disputed that a judgment following such trial would be valid.

Where a cause of action is within the general jurisdiction of a court the voluntary appearance of the parties and submission of the cause on its merits confers jurisdiction to try the issues presented. *Allen v. Allen*, 159 Cal. 197, 113 Pac. 160; *In re Crawford*, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071. If the parties can waive the right to object to want of jurisdiction by actually going to trial they certainly can confer such jurisdiction by a stipulation to submit the cause to trial.

There is, moreover, nothing in the wording of the statute in question to deprive the court of jurisdiction upon the mere lapse of five years. It is only after due notice to plaintiff that it may be dismissed on motion of the defendant, and until the actual dismissal there appears no reason why the matter of going to trial should not remain subject to the stipulation of the parties.

Unlike the preceding sections, 581a and 581b, directing dismissals upon failure to issue and return summons within a specified period, or upon failure to pay fees on transfer of actions, section 583 does not require that such actions shall not be "further prosecuted and no further proceedings shall be had therein," after the limited time has expired. The provision of section 583, for an extension of time for trial by stipulation of the parties, and directing notice, before dismissal on motion of the plaintiff, would suggest that even a dismissal on the court's own motion would contemplate some previous determination as to whether or not such stipulation between the parties existed. Under sections 581a and 581b the writ of prohibition has been upheld to prevent further exercise of jurisdiction in actions coming under those provisions (*Modoc Land Co. v. Superior Court*, 128 Cal. 255, 60 Pac. 848; *White v. Superior Court*, 126 Cal. 245, 58 Pac. 450), and such dismissal can be had without notice to either of the parties (*Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 Pac. 951).

The only relief granted under section 583 by our decisions has been to require, on proper showing, that an order of dismissal be entered, upon the apparent assumption that until such dismissal is made or demanded the parties are at liberty to treat the action as pending and within the jurisdiction of the court. Even under sections 581a and 581b it is held that the control of the court over the action is not lost for some purposes until the order of dismissal is made. *Consolidated Construction Co. v. Pac. Elec. Ry.*, 193 Pac. 238. In any event it was competent for the parties here, by consenting to go to trial upon the issues as framed in the action, to confer jurisdiction upon the court to try the case.

We are of the opinion that the correspond-

ence between the plaintiff and defendant with reference to setting the case for trial after the expiration of the five-year period, followed by the signed telegram agreeing upon the date, constituted a stipulation in writing signed by the parties agreeing to bring the case to trial at a date beyond the period prescribed by section 583 of the Code of Civil Procedure.

The writ is denied.

We concur: LENNON, J.; WILBUR, J.; SHAW, J.; SHURTLEFF, J.; LAWLOR, J.

186 Cal. 668

In re PARKER'S ESTATE. (L. A. 6734.)

(Supreme Court of California. Aug. 19, 1921.)

1. Executors and administrators ☞109(2)—Entitled to reimbursement for necessary traveling and other expenses.

An administrator or executor is entitled to reimbursement for such traveling and other expenses as were necessarily and properly incurred in the preservation and care of the assets of the estate.

2. Executors and administrators ☞510(10)—Court's discretion as to reasonableness and necessity of executor's expenditures abused and reviewable, when it exceeds bounds of reason or contravenes uncontradicted evidence.

Though the court below, when passing on the reasonableness and necessity of an executor's expenditures, is invested with a broad discretion, which, when exercised for or against the executor's claim, will not be disturbed on appeal, such discretion is abused whenever it may be fairly said that in its exercise the court exceeded the bounds of reason or contravened the uncontradicted evidence.

3. Executors and administrators ☞497—Entitled only to regular statutory commission for ordinary services.

For services rendered in the ordinary administration of an estate, consisting in locating assets thereof, collecting claims due it and selling personal property belonging thereto, the executrix is entitled only to the regular commission fixed by statute, Code Civ. Proc. § 1618; additional compensation being allowable only when there has been an extraordinary service.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Petition by Anness A. Hoyt, executrix of the estate of Ida B. Parker, deceased, for an allowance for extraordinary services and expenditures. From an order disallowing her claim, executrix appeals. Reversed in part, and remanded, with directions.

See, also, 200 Pac. 620.

Raymond E. Hoyt, of Los Angeles, for appellant.

John A. Harvey and S. M. Davis, both of Santa Ana, for respondent.

LENNON, J. Anness A. Hoyt, executrix of the estate of Ida B. Parker, deceased, petitioned the court below for an allowance from the funds of said estate in the sum of \$159.73, which she claimed was due her in addition to \$318.92, the regular commission allowed by statute for services during the administration of the estate. Code Civ. Proc. § 1618. One hundred dollars of this sum the executrix requested as compensation for extraordinary services alleged to have been performed by her for the benefit of said estate; the balance of \$59.73 was claimed as reimbursement for extraordinary expenditures made for and upon behalf of said estate by said executrix. Upon a hearing of the petition, the court below ordered that the same be disallowed, save and except to the extent of the sum of \$25, which sum was allowed solely for "extraordinary services." The executrix appeals from this order, and the appeal is grounded in the contention that the order is contrary to the uncontradicted evidence adduced upon the hearing of the petition.

[1] This contention must be sustained in part. It is an admitted fact in the case that the preservation and care of the property of the estate and the disposal of the personal property thereof necessitated trips from the city of Los Angeles, where the executrix resided, to points in and about the county of Orange, where the property of the deceased was situated. It is also an undisputed fact that the sum of \$59.73 was necessarily expended in these trips. It further appears that when the executrix took charge of the estate it was insolvent, and that as a result of her promotion and direction of sales of the personal property, coupled with her efforts in the collection of accounts due the estate, the sum of \$3,623.39 was brought into the estate which would otherwise have been lost to the estate. The traveling expenses in question were therefore necessary to preserve the property of the estate, and resulted in a distinct, direct, and consequential benefit to the estate.

[2] An administrator or executor is entitled to reimbursement for such traveling and other expenses as were necessarily and properly incurred in the preservation and care of the assets of the estate. Estate of Byrne, 122 Cal. 260, 54 Pac. 957, 1015. It is true that the court below, when passing upon the reasonableness and necessity of such expenditures, is invested with a broad discretion, which, when exercised for or against the claim of the executor or administrator, will not be disturbed on appeal. This discretion,

however, is abused, in a legal sense, whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence. *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Murray v. Buell*, 74 Wis. 14, 41 N. W. 1010. The uncontradicted evidence in the instant case shows beyond cavil that the money expended by the executrix and for which she sought reimbursement was necessarily and properly expended in the preservation of the property of the estate, and that sum should therefore be allowed her.

[3] With respect to the claim for compensation for extraordinary services, however, as distinguished from the claim for reimbursement for expenditures, petitioner's contention cannot be upheld. The court below allowed petitioner \$25 for the alleged extraordinary services performed by her. The services performed by the petitioner consisted in locating assets of the estate, collecting claims due the estate, and selling personal property belonging to the estate. The services rendered in the performance of these acts appear to have amounted to nothing more than the performance of the ordinary duties of an executrix in securing possession of and preserving the property of the decedent. For services rendered in the ordinary administration of the estate an executrix is entitled only to the regular commission fixed by statute. Additional compensation is allowable only when there has been an "extraordinary" service. *Estate of Phelps*, 199 Pac. 10. In the instant case the commission provided by the Code of Civil Procedure constitutes payment for all ordinary services in connection with the administration of the estate and the extra allowance of \$25 made by the court below is full compensation for any services of the petitioner that could, by any possibility, be deemed "extraordinary."

The order appealed from is reversed, in so far as it pertains to the petition for reimbursement for extraordinary expenditures, and the case is remanded, with directions to the trial court to proceed in conformity with the above opinion.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; SLOANE, J.; SHURTLIFF, J.; WILBUR, J.

186 Cal. 671

In re PARKER'S ESTATE. (L. A. 6735.)

(Supreme Court of California. Aug. 19, 1921.)

Executors and administrators §510(10) — Court's allowance of attorneys' fees not reversed, unless discretion clearly abused.

Though the court below would have been warranted in allowing an attorney for an es-

tate a much larger sum for extraordinary services, its allowance will not be reversed or modified, unless the Supreme Court can plainly see and unequivocally say that its order is absolutely and unqualifiedly an abuse of discretion; the allowance for extraordinary services resting largely in the discretion of the court.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Petition by Raymond E. Hoyt, as attorney for the executrix of the estate of Ida B. Parker, deceased, for fees for extraordinary services and expenses. From an order granting his petition in part, he appeals. Affirmed.

See, also, 200 Pac. 619.

Raymond E. Hoyt, of Los Angeles, for appellant.

John A. Harvey and S. M. Davis, both of Santa Ana, for respondent.

LENNON, J. This is an appeal by Raymond E. Hoyt, as the attorney for the executrix in the above-entitled estate, from an order of the court below granting in part only a petition for fees for extraordinary services rendered and extraordinary expenses incurred by said attorney in behalf of said estate. Code Civ. Proc. § 1616. The petition in question prayed for an allowance in the sum of \$311.35, of which \$16.35 was for extraordinary expenses and the remaining \$295 was claimed as a charge for extraordinary services rendered by petitioner to the estate. The court below upon a hearing of the petition made an order allowing the petitioner the sum of \$85 in full for the sums claimed to have been expended as extraordinary expenses and for attorney's fees for the rendition of extraordinary services. The uncontradicted evidence clearly shows that the extraordinary expenses, legitimately and necessarily incurred in the performance of services as attorney for the executrix of said estate, amounted to \$16.35. Deducting this sum from the award of the court leaves \$68.65 as the amount of the award for extraordinary services. It is contended that the order of the court is contrary to the undisputed facts in the case and an abuse of discretion, which may therefore be reversed by this court.

It may be conceded that upon the record before us the court below would have been warranted in allowing petitioner a much larger sum for his extraordinary services as attorney to the estate, but the allowance of attorney's fees for such services rendered in the probate of an estate rests largely in the discretion of the court in the first instance, and will not be reversed or modified, unless this court can plainly see and unequivocally say that the order under review is absolutely and unqualifiedly an abuse of discretion.

Estate of Adams, 131 Cal. 415, 63 Pac. 838; Treadwell v. Treadwell, 134 Cal. 158, 66 Pac. 197. In other words, as was said very recently in Estate of Conrad Iser, 198 Pac. 1014:

"To justify us in holding that the court below erred to the prejudice of appellants in its allowance of attorney's fees for professional services rendered by appellants in the action referred to, we must be prepared to say that such allowance is, upon its face, so far out of proportion to the value of the services rendered as to constitute the making of the order of allowance a clear or manifest abuse of judicial discretion. After a painstaking consideration of the question thus propounded, we have not been able to satisfy ourselves that it can justly be held that the order complained of involved an abuse of the discretion with which trial courts are invested in disposing of such matters as the one now before us. If the application for the allowance of attorney's fees had been directly made before and the evidence directly heard by us, we might have ordered the payment of a fee in excess of that allowed. But we are here reviewing an order in the making of which, as is declared by the Supreme Court in Freese v. Pennie, 110 Cal. 467, 42 Pac. 978, the trial court is clothed with a 'large discretion,' which is always regulated or controlled by a showing directly made before the court to which it is committed."

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; SLOANE, J.; SHURTLIFF, J.; WILBUR, J.

186 Cal. 789

SUMMER v. NEW YORK LIFE INS. CO.
(L. A. 6566.)

(Supreme Court of California. Aug. 29, 1921.)

1. Appeal and error $\hookrightarrow$ 1002—**Verdict in action on life policy held to involve a weighing of conflicting testimony and cannot be disturbed, notwithstanding documentary evidence.**

Verdict for plaintiff in an action on a life policy, involving a finding of seasonable mailing of a premium, *held* to necessitate a weighing of conflicting testimony of different witnesses and a determination of the credence to be accorded each, so that it cannot be disturbed on appeal, notwithstanding written testimony tending to contradict plaintiff's testimony, it not so corroborating that of defendant's witnesses as to conclusively contradict plaintiff's testimony, or impair it to such an extent as to compel conclusion that a finding based thereon was due to prejudice, rather than credence thereof.

2. Insurance $\hookrightarrow$ 665(3)—**Evidence of seasonable mailing of premium sufficient.**

Evidence for plaintiff in action on life policy, involving question of seasonable mailing of premium, *held*, notwithstanding that for defendant was exceedingly strong, sufficiently substantial to sustain a verdict for plaintiff.

3. Insurance $\hookrightarrow$ 360(1)—**Life policy not forfeited by failure to pay interest, as well as premium, within 30 days after premium is due.**

Under provision of life policy declaring a premium in default if not paid on or before the day it falls due, but allowing a grace of a month, subject to an interest charge of 5 per cent. per annum, for payment of the premium, during which time the insurance continues in force, the policy is not forfeited by failure to pay the interest, as well as the premium, during the month; interest, defined by Civ. Code, § 1915, in view of section 1919, not being considered as part of the premium in the absence of express agreement to that effect.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Morres Summer against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Meserve & Meserve and Shirley E. Meserve, both of Los Angeles, for appellant.

E. A. Klein, of Bakersfield, for respondent.

LENNON, J. Defendant appeals from a judgment entered upon verdict rendered in favor of the plaintiff. The suit is brought upon a life insurance policy whereby the defendant corporation, New York Life Insurance Company, insured plaintiff, Morres Summer, and his wife, Sadie Summer, jointly, in the sum of \$2,000, payable to the survivor upon proof of the death of either. Sadie Summer died on October 15, 1918, and plaintiff claims that he is entitled to the \$2,000.

By the terms of the policy the insured agreed to pay \$17.92 by way of premium, said sum to be paid quarterly in advance, commencing December 10, 1917, and the present controversy is concerned with the question as to whether plaintiff performed this particular prerequisite to the collection of insurance. The policy of insurance provided, in effect, that, upon the failure to pay a premium on the date when it became due, the policy was to continue in force during a definite period of grace, upon the expiration of which without payment being made the policy should become inoperative. The clause which deals with the period of grace is in the following words:

"If any premium is not paid on or before the day it falls due the policy holder is in default; but a grace of one month (not less than thirty days) subject to an interest charge of 5 per cent. per annum will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the unpaid premium for the then current insurance year will be deducted from the amount payable hereunder"

It is conceded by both parties that, up to September 10, 1918, plaintiff made all requir-

ed payments, but the premium due on that date, to cover the three ensuing months, was not paid or tendered until some time during the month of October, 1918. Defendant contends that the check for the premium due September 10, 1918, was not mailed until after October 10, the day upon which the period of grace expired, and that, as a consequence, the policy was forfeited, and had ceased to operate at the time of the death of Sadie Summer on October 15. Practically all of the evidence adduced upon the trial of the case pertained to this issue.

It was customary for the defendant insurance company to send plaintiff a notice when the premium became due, and to inclose with the notice a self-addressed envelope. In the inclosed envelope plaintiff, in turn, mailed to defendant a check for the amount of the premium, receiving no receipt other than the canceled check. Plaintiff testified that he received a notice that a payment of premium was due September 10, 1918, and that, on the afternoon of October 4, 1918, he mailed a check for the sum of \$17.92 in one of defendant's self-addressed envelopes. A canceled check to the order of the insurance company for that amount, signed by plaintiff, and bearing date October 4, 1918, was introduced in evidence and identified by plaintiff as the one mailed by him. Plaintiff further testified that, late in the afternoon of October 15, 1918, shortly after the death of his wife, he went to the place of business of a friend and stated that his wife had died. The bookkeeper at that place (who died before this case came to trial) had previously written checks in favor of the insurance company for plaintiff, including the one dated October 4. Upon hearing that plaintiff's wife had died, the bookkeeper informed plaintiff that he must notify the insurance company of that fact. Plaintiff asked the bookkeeper to write the notification, took the letter written at his request, and went home and placed it in one of defendant's envelopes, which he deposited in the same mail box in which he had mailed the check of October 4. This, in brief, is the plaintiff's case.

It is defendant's theory that the envelope mailed by plaintiff on the afternoon of October 15 contained the check dated October 4, and not the information concerning the wife's death. In support of this theory, the cashier of defendant's branch office at Los Angeles, who stated that he was in charge of all correspondence, testified that the check above mentioned was received at defendant's Los Angeles office on October 16, 1918, in an envelope postmarked "Bakersfield, October 15, 7 p. m. 1918," which was introduced in evidence. He also testified that the first notice of the death of Sadie Summer which reached his office was contained in a letter from plaintiff's attorney, dated October 25, 1918, and received October 26, 1918. Several let-

ters were admitted in evidence in behalf of defendant.

[1, 2] Defendant contends that the verdict of the jury in plaintiff's favor rests upon a finding that the check was mailed prior to October 10, 1918, and that the preponderance of the evidence is against such a finding. Since a considerable portion of the evidence consists of written instruments, it is urged that this court is in as good a position as the jury to pass upon the weight of the evidence. When analyzed, however, it is apparent that the verdict of the jury necessitated a weighing of the conflicting testimony of different witnesses and a determination of the degree of credence to be accorded each which cannot be disturbed on appeal. The only material evidence in plaintiff's favor was plaintiff's testimony and the canceled check. Opposed to this evidence was the testimony of the cashier of defendant's Los Angeles office and of a postmaster, together with certain written instruments. We are of the opinion that the written evidence, while it tended to contradict the plaintiff's testimony, did not so corroborate the testimony of defendant's witnesses as to conclusively contradict plaintiff's testimony or impair it to such an extent as to compel the conclusion that a finding based thereon was due to prejudice against the defendant, rather than credence of the plaintiff. Thus, the letter written to the insurance company by plaintiff's attorney on October 25, 1918, reads as follows:

"This is to advise you that the insured, Sadie Summer, died, and her husband, Morris Summer, has requested me to so inform you of that fact and ask you to mail me the necessary papers to sign to establish the proof of death."

By this letter defendant sought to disprove plaintiff's statement that the envelope mailed by him on October 15, 1918, contained a notice to the company of his wife's death. It does not necessarily follow from the wording above quoted that the letter of October 25, 1918, contained the first notification of death. Inasmuch as this was the first appearance of plaintiff's attorney in the matter, it was not unnatural for him, in his capacity of attorney, to open the correspondence with a formal notice of death and application for papers necessary in the establishment of the proof of death, regardless of whether or not plaintiff himself had previously notified the company. In fact, it would seem that this communication was intended primarily as a notification that plaintiff had requested his attorney to act for him in attempting to collect the insurance. A letter from the insurance company to plaintiff dated October 21, 1918, was introduced for the purpose of showing that the company had received no notice of death up to that date, and that the check was received after October 10. In this letter defendant's agent

(200 P.)

acknowledged receipt of plaintiff's check, and stated that, as it had been remitted after the policy had lapsed, it would be necessary for plaintiff and his wife to sign the inclosed application for reinstatement. This letter is, however, not conclusive against the plaintiff. At the time the letter was written by defendant's agent, plaintiff's letter of October 15, containing the notice of death, may have been misplaced, or defendant's agent may have overlooked, or for some reason have been unaware of, the notice of death. These inferences the jury was entitled to draw.

Perhaps the strongest evidence in defendant's favor is the testimony of the postmaster to the effect that a letter deposited in the mail box mentioned by plaintiff after 3 o'clock in the afternoon of October 15, 1918, would, in all probability, bear the postmark "9 p. m.," instead of "7 p. m.," which was the hour stamped on the envelope mailed by plaintiff. Relying upon this testimony, defendant claims the envelope mailed October 15 must have been posted before 3 o'clock and therefore could not have contained notice of the death of Sadie Summer, which, according to the testimony of plaintiff, occurred about 4 o'clock. Inasmuch as plaintiff is not an educated man, nor thoroughly familiar with the English language, the jury may have concluded that he became confused in attempting to remember and state the exact hour of his wife's death and the precise moment of his arrival at the mail box. While we consider the evidence in defendant's behalf exceedingly strong, we nevertheless find that the evidence in support of plaintiff's case is sufficiently substantial to raise a conflict and sustain a verdict in his favor.

[3] Assuming the check to have been mailed on October 4, defendant contends that plaintiff failed to make payment as required by the policy. It will be noted that the policy provides for an interest charge on the premium, at the rate of 5 per cent. per annum, during the month of grace after the premium has become due. Plaintiff's check of October 4 was for \$17.92, the amount of the quarterly premium. The interest thereon for the 24 days of grace was never requested by defendant nor paid by plaintiff. Defendant directs attention to this omission on plaintiff's part, claiming that it was essential to the continuance of the policy that the interest, as well as the premium, should be paid before the expiration of the period of grace.

Unless clearly justified by the language of the contract, we cannot hold the parties to have contracted that a policy carrying a quarterly premium of \$17.92 should be forfeited upon a failure to pay a sum which, in this case, was less than 6 cents and which could, in no event, have amounted to more than 7 cents. That the defendant did not

consider the policy as so providing is evidenced to some extent by previous conduct. For instance, the premium due June 10, 1918, was paid on June 24, 1918, and, although no interest was paid for the 2 weeks' delay, none was demanded, and the policy was not considered as forfeited.

"Provisions in an insurance policy are always construed so as to prevent a forfeiture, if the language will reasonably permit such a construction." *O'Neill v. Caledonian Ins. Co.*, 166 Cal. 310, 315, 135 Pac. 1121, 1123; *Welch v. British American, etc., Co.*, 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396.

The policy provides:

"A grace of one month (not less than thirty days), subject to an interest charge of 5 per cent. per annum will be allowed for the payment of every premium after the first, during which time the insurance continues in force."

"Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." *Civ. Code*, § 1915.

It cannot be considered a part of the principal, or basic fund, unless the parties expressly agree to do so (*Civ. Code*, § 1919), and, since there is no such agreement in the instant case, the words "premium" and "interest," appearing in the above quotation, must be regarded as separate and distinct terms. While it is clearly intended that the policy shall lapse upon the failure to pay the premium within the month of grace, no such intent is manifest in the event of a failure to pay interest. Assuming that the interest may be regarded as due and payable at the same time as the premium on which it is charged, it does not follow that the provision with respect to forfeiture attaching to the failure to pay the premium within the month of grace attaches likewise, to the omission to pay the interest when due. The grace of one month is allowed for the payment of the "premium" and, in the absence of a more specific provision concerning the acts required of the defaulting policy holder during the time the insurance continues in force, there is a natural implication that the payment of the premium within the period of grace will prevent a lapse of the policy. Since reason does not require that the language of the policy be construed as prescribing a forfeiture upon failure to pay interest within the month of grace, it will not be accorded that interpretation.

Upon the record before us, it must be held that there was no lapse of the policy prior to the death of the insured. The judgment in favor of plaintiff is therefore affirmed.

We concur: SHAW, J.; SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.; WILBUR, J.

186 Cal. 782

**STATE COMPENSATION INS. FUND v.
JORN. (L. A. 6338.)**

(Supreme Court of California. Aug. 29, 1921.)

1. Highways ☞184(2)—Evidence held to support finding of contributory negligence in crossing highway on motorcycle.

Where one riding a motorcycle did not exercise proper care in looking before crossing a highway, and was injured by an automobile, evidence held to support a jury finding of contributory negligence.

2. Appeal and error ☞1170(9) — Error in question submitting special issue held not prejudicial.

Where, in the submission of a special issue as to whether an injured person was guilty of negligence contributing directly or proximately to his injury, the word "approximately" was used instead of "proximately" but various other instructions required the jury, if they found contributory negligence, to find that it was the proximate cause of the injuries, and an instruction defining "proximate cause" was given, the error is not prejudicial under Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the State Compensation Insurance Fund against Carl Jorn. From judgment for defendant, plaintiff appeals. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

F. C. Drumm, of Orange, and H. C. Head, of Santa Ana, for respondent.

SLOANE, J. The plaintiff, an insurance carrier under the Workmen's Compensation Law of California for the employer of one Earl Summers, paid compensation to Summers for injuries received by him in an automobile accident. The injuries inflicted were alleged to be the result of the negligent driving of his automobile by the defendant here, Carl Jorn, and the insurer claims subrogation to the rights of the injured party under the compensation law (Act 1913, p. 279, §§ 31, 34f).

The judgment was in favor of the defendant, and plaintiff appeals. One of the issues presented by the pleadings was contributory negligence on the part of Summers. A special verdict was submitted and returned by the jury against the plaintiff on this issue. If this finding of contributory negligence can be sustained under the instructions and the evidence, it is conclusive in support of the verdict, and the judgment must be affirmed.

Appellant attacks the finding of the special verdict on two grounds: First, that the evidence is insufficient to show contributory negligence; second, that there was prejudicial error in the instructions of the court upon that issue.

The undisputed facts, as shown by the record, are that Summers, at the close of his day's work upon the ranch of his employer, had occasion to ride a motorcycle across a public highway which intervened between the field where he had been at work and the ranch house. This highway extended north and south. He approached it from along a roadway leading into the highway from the east, and was attempting to cross the highway to a driveway near the house on the opposite or westerly side of the highway. The entrance to this driveway connected with the highway at a short distance north of the point of intersection of the road on which he approached the crossing. According to his own testimony, he looked up and down the highway as he entered upon it, and saw no vehicle excepting a wagon drawn by a team of horses or mules, which was coming from the south, and about 40 or 50 feet from where he entered the highway. He claims that he entered upon the highway, veered his motorcycle slightly to the right toward the north, so as to come opposite to the entrance to the driveway, and then crossed to the left toward his destination, when he was run into by an automobile driven by the defendant, which suddenly came upon him at a rapid rate of speed from the south, and on the westerly side of the highway, within a few feet of the entrance to the driveway. He testifies that he saw nothing of the automobile until it was fairly upon him.

The defendant's account of the accident is that he came up the road from the south driving his automobile at a rate of about 22 miles an hour; that as he approached the wagon referred to he turned to the left to pass it; he saw the employee, Summers, enter the highway from the east and turn his motorcycle to the north, and going at a speed of about 10 miles an hour; that he supposed the motorcyclist was going on up the highway toward the north, and that he continued to the left, intending to pass him; that suddenly, without giving any signal or warning, the motorcycle was turned to the left, and ran into defendant's machine, with the resultant injuries to the rider. The defendant's version of the occurrence is corroborated by the testimony of a companion who was with him in the automobile.

[1] We think under this state of the testimony the jury was justified in finding in favor of the defendant on the issue of contributory negligence. The conflict in the evidence, if there is any, must be resolved in support of the verdict. The fact, as testified to by the employee himself, that he crossed the intersection of the highway without seeing this approaching automobile, is a circumstance against him. The view to the south was unobstructed but for the team and wagon, and this could have obscured an

automobile approaching at a rapid speed but for an instant. He did not take a second look, and did not become aware of the automobile until it was upon him. His course, as testified to by defendant and his witness, was such as to justify them in the conclusion that he was going north on the highway, and his turn to the left to enter the driveway, without again looking, and without a signal, was evidence of negligence upon which the jury could properly base its verdict and special finding.

It might be questioned, under the evidence in this case, if actionable negligence existed on the part of the defendant, but that becomes immaterial in view of the finding that the injured employee contributed proximately to the accident by his own negligence.

[2] The second assignment of error bearing upon the finding of contributory negligence arises upon an instruction of the court in submitting the special issue to the jury. This issue was submitted in the following words:

"Was Earl Summers guilty of negligence that contributed directly or approximately to the collision?"

The use of the word "approximately" for "proximately" was doubtless a clerical error. Standing alone it might be misleading and prejudicial. But the court had just previously instructed the jury that the pleadings had "raised the issue that the said Earl Summers contributed to the direct and proximate cause of said accident by his own negligence," and as to what facts under the testimony they could consider in reaching a verdict on that point, and that if they found such to be the facts, and that they contributed "directly or proximately" to the collision, then they should find said Summers guilty of contributory negligence.

Elsewhere in the instructions the jurors were told, as to alleged negligence of the defendant, that "lack of ordinary care, which is the proximate cause of the injury," constitutes grounds of recovery, and that he would be liable for the injury if his acts were the "direct and proximate cause thereof," and proximate cause was defined as "negligence at the time of the injury which was its direct and controlling cause."

In view of the many references in the instructions to "direct and proximate cause of the injury" as the basis of liability, it is altogether improbable that the jurors were misled by this error, even if they noticed the variation in the terms used. In common parlance the two words, "proximate" and "approximate," are used interchangeably, and the dictionaries give them as synonyms. It is true, however, that the word "proximate" has a distinct and separate legal significance; but, in view of the explicit instructions making the negligence to depend upon the "proximate"

cause, the jury could not well have been misled by the substitution of the word "approximate" in the submission of the special issue. The courts have frequently held such an interchange of these terms in instructions without prejudice. *Brooks v. Muncie & P. Tr. Co.*, 176 Ind. 298, 95 N. E. 1008; *Choctaw O. & T. Ry. Co. v. McLaughlin*, 43 Tex. Civ. App. 523, 96 S. W. 1091; *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456, 95 N. W. 1060.

In the absence of any showing of actual misleading of the jury, the error complained of may be properly disregarded, under section 4½, art. 6, of the Constitution.

In the face of the finding on this special verdict, the general verdict of the jury could have been no other than it was, and it is unnecessary to pass upon the several assignments of error involving the various rights and liabilities of the parties arising under the Workmen's Compensation Act.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.; SHAW, J.; LAWLOR, J.

186 Cal. 754
FURLOW PRESSED BRICK CO. v. BALBOA LAND & WATER CO. et al. (L. A. 6710.)

(Supreme Court of California. Aug. 29, 1921.
Rehearing Denied Sept. 26, 1921.)

1. Appeal and error ☞110—Appeal from order granting new trial, where trial was by judge, unauthorized.

Under Code Civ. Proc. § 963, as amended in 1915, providing for an appeal from an order granting a new trial in an action or proceeding tried by jury as a matter of right, and section 956, providing that the court may also, on appeal from the judgment, review any order on motion for new trial, no appeal lies from an order granting a new trial where there had been no trial by jury.

2. Appeal and error ☞870(6) — Appeal from order granting new trial may not be considered on appeal from second judgment.

Under Code Civ. Proc. § 956, as amended in 1915, providing that the court may, on appeal, review any order on motion for new trial, where the entire case was tried de novo on the new trial, the order granting a new trial cannot be considered on appeal from the judgment on the second trial.

3. Appeal and error ☞870(6)—Order granting new trial on certain issues may be reviewed on appeal from judgment.

Where the order granting a new trial confines the order to certain issues, or, in some other way, enters into and affects the final determination of the case, it can be reviewed on appeal from the judgment, and it is only such orders granting new trials that can be considered on appeal from the second judgment.

4. Limitation of actions — 29(1)—Open book account barred in four years.

Under Code Civ. Proc. §§ 337, 339, as amended in 1917 (St. 1917, p. 299), the period of limitation for actions on open book accounts is four, and not two, years.

5. Limitation of actions — 53(1) — Against open, mutual, and current account statute runs from the date of the last item.

Under Code Civ. Proc. § 337, subd. 2, setting the limitation of actions on a mutual, open, and current account at four years, the time when the statute commenced to run is the date of the last item shown in the account.

6. Limitation of actions — 53(2)—Statute held to put a book account on the basis of an open account.

Under the amendment of Code Civ. Proc. § 337, subd. 2, to include an open book account, the statute begins to run in case of an open book account on the date of the entry of the last item.

7. Limitation of actions — 159 — Statute is tolled by payment made and entered on open book account.

Since the Legislature fixed a different period of limitations in case of an open book account and an ordinary account, a payment made and entered upon the open book account tolls the statute, notwithstanding Code Civ. Proc. § 360, requiring a written acknowledgment to toll the statute.

8. Limitation of actions — 29(4)—Partner having power to bind others by book account for goods used in partnership business, such account held an open book account.

Where a partner was intrusted with the management of business of the other partners and opened a book account for goods to be used in partnership business which were charged in his name, in view of Civ. Code, §§ 2428, 2429, giving a partner power to bind his co-partners in writing in the transaction of partnership business, the account so kept is an open book account as to the other partners within the statute of limitations.

9. Limitation of actions — 143(3)—Partner's letter held to be sufficient acknowledgment of indebtedness to toll the statute.

Where partner intrusted with the carrying on of partnership business wrote a letter, the letter head of which contained the names of all the partners, and acknowledged indebtedness in language indicating that it was a partnership indebtedness, the letter tolled the statute of limitations with respect to all the partners under Code Civ. Proc. § 360, requiring an acknowledgment "signed by the party to be charged thereby."

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Furlow Pressed Brick Company, a corporation, against the Balboa Land & Water Company, a corporation, and others. From a judgment for defendants, plaintiff appeals. Reversed by the District Court of

Appeal, and on hearing in the Supreme Court judgment of superior court reversed.

Simpson & Simpson, of Pasadena, for appellant.

W. N. Goodwin and Goodwin & Morgrage, all of Los Angeles, for respondents.

WILBUR, J. This is an action to recover from the defendant Balboa Land & Water Company, alleged to be a corporation, but in fact a partnership, E. J. Louis, J. P. Greeley, E. E. Richardson, and E. W. Beckwith, a balance of \$808.15 upon an open book account for brick and mineral ore sold by the plaintiff to defendants for a building being erected by them at Balboa. The case was decided against the plaintiff on the statute of limitations. The original complaint was filed April 19, 1917, but was superseded by an amended complaint served on defendants May 9, 1918, and filed on May 15, 1918, the date of the first trial. It was stipulated that the defendants might answer thereto at any time prior to May 15th. The answer was filed May 17, 1918. The answer contained a general denial and alleged that the claim was barred by subdivision 2, § 337, and subdivision 1, § 339, Code of Civil Procedure.

Before the first trial, on April 15, 1918, a written agreement had been entered into between the parties stipulating that the only issues in the action to be determined by the court were:

"First, the question as to whether or not the statute of limitations is a bar to the cause of action set up in plaintiff's complaint; second, a determination of the quantity of brick sold and delivered by plaintiff to defendants, which latter question by said stipulation was to be determined by two referees selected by the parties."

The referees filed their report, and it was stipulated in open court to be correct. The cause was then submitted upon the statute of limitations. The court decided that the action was not barred and gave judgment for the plaintiff for \$808.15 and interest amounting to \$287.09. Thereafter, a motion for a new trial was made by the defendants and granted. The new trial was had on the 26th day of November, 1918. It was also stipulated that the cause of action set forth in the second count was set up for the first time in the amended complaint filed May 15, 1918. On the new trial the plaintiff offered in evidence the stipulation of April 15, 1918, as to the issues between the parties. The defendants objected to the use of the stipulation as evidence on the ground that after it had been entered into the complaint had been amended and for the first time set forth the cause of action contained in the second count thereof. Plaintiff insisted that the trial be conducted in accordance with the stipulation, but the court refused the request

and made an order releasing defendants from the stipulation and sustaining defendants' objection thereto. The court apparently acted solely upon the theory that there had been a change in the pleadings which justified the rejection of the stipulation. It appears, however, that the stipulation had been used on the previous trial, after the amendment of the complaint. The original complaint is not set out in the transcript, but it is fairly inferable from the stipulation and from the evidence on the trial that the original complaint was to recover for the purchase price of the same brick and ore. The plaintiff did not ask for a continuance on the ground of surprise at the ruling of the court, and introduced other evidence in support of its claim. At the close of the plaintiff's evidence the defendants' motion for a nonsuit was granted. Findings of fact and conclusions of law were made wherein it was found that the Balboa Land & Water Company was not a corporation; that the allegations of the amended complaint were untrue. The court further found that plaintiff's cause of action was barred by subdivision 1, § 339, and subdivision 2, § 337, Code of Civil Procedure. Thereupon, judgment was rendered that plaintiff take nothing by the action and purporting to dismiss the action.

It appears from the record that the original controversy between the parties was as to whether or not all the brick the plaintiff claimed to have shipped to defendants had been delivered to them, the defendants claiming that there was one carload short. There was never any question as to the correctness of the account except as to the amount of brick actually delivered to defendants. On this subject E. J. Louis, who acted on behalf of the other defendants, testified that he had checked over the accounts and had satisfied himself that they were correct, with the possible exception of one carload of brick, and that they were unable to determine whether that carload of brick was received by the defendants. The Balboa Land & Water Company was not a corporation, but was an association or copartnership composed of E. J. Louis, E. W. Beckwith, J. P. Greeley, and E. E. Richardson. E. J. Louis testified that he had acted as general manager in conducting the affairs of the defendants in the construction of the building at Balboa, and that practically all correspondence, payments of money, etc., had been taken care of by him or had passed through his hands. It appears that a Mr. Butler called up the president of the plaintiff corporation and left an order on behalf of the defendant Balboa Land & Water Company, for the shipment of seven cars of sand lime brick to the Balboa Land & Water Company. Mr. Butler informed the plaintiff that the defendants were all interested in the Balboa Land & Water Company; that thereupon the presi-

dent of the plaintiff corporation made in the account-book of the plaintiff corporation the following entry: "Mch. 25-13. E. J. Louis, Sec. Balboa Land & Water Company, Balboa. Main 2217. I. W. Hellman Bldg. Ship 7 cars sand lime brick No. 1, 19.70. No. 2, 11.70. 1st car about Tuesday"—and thereafter entries were made in the books of the plaintiff showing shipments of six cars of brick. In each item the name of E. J. Louis is entered, together with the character of brick and the price per thousand. The last item of brick furnished is April 19, 1913. On April 15, 1913, a charge for "mineral ore" amounting to \$36.50 was entered in the books. The following payments were entered in the account: "January 19, 1913, Cash, \$700, August 4, 1913, \$220, August 13, 1914, \$100." Evidence was given that the payment of August 4, 1913, was by the personal check of defendant E. W. Beckwith, mailed to the plaintiff by E. J. Louis, and the payment of August 13, 1914, was by the personal check of E. J. Louis. Certain letters were written by E. J. Louis to the plaintiff in connection with the account. A letter of August 12, 1914, accompanying the check for \$100, above referred to, addressed to the plaintiff and signed by E. J. Louis is as follows:

"Inclosed please find check #401 in the sum of \$100.00, which kindly credit for the brick furnished for the Balboa building, sending receipt to me."

A letter dated October 27, 1914, addressed to the plaintiff, signed by E. J. Louis, stated that the discrepancy of one carload of brick was being considered; that the associates would meet and try to determine what had become of the disputed carload of brick. He closed as follows:

"We are just as anxious to clear this matter up as you can be, only we want to be sure we are not going to pay for something we did not get, and we feel quite sure you do not wish us to do otherwise."

On November 13, 1914, under the letter head of the Balboa Land & Water Company, which letter head showed the names of all the defendants, E. J. Louis addressed the plaintiff admitting the receipt of five carloads of brick and stated that three were unaccounted for, and adding:

"The writer wishes to co-operate with you in every way to expedite the adjustment of this account, and hopes you will exercise just a little bit more patience and he believes it will be done."

On November 19, 1914, E. J. Louis addressed to plaintiff another letter saying that one carload, number 5085, had not been delivered to them, and stating:

"I am sending a copy of this letter to Balboa and hope that we are on the track of these deliveries, and that we will be able to determine very shortly who received the brick."

On November 24, 1914, a letter was addressed by E. J. Louis to plaintiff's attorneys, in which he states:

"I incline to believe that Mr. Wold [plaintiff's president], under whose instructions you are acting, wants nothing more than is due him, and so far as we are concerned we want to pay every dollar which we are justly owing."

The letter then proposed that Mr. Wold meet with them on the Sunday next in order to determine the amount of the claim due, and concludes as follows:

"If we can then agree on the correct amount, I firmly believe the matter of settlement can be adjusted. Hoping that no unnecessary expense will be incurred, I remain, Very truly, E. J. Louis."

On December 29, 1914, another letter was addressed by Mr. Louis to plaintiff's attorneys stating among other things as follows:

"We wish to reiterate that it is our desire to pay your client for every brick which we used or sold for their account and which is in keeping with our arrangement in the early part of 1913, and can be disclosed by correspondence on file in our office, and, we assume, as well in that of your client."

Then follows the suggestion that the attorneys of the respective parties get together and fix the amount due.

[1] Appellant's first contention is that the trial court was in error in granting the defendants' motion for a new trial after the first judgment in the case. Section 963, Code of Civil Procedure, as amended in 1915 provides for an appeal "from an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right," but does not provide for an appeal from an order granting a new trial after trial by the court sitting without a jury. Section 956, Code of Civil Procedure, provides that—

"Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

The second sentence was added by the amendment of 1915, so that after that amendment in order to review an order denying a motion for a new trial it was necessary to do so by an appeal from the judgment. It is contended that the order granting the new trial in this case was erroneous for the reason that the questions raised by the motion were questions of law which could have been determined by a motion to amend the conclusions of law and for judgment upon the findings (section 659, Code Civ. Proc.), or an ap-

peal from the judgment, and that for that reason the order granting the new trial was erroneous. It may be conceded that the questions raised upon the motion for a new trial were not proper subjects for consideration upon such a motion and that the order granting the new trial was therefore erroneous. The question is whether or not upon an appeal from the second judgment rendered upon the second trial the error in granting the motion for a new trial can be reviewed. The purpose of the amendment to sections 956 and 953, Code of Civil Procedure, with reference to appeals from orders granting or denying motions for new trial, was to expedite the business of the courts and avoid delays incident to appeals. Previous to that amendment orders granting motions for new trials were so largely discretionary with the trial court that an order granting a new trial was rarely reversed. As a result most appeals from such orders merely served to delay the final trial of the case. It was evidently thought by the Legislature to be more expeditious and economical to do away with the appeal from the order granting a new trial where there had been no trial jury and thus to allow the parties to try the case de novo than to permit such appeals.

[2, 3] If appellant's point that the order granting a new trial was erroneous can be considered upon an appeal from the second judgment where the order granting a new trial set the whole case at large, then, as is made evident by this appeal, there is a double chance of reversing a case where a new trial has been granted because the errors on both trials can be considered. We think this is an erroneous view of the law. While the second sentence of section 956, Code of Civil Procedure, as amended in 1915, providing that the court may, on an appeal from the judgment, review any order on motion for a new trial, is broad enough, considered alone, to justify the court in reviewing the order granting the new trial in every case, we think it apparent from the entire context and purpose of section 956, taken in connection with the scheme for appeal adopted by the Legislature in 1915, that it was not intended that any order granting a new trial should be reviewed unless it affects the second judgment and where the entire case is tried de novo, the order granting a new trial could not affect the judgment, however much it might affect the parties to the action. Where the order granting a new trial confines the order to certain issues, or, in some other way, enters into and affects the final determination of the case, it could no doubt be reviewed upon an appeal from the judgment, and it was only such orders granting a new trial that can be considered on an appeal from the second judgment. In this connection it is proper to say that the parties apparently concede that the order granting the new trial in this

case can be thus reviewed and therefore discuss the merits of the order granting a new trial. The District Court of Appeal (second District, First Division) held that the motion was improperly granted and ordered the first judgment restored. The case was transferred to this court because the assumption of the parties and of the District Court of Appeal, although the latter was justified by the remission of the respondents, was fundamentally erroneous and might lead to a misapprehension of the proper practice in such cases.

The Statute of Limitations.

[4] The amended complaint was filed within four years after the last payment upon the account, and if the statute of limitations begins to run at the time of the last payment the suit was brought in time. In this action appellant seems to be laboring under a misapprehension as to the effect of the amendment of 1917, for appellant admits that by that amendment of sections 337 and 339, Code of Civil Procedure, the statute of limitations upon the account in question was shortened to two years. Respondents are correct in their position that the period of limitation under section 337, subd. 2, Code of Civil Procedure, both prior and subsequent to the amendment of 1917 (St. 1917, p. 299), is four years on an open book account. The cause of action upon which the plaintiff seeks to recover was expressly alleged to be upon an open book account. Respondents' contention that the four-year period had elapsed at the time suit was brought is based upon the following line of reasoning: First, that the statutes of limitations upon an ordinary account is two years under section 339, Code of Civil Procedure; that the amount in question did not become an open book account within the meaning of subdivision 2, § 337, until the first payment was made thereon, to wit, on June 19, 1913 (Merchants' Collection Agency v. Ben Levi, 32 Cal. App. 595, 163 Pac. 870); that the account then became an "open" book account and the balance then due became a "balance due * * * upon an open book account," within the meaning of section 337, subd. 2, Code of Civil Procedure, as amended in 1907 (Stats. 1907, p. 599), and that it was barred in four years from June 19, 1913 (section 337, subd. 2, Code Civ. Proc.); that the subsequent payments, August 4, 1913, and August 13, 1914, were but partial payments upon a "balance due * * * upon an open book account" and did not, therefore, have an effect upon the running of the statute of limitations. Respondents' position cannot be maintained.

[5-7] The rule has long been settled in this state with reference to "a mutual, open and current account" mentioned in subdivision 2, § 337, Code of Civil Procedure, that the statute runs from the date of the last item shown in the account. *Carter v. Canty*, 181 Cal. 749,

186 Pac. 346. The evident purpose of the amendment, subdivision 2, § 337, Code of Civil Procedure, was to put an open book account upon the same basis. Such an account is differentiated from an open, mutual, and current account solely by the fact that to constitute an open, mutual, and current account it was necessary that items other than cash appear as credits upon the account, whereas, in an open book account cash payments alone are sufficient to characterize the account as an "open book account." If we apply the rule so well established as to "a mutual, open, and current account," it would follow that the four-year period of limitations runs from the date of the last payment, in this case August 13, 1914. In most of the states a partial payment upon an account tolls the statute. The rule is otherwise in this state, because of section 360, Code of Civil Procedure, requiring a written acknowledgment, but it is a reasonable construction of the legislation fixing a different period of limitation upon an "open book account" from an ordinary account to hold that the payment made and entered upon the open book account tolls the statute. It follows that the statute of limitations began to run on this account on August 13, 1914, and that the amended complaint filed May 15, 1918, was within the four years.

With reference to the contention of the respondent that there is no sufficient evidence as to the price of the brick furnished, and hence that the nonsuit was proper, it is sufficient to call attention to the testimony of E. J. Louis that the accounts were correct with the exception of the question at issue, namely, the delivery of one carload of brick.

[8] We have not thus far discussed the proposition that the account was charged on the books to E. J. Louis, one of the partners, and that the names of the other partners nowhere appear on the account. In *Wright v. Loaiza*, 177 Cal. 605, 171 Pac. 311, suit was brought upon an open book account consisting of one item for funeral expenses. It appeared that this item had been charged upon the books of Wright against W. Y. Loaiza, the defendant, and it was attempted by the action to charge his sister, Dolores Loaiza, upon said account after two years had elapsed. It was held that the action could not be maintained against her, although he was authorized by the appellant Dolores to incur the indebtedness, for the reason that the "open book account" was not a charge against her. The court there stated:

"It may fairly be assumed that the idea underlying the enactment of both subdivisions of this section was that a longer period of limitation might well be allowed where the existence of the claim sued upon was supported by some kind of written evidence. Where, on the other hand, the establishment of the contract rests on oral testimony only, the law requires the action to be brought before the lapse of

time may prevent the production of witnesses, or impair their memories. If this view be correct, the action against Dolores must be regarded as one upon an oral contract, and not one upon a book account. There is no account or other writing which in any way indicates her liability. To connect her with the transactions at all, resort must be had to parol testimony."

It was therefore held that the period of limitation had expired as to her.

Following this line of reasoning, the account in this case was not an open book account within the meaning of the statute as to any one except the defendant E. J. Louis, unless the fact that he is a partner and that the indebtedness is a partnership indebtedness differentiates this case from the rule announced in *Wright v. Loaiza*, supra. No question is raised as to the authority of the partner E. J. Louis to bind the partnership. Not only did he have express authority, as he testified, but the law expressly authorized him to act for and bind the copartnership in the transaction of its business and for that purpose to bind the copartners by an agreement in writing. Civ. Code, §§ 2428, 2429. A partnership may be held for an indebtedness entered into on behalf of the partnership in the individual partner's name (39 Cyc. 485), and this is true even if he has given his individual note for such indebtedness. *Beckwith v. Mace*, 140 Mich. 157, 103 N. W. 559. The only question involved here is whether the account in question is an open book account upon which the statute of limitations does not run for four years against the other partners where the partnership account is inadvertently, or as a matter of convenience, charged to one partner only. The reasons leading to the decision in *Wright v. Loaiza*, supra, as to the proof by parol of an agency to enter into the account do not apply. Here the fact of partnership may be readily proven and the circumstances showing the nature of the indebtedness are readily susceptible of proof and do not usually depend solely upon parol evidence as to the nature of the transaction. It was clearly proper to show that the indebtedness was a partnership one, and the fact that it was charged on the plaintiff's books to one of the partners was sufficient to constitute it a book account within the meaning of our Code.

In this connection it is proper to note that, in addition to the testimony of E. J. Louis that the business transactions with reference to the erection of the brick building were carried on by him, defendant J. P. Greeley testified that there was no written agreement between the parties to the association known as the Balboa Land & Water Company and that he and his associates had permitted the defendant E. J. Louis to attend to matters of business for them and had made no complaint of any of his acts in connection therewith; that he knew that there was a claim

asserted against the association by the plaintiff, but knew very little about it. Defendant E. E. Richardson testified that he was a member of the association and that he was not personally present at any time during the construction of the building at Balboa and knew very little about it; that he had informed his associates that he was willing to abide by whatever action was taken by them in regard to the property; that he knew that E. J. Louis was attending to matters of detail in connection therewith; that he made no objection to any action taken by his associates. It appears from the correspondence between the parties that all the negotiations with reference to the account were carried on by E. J. Louis in his own name and that in all this correspondence he purported to be representing his associates. We thus have a case where one member of a partnership carries on the business in his own name with the consent of his associates and contracts a partnership indebtedness in his own name. It is true that the partners are in a sense agents for one another, but they also have power to act for and on behalf of the partnership, and when they act in partnership business the partnership acts. The partnership is regarded for some purposes as an entity. 30 Cyc. 422.

[9] The trial court rejected the letter of November 13, 1914, on the letter head of the Balboa Land & Water Company, above referred to, except as evidence of the relationship of the defendants. It was rejected as evidence of an acknowledgment of indebtedness. The letter clearly refers to the partnership indebtedness, as such, in the following sentence:

"Personally the writer wishes to see this matter cleaned up at the earliest moment possible, but at the same time, unless delivery can be proven he does not feel that the account should be paid, and *our company* fight it out with the Pacific Electric." (Italics ours.)

Reference is here made to three cars then in dispute, the delivery of five cars being admitted in the letter. In the inclosure in the letter, a copy of a letter addressed to the Pacific Electric Railroad Company, the plural pronoun is repeatedly used as indicating the consignee of the cars of brick, and closes with the request to "advise us promptly, as we wish to arrive at a settlement with the Furlow Pressed Brick Company, but cannot do so until we have your reply." This acknowledgment was clearly admissible against defendant E. J. Louis. He also had authority to bind the copartnership by his acknowledgment made in the course of business before the statute had run and before dissolution of the copartnership. *Sears v. Starbird*, 78 Cal. 225, 229, 20 Pac. 547. The only question remaining is whether it is an acknowledgment "signed by the party to be charged thereby" within the meaning of section 360, Code of

Civil Procedure, sufficient to start another four-year period under our statute of limitations as against his copartners. In the case of Union Oil Company of Cal. v. Purissima Hills Oil Company, 181 Cal. 479, 185 Pac. 381, a letter signed by the president of a corporation, written upon the letter head of the corporation, was held sufficient where the president had authority to incur the indebtedness and his name was shown on the letter head as president. In the case at bar the names of the four partners were shown upon the letter head, as well as the name of the copartnership; thus the authority of E. J. Louis to bind the copartnership was shown upon the face of the letter, as well as the fact that he was acting for the copartnership in writing the letter. The acknowledgment was therefore sufficient to bind the copartnership upon the authority of Union Oil Co. v. Purissima, supra. See, also, Auzerais v. Naglee, 74 Cal. 60, 69, 15 Pac. 371.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; LENNON, J.; LAW-LOR, J.

186 Cal. 689

**FIDELITY SAVINGS & LOAN ASS'N v.
CITIZENS' TRUST & SAVINGS
BANK. (L. A. 5653.)**

(Supreme Court of California. Aug. 24, 1921.)

**1. Bankruptcy §114(1)—Constitutional law
§306—Receiver not authorized to seize
property transferred to third person not party
to proceeding.**

An order of the bankruptcy court directing a receiver to take possession of the property of the estate does not extend to property transferred by the bankrupt to a third person, who was not a party to the proceeding in which the order was made, and had no notice or opportunity to be heard, in view of Const. Cal. art. 1, § 13, and Const. U. S. Amends. 5 and 14, § 1, relative to due process of law.

2. Bankruptcy §115—Property held not surrendered to receiver voluntarily.

Where the agents of a receiver in bankruptcy secretly entered and took possession of a hotel, which had been transferred by the bankrupt, and obtained the keys by threats of contempt proceedings, the property was not surrendered voluntarily to the receiver, and the seizure being unauthorized, he was liable as a trespasser, though no force was used.

**3. Bankruptcy §115—Payment of earnings of
illegally seized property by receiver to trustee
according to an order of referee does
not relieve receiver of liability.**

Where the earnings of plaintiff's property illegally seized by a receiver in bankruptcy were paid to the trustee, in pursuance of an order of the referee directing such payment, obtained without notice to, or appearance by,

plaintiff, the receiver is not relieved from liability for making an illegal seizure.

**4. Bankruptcy §115—Application of owner
of illegally seized property for its return
does not waive his right to sue for its earnings
while detained.**

Where a hotel was illegally seized by a receiver in bankruptcy, the fact that the owner subsequently applied to the bankruptcy court for the release of his property did not prevent him from suing in a state court to recover the income of his property while it was detained; that relief not having been asked in the application to the bankruptcy court.

**5. Bankruptcy §115—Exemplary damages
for unlawful seizure of property by receiver
in bankruptcy held not justified.**

Where a receiver in bankruptcy illegally seized property, but acted in good faith and in belief that the order under which the seizure was made applied to the property, and was not guilty of using actual force and violence in the seizure, he is not liable for exemplary damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by the Fidelity Savings & Loan Association against the Citizens' Trust & Savings Bank. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

G. Harold Janeway, Hunsaker, Britt & Edwards, Robert B. Murphy, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellant.

Milton K. Young and L. L. Young, both of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment. The complaint is voluminous, but, in effect, it sets forth a cause of action against the defendant for damages for wrongfully, unlawfully, and oppressively seizing and holding possession of a hotel known as Hotel Schuyler, which was then a going concern and was then the property of the plaintiff. Judgment was given in favor of the plaintiff for the sum of \$1,503.59, which the court found the defendant had received from the patrons of the hotel during the time it was in possession thereof, and for an additional sum of \$500 allowed as exemplary damages.

In support of the appeal it is claimed that the evidence does not support the findings or judgment in several material particulars. The decision of these points depends in great measure on questions of law, there being little conflict in the evidence. The main defense is that the defendant was lawfully authorized to take and hold possession of the hotel under and by virtue of an order of the referee in bankruptcy of the United States District Court appointing it receiver of the assets and property of Hotel Schuyler, a corporation, which had been adjudged

a bankrupt on its own petition by said court on May 24, 1916. The evidence shows that said corporation was duly adjudged a bankrupt on that day, that the matter was duly referred to the referee in bankruptcy, and that the referee, on May 26, 1916, by an ex parte order, on the petition of alleged creditors of said bankrupt, made an order appointing the defendant receiver of the estate of said bankrupt, authorizing it as such receiver "to take possession of, hold, preserve, care for, secure, and inventory the property of said bankrupt estate until the appointment and qualification of the trustee hereinafter to be chosen, and with the further authority to collect all accounts receivable of said bankrupt," and to operate the business of said bankrupt.

Under the authority of this order the defendant, on May 27, 1916, took from the plaintiff the possession of said hotel and held possession thereof until June 12, 1916, on which day it delivered possession thereof to one Levin, who had been elected trustee in bankruptcy of said bankrupt corporation. On June 14, 1916, the trustee, in pursuance of an order of said United States District Court, restored to plaintiff the possession of said hotel. During the time the defendant held possession as aforesaid as receiver it conducted the hotel business therein, and in so doing took and received money belonging to the plaintiff amounting to \$1,503.59, which it has not returned or repaid to the plaintiff. At the time the receiver thus took possession of the hotel the plaintiff had been in possession thereof, and had been carrying on the hotel business therein on its own behalf, ever since November, 1915. It had been put in possession thereof by said Hotel Schuyler Corporation by reason of the plaintiff's rights thereto under a deed of trust executed to it by said bankrupt corporation for the securing of debts of said corporation amounting to \$140,000. Afterwards, on January 26, 1916, the matter was adjusted by a deed executed by said Hotel Schuyler, a corporation, to the plaintiff, and conveying to it the remaining rights of said Hotel Schuyler in and to said hotel and the furniture and furnishings therein.

[1] For the purposes of this case, it may be conceded that the referee in bankruptcy had power to make an ex parte order directing that a receiver be appointed in the bankruptcy proceeding to take and hold possession of any and all property belonging to the bankrupt at the time of the adjudication. The decision of this case does not depend on the existence of such power. The case made by the plaintiff is that it was the owner of the property of which the receiver took possession, and that the bankrupt corporation, Hotel Schuyler, did not at that time have either the possession, or the right of possession of that property. While the

order was good against the bankrupt and those holding as its agents or servants, it was made ex parte and it was not enforceable against third persons holding possession of property once owned by said bankrupt, under transfers made by the bankrupt to them which were valid under the bankrupt law. The plaintiff was not a party to the proceeding, nor to the application for the appointment of the defendant as receiver therein, and it was not bound thereby.

The receiver could not justify under an order made in that manner. It was in no better position than a sheriff, who makes a levy on property in the possession of a third person, belonging to such third person, and to which the attachment or execution defendant has neither title nor right of possession. It was a mere trespasser. An attack upon a seizure so made is not a collateral attack upon the order appointing the receiver. That is conceded to be valid. The real contention, and it is well taken, is that the seizure was not within the authority conferred by the order; that the property which it gave authority to take and hold was the property of the bankrupt, not that of third persons. The right of the plaintiff to keep possession of the hotel could not be divested, except by an order made in a proceeding to which it was a party, and in which it had been given an opportunity to be heard. To take it in any other manner would be to deprive it of its property without due process of law, a thing forbidden both by our own Constitution (article 1, § 13) and by the Constitution of the United States (Amends. art. 5, and article 14, § 1).

The Constitution of the United States, by article 5 aforesaid, withholds from the Congress the power to enact a law authorizing such taking of property. It is true that the bankrupt law authorizes a provisional summary seizure of property by order of the court where a creditor, or the trustee, after his appointment, alleges facts showing that the person in possession holds it under an unlawful preference to a creditor, or in virtue of a transfer made to defraud the creditors of the bankrupt, and that the seizure of such property is necessary for the preservation of the estate. Such seizure has been held to be authorized by sections 2, 3, 60, and 69 of the act (U. S. Comp. St. §§ 9586, 9587, 9644, 9653). In such cases the property is taken for the purpose of holding and preserving it until the final order in the matter and the law provides for adequate security to the adverse claimant if the facts alleged are not established at the hearing. But no proceeding to obtain such an order was begun in the bankruptcy proceeding here in question, and no such order was made by that court. In no other manner does the act purport to authorize the taking

of property in the bankrupt proceeding in the adverse possession of a third person, before such person is brought in by process and is given an opportunity to defend. Loveland on Bkcy., p. 100; Remington on Bkcy., §§ 1652, 1696. It is also true that it has been held that the court may in the bankruptcy proceeding make inquiry in regard to the question whether the property is in the virtual or constructive possession of the bankrupt and is in legal effect the property of the bankrupt, and that, if it so determines, it may proceed accordingly to hold the property. But in the present case there was no such inquiry made, and the order appointing the receiver was not based on any decision to that effect.

The case comes within the rule set forth in *Tapscott v. Lyon*, 103 Cal. 297, 37 Pac. 225. In that case there had been a proceeding in insolvency, and an adjudication of insolvency, and the defendant had been appointed receiver to take and hold possession of all the property of the insolvent. The plaintiff was in possession of certain goods formerly belonging to the insolvent, but which had been transferred to the plaintiff before the proceeding in insolvency. He sued the defendant for damages for the wrongful taking and conversion of the goods. The court held that the order appointing the receiver authorized him to take possession of the goods of the insolvent (which was identical to that extent with the order of the referee herein involved), gave the receiver no authority to seize the goods in the possession of the plaintiff and claimed by him, "however manifest the fraud through which they were acquired," and that if he took property from the possession of one who was not a party to the proceedings in which he received his appointment, he "does so at his personal risk." This is the precise doctrine invoked by the plaintiff in the present case, and the facts are in all respects similar to those referred to in *Tapscott v. Lyon*. It is authority, therefore, for the proposition that the defendant was not authorized by the order to take goods from the possession of the plaintiff under claim of title.

The defendant relies on the further statement in the *Tapscott Case* upon other facts appearing therein. The court there held that the duty of the receiver, if he believed that the goods really belonged to the insolvent, was to demand the same, and upon a refusal to deliver the same to bring an action for the recovery thereof. But it appeared in that action that he did demand the goods, and that thereupon the plaintiff voluntarily surrendered them. Upon this the court said that when they were surrendered the receiver could not refuse to accept them, and that when he did accept the possession thus given the goods were in his custody—that is, in the custo-

dy of the law—and that thereupon the court in the insolvency proceeding acquired jurisdiction of the property by the consent of the plaintiff, so that the only remedy of the plaintiff thereafter was to apply to that court for relief and obtain an order for the redelivery, upon showing that his title was superior to that of the insolvent, and that since the plaintiff voluntarily surrendered the goods on demand, and thus put them within the jurisdiction of the court, the receiver did not take or hold them as a trespasser, and was not liable in an action for trespass.

[2] If it were true that the plaintiff had voluntarily yielded to the defendant's demand for the possession of the hotel, the doctrine stated in the last-mentioned portion of the opinion in *Tapscott v. Lyon* would be applicable. But the court below found that the defendant seized and forcibly took possession of the hotel, with knowledge that the plaintiff was in possession and was claiming ownership, and that the possession was not voluntarily given to the defendant by the plaintiff. This finding brings the case within the rule first stated in *Tapscott v. Lyon*.

We think there is sufficient evidence to sustain the material portion of this finding. The court was authorized from the evidence to find that the possession was not given voluntarily and that there was no surrender of the property on the demand of the receiver. The evidence showed that the defendant's agent gained access to the hotel building through the back door and proceeded to a room therein occupied as the office of the manager; that the manager was temporarily absent, and that they then summoned the clerk, who was at the desk in the main lobby, and told him that they were in possession of the premises; that they then shoved him out of the office, conducted him to the desk in the main lobby behind the counter, and put seals on the cash drawer and safe; that at about that time the manager entered the hotel and was told by the said agents that they were in possession in virtue of the order appointing the receiver, which was then exhibited to him. Demand was then made for the keys, which he did not immediately deliver. He was told that if he did not give up possession the United States marshal would be called to put him out and that he would be in contempt of court. The hotel was in Long Beach, and the place of business of the plaintiff was in Los Angeles. After telephoning to the plaintiff's office in Los Angeles, the manager turned over the keys, through fear of being taken to court on a charge of contempt. From all this and other evidence the court was justified in determining that the defendant seized possession of the hotel and that the same was not voluntarily given to it by the plain-

tiff. It is immaterial whether actual force was used or not. That part of the finding may be disregarded. A possession thus given cannot be said to have been voluntarily surrendered. The defendant was a trespasser in so doing, and it was not justified by the order under which it acted. It was therefore liable for the return of the money which it received from the operation of the hotel during the time it was in the occupancy thereof.

[3] The payment of the money to the trustee in bankruptcy by the defendant, in pursuance of an order of the referee in bankruptcy directing it to do so, did not relieve the defendant of liability for the return of the money to the plaintiff. The defendant was not notified of the making of the order, nor of the hearing of the application therefor; it made no appearance in that proceeding, and was not a party thereto. The referee had no more jurisdiction to direct the payment of the money to the trustee than it had to order the taking of the property from the plaintiff. Conceding that the referee might have made inquiry with reference to the validity of the transfer from the bankrupt to the plaintiff prior to the adjudication in bankruptcy, the fact remains that no such inquiry was made and no such determination given, and it also appears by the evidence that the transfer of possession and of the right of possession of the hotel property was made more than four months prior to the adjudication, and that there was no ground upon which it could be declared invalid under the Bankruptcy Act (U. S. Comp. St. §§ 9585-9656).

[4] The defendant further claims that the order of the United States District Court, made on June 14, 1916, directing the trustee to restore the possession of the hotel to the plaintiff, was made on the application of the plaintiff, and that this was a submission to the jurisdiction of the court in the bankruptcy proceeding over said property and the proceeds thereof, up to the time of the said order for restoration. When the wrongful taking took place, the plaintiff had its option to proceed in either of two ways: It could treat the order as ineffectual to authorize the taking, and void to that extent, and sue in the state courts for the recovery of the possession of the property, or it could upon the same grounds apply to the District Court in which the bankruptcy proceeding was pending for an order in that proceeding restoring possession to it. It is true that it made such application to the District Court for the restoration of the hotel property, and it was given to it in accord-

ance with its application; the court holding that the taking of the hotel by the receiver was without authority and that the trustee had no right to the possession thereof. It does not appear, however, that the plaintiff ever made any application to the District Court or the referee for the return of the money obtained by the defendant as receiver from the operation of the hotel while it was in possession thereof. That relief was not included, so far as appears, in the application for the restoration of the hotel property, and it follows that the defendant did not in any manner waive its right to take either of the two courses above suggested by any submission to the jurisdiction of the court with respect to said money. It had the right, therefore, to resort to the ordinary action for damages for trespass in order to recover the money from the receiver.

[5] The court below found that the seizure of plaintiff's property aforesaid was made by the defendant wantonly and oppressively, and that by reason thereof the plaintiff was entitled to \$500 exemplary damages. We are of the opinion that this portion of the finding is not supported by sufficient evidence. While it is true that the conduct of the agents of the defendant in taking possession of the property was somewhat abrupt and overbearing, there was no actual violence on their part, and we think it is plain from all the testimony that the defendant and its agents actually believed that the order appointing the receiver gave it authority to take the property in controversy, and that the seizure was made by its agents in good faith and for the purpose of carrying out the authority which they supposed they had as agents of the receiver to execute said order. There was no exhibition of any intent to make use of the order, knowing it to be void, for the purpose of overawing the plaintiff's agents in possession of the hotel. No sufficient evidence of the attempt to act oppressively or wantonly appears in the record. The appellant may obtain all the relief it is entitled to from this error of the court by a modification of the judgment. A reversal thereof is not necessary.

It is ordered that the judgment be modified, by deducting therefrom the sum of \$500 allowed by the court as exemplary damages, and that, as so modified, the judgment be affirmed; the appellant to recover the cost of the appeal.

We concur: SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

186 Cal. 767

WILLIAMS v. SEIGLITZ. (L. A. 6593.)

(Supreme Court of California. Aug. 29, 1921.
Rehearing Denied Sept. 26, 1921.)

1. Libel and slander ⚡86(2)—Enough to plead that words slanderous per se were spoken of and concerning plaintiff.

While, where words used are of such a character as to contain a covert slander, their meaning must be alleged and proved in an action therefor, it is enough, under Code Civ. Proc. § 460, where the words are actionable per se, to allege that they were spoken of and concerning plaintiff.

2. Libel and slander ⚡9(7)—Stating that respondent in his business of jeweler was a crook, and got away with a diamond left with him, actionable per se.

Statement that one in his business as a jeweler was a crook, and that he got away with a diamond intrusted to him, is actionable per se, under Civ. Code, § 46, as calculated to injuriously affect him in his business.

3. Witnesses ⚡392(1)—Abandoned pleading admissible to impeach pleader's testimony by showing prior inconsistent statements.

While an abandoned pleading is not admissible as evidence against the pleader, it is admissible for purpose of impeaching his testimony, by showing prior inconsistent statements.

In Bank.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Action by Clinton E. B. Williams against Frank P. Seiglitz. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles L. Childers, of El Centro, for appellant.

Ault & Anderson, of Calexico, and Ross T. Hickcox and Hickcox & Crenshaw, all of Los Angeles, and Hickcox, Crenshaw & Trude, of El Centro, for respondent.

LAWLOR, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for damages in the sum of \$1,000 and costs in an action for slander.

Appellant and respondent were both engaged in the jewelry business in Calexico, Imperial county. Respondent's business was called the "Williams Jewelry Company," and respondent employed his brother, George Williams, in the capacity of manager. Respondent and appellant were advertisers in the "Semi-Weekly Plain Dealer," a newspaper published in Calexico, and with which one Frank W. Roach was connected. Upon an occasion in the month of December, 1918, appellant called at the office of the "Plain Dealer" for the purpose of discontinuing his advertising in and his subscription to the paper. He had a conversation with Mr. Roach at that time in which he assigned as

the reason for his action that he did not care to support any one who was supporting his competitors, the Williams Bros. It was during this conversation that the alleged slanderous statements were made. The alleged slander consisted in appellant having said, speaking of and concerning respondent and his brother, that "they are not men who are entitled to support, they are crooks," that they "were run out of a place in Arizona," that "the people [meaning the people of Cal-exico] will find it out," that "somebody left a diamond with the Williams Bros. in Arizona, and they got away with it," that "some persons are going after them legally on some crooked deals they were mixed up in before they came to Calexico," and that "they cannot get goods through wholesale houses."

Appellant relies upon two points for reversal—the denial of his motion for nonsuit, and the admission in evidence of his original answer over his objection.

1. The first point is thus stated in appellant's brief:

"Section 46 of the Civil Code carefully defines what a slander is. There is nothing anywhere in the plaintiff's complaint which on its face charges or tends to charge a crime, or that the plaintiff had been indicted, convicted or punished for crime, and there is no explanation anywhere of any of the alleged statements which explains in any way what any of these statements mean, or were supposed to have meant or was understood to have meant, but the statements are left standing entirely alone and unsupported. There is no allegation that any of the alleged statements tends directly to injure the plaintiff in respect to his office, profession, trade, or business, either by imputing to him general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits. Since there is no allegation on this point, of course, an attempt to prove it would be erroneous, but the plaintiff did not even attempt to make the proof. * * * There is not the slightest bit of evidence that any actual damage was caused by these or any other remarks, so we find nothing in any of the evidence that brings any of the alleged statements within the meaning of section 46 of the Civil Code, and therefore, on that ground alone, the defendant's motion for nonsuit should have been granted."

Respondent claims that the language used was actionable per se as imputing to him a crime and as tending to injure him in respect to his trade and business; as imputing to him a want of integrity, a qualification which his occupation, trade, and business peculiarly required; and that therefore it was not necessary minutely and in detail to show what appellant meant by the language used, how he meant it to be understood, or how it was understood. However, he contends further that even if the words

are not actionable per se, their meaning is set forth in the complaint, and that evidence was introduced to show that they were used and understood in an actionable sense.

The following testimony of Mr. Roach as to his conversation with appellant will be sufficient for our purposes:

"Why, he canceled his arrangement for advertising and his subscription to the paper, and I asked him why, and he said that he didn't care to support any one who was supporting or helping those—his competitors, I don't know just how he referred to them, but his competitors in the jewelry business, and I said that seemed to be a foolish view to take of it, I said in a newspaper competitors in all lines advertised, and were supposed to, and he had to expect competitors in his business in Calexico sometime, and he said he didn't object to competitors, he would welcome competition of the right kind, but he did object to competition, he said that those people were not worthy of support of the people at that time, and they were not the kind of competitors that he liked, or words to that effect, and I said that I had found the Williams boys, in my dealings with them, to be fair and straight, honest and all that, and he said I didn't know them, that when the people of the town did know them as well as he knew them they would be run out, or something of that kind, that they wouldn't be supported, and that they had been run out of some place in some other state, I believe he said Arizona, where they had done business, in fact he knew them to be crooked, he said. And I think that was about the extent of the conversation, he canceled his contract and canceled his business with me. * * * He stated that he had knowledge or knew something about a diamond ring, he mentioned its value it seems to me, I am pretty certain it was about a thousand dollars, had been left with the Williams boys in Arizona some place for remounting or cleaning or something of that kind, and had disappeared while in their possession. Q. Was anything said at that time that they were guilty of embezzlement, or taking the property? A. Yes, sir; he intimated that they know what became of it. * * * His words were that they had got away with it."

On cross-examination, he testified:

"He said a diamond ring had been left with them, I don't remember for what purpose he said, to be repaired, or reset or to be cleaned, and it disappeared and they had gotten away with it."

On redirect examination, he stated:

"Q. I will ask you, Mr. Roach, whether or not the term 'crook' was used in the conversation? A. Yes, sir; it was. Q. And directed to the Williams boys? A. Using the personal pronoun, yes, sir, without expressing either one, just 'them' or 'they.' Q. You understood him to mean the Williams boys, the jewelers? A. Yes, sir. Q. And Clinton E. B. Williams, and George Williams? A. Yes, sir."

Section 46 of the Civil Code defines "slander" as a false and unprivileged publication other than a libel, which: (1) Charges any person with crime. (3) Tends directly to in-

jure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit. (5) Which, by natural consequence, causes actual damage."

[1] Where the words used are of such a character as to contain a covert slander, their meaning must be alleged and proved. *Edwards v. San Jose Publishing Society*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290. But where the words are actionable per se, an allegation that they were spoken of and concerning the plaintiff is sufficient. Code Civ. Proc. § 460; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216.

In *Beek v. Nelson*, 126 Minn. 10, 147 N. W. 668, the plaintiff was a secretary and executive officer of an association. The slanderous expressions were that he was a paid hireling of a combine, that he had never done a decent or respectable thing for his city, and that he was employed to do the dirty work of a jobbers' union. In reversing the judgment of the court below, wherein it was held that the words were not actionable per se, it was said:

"By the great weight of authority, spoken words directly disparaging a person in his employment or calling are held to be actionable per se even though they do not charge a crime. [Citing numerous authorities.] * * * The rule is applicable to a person engaged in any lawful occupation or employment by which he gains his livelihood. *Johnson v. Shields*, 25 N. J. L. 116. The reason of the rule is that, when an employment is lucrative, words which reflect upon the integrity or the capacity of the employee render his tenure precarious, and are therefore a detriment in a pecuniary point of view. *Gove v. Blethen*, 21 Minn. 80, 18 Am. Rep. 380."

In *Noeninger v. Vogt*, 88 Mo. 589, the defendant, referring to plaintiff in his business of merchant and miller, said in part: "You are a defrauder; all that you have you accumulated by defrauding." The court, holding these words to be actionable per se, said:

"Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. * * * Language which imputes to one fraud, or want of integrity in his business, is actionable, per se, and hence special damages need not be alleged."

[2] In our opinion respondent's contention that the words are actionable per se must be sustained. While it may be true, as appellant asserts, that honesty is a requisite in any business, still that quality, within the meaning of the statute, is peculiarly required of a bailee such as a jeweler to whom jewelry is intrusted in the course of his

business. The statements that respondent in his business as a jeweler was a "crook," and that he "got away" with a diamond ring which had been intrusted to him in another state, palpably imputed to him a want of the quality of keeping safe and returning the articles intrusted to him. In addition to being an imputation of a want of integrity in his trade, such an accusation would naturally tend to lessen the profits of his jewelry business, for, as respondent says:

"If a general impression were established among the good people of Calexico that plaintiff had gotten away with a thousand dollar diamond ring left with him as bailee, how many diamond rings would thereafter be intrusted to his care?"

Appellant relies on the following authorities in support of his contention that where the meaning of the words is ambiguous it must be set out and proved: *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499; *Edwards v. San Jose Publishing Society*, supra; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *People v. Isaacs*, 1 N. Y. Cr. 149; *Bloss v. Tobey*, 2 Pick. (Mass.) 320; *People v. Collins*, 102 Cal. 345, 36 Pac. 669. It will be found by an examination of these authorities that the law as to the allegation and proof of ambiguous terms in actions of libel or slander is as we have stated it to be. Appellant insists that the words used in this case are no stronger than those used in other cases where the language has been held not actionable per se. These cases are *Clark v. Fitch*, 41 Cal. 472; *Nidever v. Hall*, 67 Cal. 79, 7 Pac. 136; *De Witt v. Wright*, 57 Cal. 576; *Frolich v. McKiernan*, 84 Cal. 177, 24 Pac. 114; *Mellen v. Times-Mirror Co.*, 167 Cal. 587, 140 Pac. 277, Ann. Cas. 1915C, 766; *Rea v. Wood*, 105 Cal. 314, 38 Pac. 899. While it is true the words alleged in several of these cases were held not to be actionable per se, the decisions were put upon the ground that it was not properly alleged that they applied to the plaintiff, as for instance in *De Witt v. Wright*, supra, or *People v. Isaacs*, supra; in *Mellen v. Times-Mirror Co.*, supra, where the words purported to impute a crime, it was held the language was insufficient; where the words purported to affect the plaintiff in a public office, as was the case in *Rea v. Wood*, supra, or his business, as in the case of *Maynard v. Fireman's Fund Ins. Co.*, supra, the language complained of was not calculated peculiarly to affect the plaintiff in such office or business. In the case at bar the language was plain and unequivocal, clearly applying to respondent, and, as we have shown, cal-

culated to injuriously affect him in his business.

Since the words were actionable per se, it will not be necessary to consider appellant's contention that the allegations of the complaint are insufficient as to the meaning of the language used, or respondent's contention that the words impute a crime and are also actionable per se within the meaning of subdivision 1 as well as subdivision 3 of section 46.

The foregoing testimony of Mr. Roach amply supports the allegations of the complaint that the alleged statements were made, and we have shown they were slanderous per se. The motion for nonsuit was therefore properly denied.

[3] 2. In support of his contention that the original answer was improperly admitted as a part of his cross-examination, appellant cites *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579; *Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222. These authorities lay down the rule that in this state an abandoned pleading may not be used as evidence against the pleader. However, it has been held that such a pleading may be admitted for purposes of impeachment of the pleader's testimony by showing prior inconsistent statements. *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4; *Schuh v. Herron Co.*, 177 Cal. 17, 169 Pac. 682; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625. On his direct examination appellant testified that he "knew absolutely nothing about respondent that he could have discussed his character at any time." In the original verified answer he alleged in effect that the statements attributed to him concerning respondent were each and all of them true. In the amended answer the allegation was modified to include only the statements that "some persons are going after them legally on some crooked deals they were mixed up in before they came to Calexico" and "they cannot get goods through wholesale houses." Notwithstanding appellant's claim to the contrary, we think it clear from the record that the original answer was admitted for purposes of impeachment, although there is no direct statement to that effect. It appears that appellant was given an opportunity to explain the inconsistency, and did offer an explanation. The pleading was properly admitted.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

186 Cal. 775

BADOVER v. GUARANTY TRUST & SAVINGS BANK. (L. A. 6403.)

(Supreme Court of California. Aug. 29, 1921.)

1. Appeal and error — 1010(1)—Where evidence is sufficient to sustain findings of trial court, they will not be disturbed.

Under Code Civ. Proc. § 1847, providing that the jury are the exclusive judges of the credibility of a witness, which is also applicable to a judge where a case is tried without a jury, where there is substantial evidence in favor of plaintiff in an action on a claim against an estate, the finding of the trial court will not be disturbed, even assuming that in such case the evidence must be clear and convincing.

2. Trial — 70—Reopening case to receive new evidence held within court's discretion.

The reopening of the case several months after making an order for the submission for decision upon briefs to be filed, where sufficient notice was given both parties, was within the court's discretionary powers, though the action was on a claim against an estate, and was not error in the absence of any abuse of discretion.

3. Witnesses — 140(19) — Former attorney, who had released his lien for fees, held competent witness against estate.

Where a former attorney in a case had released his lien for fees, he is not incompetent to testify under Code Civ. Proc. § 1880, subd. 3, which renders incompetent "parties" or "assignors of parties," or "persons in whose behalf an action is prosecuted," in an action against the executor or administrator on a claim against the estate of a deceased person as to any matter of fact occurring before the death of the deceased person.

4. Witnesses — 146 — Wife of plaintiff held competent witness against estate.

The wife of plaintiff was not an incompetent witness in an action by her husband on a note constituting community property, under Code Civ. Proc. §§ 1880, 1881, excluding as witnesses parties or assignors of parties to an action against an estate, since the wife of plaintiff is not a party to the action, and under Civ. Code, § 157, providing that neither husband nor wife has any interest in the property of the other, and the settled doctrine concerning the status of community property, she has no interest in the cause of action.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis M. Myers, Judge.

Action by M. Badover against the Guaranty Trust & Savings Bank, a corporation. From a judgment for plaintiff, defendant appeals. *Amrmed.*

Lewis Cruickshank, Vincent B. Vaughan, O'Melveny, Millikin & Tuller, and Dockweiler & Mott, all of Los Angeles, for appellants.

Albert J. Sherer and Robert Young, both of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by defendant from a judgment in favor of plaintiff for \$7,253.88 upon a promissory note found to have been given "for value" by defendant's testate, Benjamin L. Liveson, to plaintiff. The action was commenced against said Liveson about two months before his death, which occurred March 4, 1917, prior to the trial. The trial court found that the note was lost after the commencement of the action and prior to the filing of the supplemental complaint filed after the death of Liveson, and has not since been found, notwithstanding diligent search therefor.

[1] 1. It is earnestly urged that the evidence is insufficient to sustain the findings of the trial court with relation to the giving of the note. In the light of the record it cannot reasonably be contended that there was not substantial testimony in favor of plaintiff on every disputed point. The contention of insufficiency is based upon matters going to the question of the credibility of the witnesses, and upon the theory that the proof of a claim against the estate of a deceased person must be clear and convincing. It is, of course, true that the burden is on the claimant to establish his claim by a preponderance of evidence to the entire satisfaction of the trial judge, who alone, in the absence of a jury, has to do with all questions as to the credibility of the witnesses. As our law puts it with regard to a witness "the jury are the exclusive judges of his credibility" (section 1847, Code Civ. Proc.), and this is equally applicable to the judge where the case is tried without a jury. This is the absolute rule in the matter of review of findings of fact of a trial court by an appellate court, except where the record demonstrates that in the very nature of things certain testimony of a witness cannot be true and we have no such case here. Assuming that in such a case as this the evidence of genuineness of the claim should be "clear and convincing" to the trial court, as was said in *Couts v. Winston*, 153 Cal. 686, 688, 96 Pac. 357, 358, "whether or not the evidence * * * is clear and convincing is a question for the trial court," and "in such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court." See, also, *Wadleigh v. Phelps*, 149 Cal. 627, 637, 87 Pac. 93; *Beckman v. Waters*, 161 Cal. 581, 584, 119 Pac. 922. It would serve no useful purpose to set forth the testimony in this opinion. It will suffice to say that there was substantial positive testimony in favor of plaintiff as to every necessary element of his case and that there is no possible justification for a conclusion by this court that the same did not fully warrant the learned trial judge in his conclusion as to the facts. The apparent

earnestness of counsel has caused us to give more attention to this point than it deserves in view of the fact that the rule is so thoroughly established by our decisions.

[2] 2. Complaint is made that the court on three separate occasions, over the objection of defendant's counsel, permitted the case to be reopened for the purpose of the introduction of further evidence by plaintiff. One of these occasions was nine months after the making of an order for the submission of the cause for decision upon briefs to be filed; the cause being then reopened on the court's own motion for further testimony on certain specified matters. There is no suggestion that defendant was prejudiced in the conduct of its defense by any action of the trial court in this matter. It had the same full opportunity to meet the new evidence that it would have had if the same had been introduced on the first hearing. It is not intimated that it was denied the right to procure additional evidence in reply. It is apparent from the record that the learned trial judge was anxiously seeking the truth in this case, and that his action was due entirely to a commendable desire to have all the facts before him. There can be no question, it seems to us, of the discretionary power of the trial court to permit further evidence in any cause at any time before decision, where it is believed by the court that the ends of justice will be subserved by so doing. That a trial court has such power in an ordinary case is not disputed, but it seems to be contended that a different rule should be applied in actions against the estate of a decedent. The reasons of counsel for this asserted distinction, for which distinction we find no basis, go rather to the weight to be accorded the new evidence than to anything else. To our minds the trial court has this discretionary power in all cases, and so long as the power is exercised with due regard to the adverse party's right to fully present his side of the case there can be no prejudice of which he has the right to complain on appeal. Where a trial court abuses the discretion confided to it in this respect to the prejudice of a party the action will, of course, be set aside on appeal. We find no warrant in the record for the claim that the trial court was guilty of any abuse of discretion in this regard. See in this connection *Clavey v. Lord*, 87 Cal. 413, 25 Pac. 493.

[3] 3. One Max Rapaport, who was the original attorney of record for the plaintiff in this action, and for whom another attorney was substituted prior to the trial, was allowed to testify as to matters of fact occurring before the death of Mr. Liveson over the objection that under subdivision 3 of section 1880, Code of Civil Procedure, he was incompetent to testify as to any such matter. His testimony was material and im-

portant, including both matter as to the existence of the note and admissions by Mr. Liveson as to his indebtedness thereon. The stipulation for substitution of another attorney in place of Mr. Rapaport, signed by both the latter and plaintiff, contained a provision that "Max Rapaport shall have a lien of \$50 for his attorney fees on account of services rendered." On the day before the commencement of the trial, Messrs. Sherer and Young, the then attorneys of record of plaintiff, paid to Mr. Rapaport \$50, and received from him a receipt in full of all demands for services in the cause, and a release "of any and all lien I may have in or on any judgment obtained" in the case. Subdivision 3 of section 1880, Code of Civil Procedure, renders incompetent as a witness:

"Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

It seems clear to us that at the time he testified Mr. Rapaport did not come within the excluded class. Certainly he was not a party to the action or the assignor of a party as to any interest whatever in the claim in suit. All that he ever had, at best, was a lien on any judgment that might be recovered, as security for the payment by plaintiff of a debt due him from plaintiff. There was no assignment of the debt and no attempted assignment of this lien. There was simply an absolute release of the lien on payment of the debt by plaintiff's attorneys, and we can see no force whatever in the suggestion that such a release constituted an assignment, either to such attorneys or to plaintiff. Plaintiff has always been the sole owner of the claim, subject only to a lien on any judgment that might be recovered thereon, created by agreement, for his personal debt to Rapaport, which lien was absolutely extinguished prior to the trial by the payment of the debt by his attorneys, presumably for him and at his request. He was in no sense a successor in interest of Rapaport as to any interest in the claim. It is likewise clear that Mr. Rapaport cannot be held to have been at the time he testified a person "in whose behalf the action" was being prosecuted, for whatever possible claim he once possessed had then been fully satisfied. It may be that the reason for satisfying his claim was to forestall any objection to his testimony as a witness, but this would be altogether immaterial. The vital thing is that the claim was absolutely satisfied, with the result that the witness could no longer be held to be one upon whose behalf the action was being prosecuted, and therefore no longer within either the letter or the spirit of the statute.

[4] 4. Mrs. Badover, the wife of plaintiff, was a most important and material witness in plaintiff's behalf. Her testimony was admitted over the objection that it was incompetent under the same statute. Subdivision 3, § 1880, Code Civ. Proc. It is conceded that the alleged note is in part, at least, community property. She is not a party or the assignor of a party to the action, but it is urged that she is a person "in whose behalf" the action is prosecuted. It is not disputed that Mrs. Badover was a competent witness unless excluded by the provisions of subdivision 3 of section 1880, Code of Civil Procedure. Our statute makes all persons "without exception, otherwise than as specified" in sections 1880 and 1881, Code of Civil Procedure, competent witnesses, expressly declaring that, except as provided in those two sections, "neither parties nor other persons who have an interest in the event of an action or proceeding are excluded." Subdivision 3 of section 1880 has already been quoted in discussing the objection to Rapaport's evidence. It excludes "parties or assignors of parties" to such an action as this. Obviously Mrs. Badover is neither a party nor the assignor of a party to the action. It also excludes "persons in whose behalf" such an action is prosecuted. It is clear that appellant's claim must stand or fall upon the true meaning of these words as used in this statute. Is the wife, within the meaning of the statute, a person "in whose behalf" an action is prosecuted against an executor or administrator by her husband upon a claim asserted by him alone against the estate of a deceased person, based upon a note alleged to have been given him by the deceased and constituting, in part at least, community property?

That the other party to the marriage is a competent witness for the plaintiff in such an action where the property involved is the separate property of the plaintiff was expressly decided by this court in *Cullen v. Bisbee*, 168 Cal. 695, 698, 144 Pac. 968. In that case however there was apparently no suggestion of a claim that the action was brought by one party to the marriage on behalf of the other party and that particular portion of the statute was not specially discussed in the opinion. It seems obvious, however, in view of our statutory provision that neither husband nor wife has any interest in the property of the other (section 157, Civ. Code), that an action by a husband or wife involving his or her separate property is not one "on behalf of" the other. There was no suggestion or intimation in the opinion in *Cullen v. Bisbee*, supra, as to what the situ-

ation would have been if the property had been community property, and the precise question here involved is one that has never been decided by this court.

It was substantially held in *Uhlhorn v. Goodman*, 84 Cal. 185, 23 Pac. 1114, that one not a party to an action against an executor on a claim against a deceased person was not a competent witness where he was in fact jointly interested with the plaintiff in the contract on which the claim was based. He was the actual owner in part of the claim, and to the extent of his interest the action might well be held to be "on his behalf." We are not disposed to question the correctness of the ruling in this case, and accept it as establishing that an action against an executor or administrator on a claim against a deceased person is one brought "on behalf of" any person not a party to the action who, nevertheless, has an existing property right in the claim. It seems to us manifest, however, that these words cannot fairly be construed as including a person not a party who has no such present property right. We are further of opinion that in view of the well-settled doctrine in this state with relation to the status of community property, a doctrine, as said in *Spreckels v. Spreckels*, 172 Cal. 775, 782, 158 Pac. 537, 539, "that had become a fixed and well-understood rule of property," it must be held that the wife, during the marriage, has no existing property right in the community property. She may enforce certain limitations established by statute on the husband's control thereof, but this gives her no present interest in the property, or as put in *Estate of Burdick*, 112 Cal. 387, 393, 44 Pac. 734, 735, "no right or title of any kind in any specific property." As was said in *Estate of Burdick*, supra, the whole matter is one of statutory regulation, "and is, of course, just what the statute has made of it," and the discussion in *Spreckels v. Spreckels*, supra, and *Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, as to the settled construction of our statutes on this subject leaves nothing to be said in regard to the matter. Any change in this settled rule of property may properly be made only by the legislative department of government.

The action not being one on behalf of the wife, the learned judge of the trial court did not err in ruling that she was a competent witness in this action prosecuted by her husband.

The judgment is affirmed.

We concur: SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

187 Cal. 7

ERKENBRECHER v. GRANT. (L. A. 5921.)

(Supreme Court of California. Aug. 31, 1921.)

1. Corporations ⇨174—Stockholders and corporation treated as identical to circumvent fraud.

Though a corporation is an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard this distinct existence and treat them as identical.

2. Limitation of actions ⇨49(6)—Purchase of notes by corporation did not constitute payment by a guarantor owning all of the corporation's stock.

The purchase of notes by a corporation of which one of the guarantors of the notes was the sole stockholder and to which such guarantor had transferred all his property did not, under Civ. Code, § 1473, constitute payment of such note by such guarantor on the theory that the corporation and the guarantor should be treated as identical, and not as separate entities, so as to set in motion the statute of limitations under Code Civ. Proc. § 339, against the claim of such guarantor for contribution against coguarantors, in the absence of a showing that the organization of such corporation by such guarantor and his transfer to it of his property or the purchase by the corporation of the notes was fraudulent or other than an open legitimate transaction.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Byron Erkenbrecher against Daniel G. Grant. Judgment for defendant, and plaintiff appeals. Reversed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Isidore B. Dockweiler, G. C. O'Connell, and Dockweiler, Dockweiler & Finch, all of Los Angeles, for respondent.

SHURTLEFF, J. This appeal is from a judgment in defendant's favor in an action brought against him to enforce contribution as a coguarantor with plaintiff and others of three certain promissory notes.

The defense urged in the answer and at the trial, and insisted upon here, is that the statute of limitations has barred the action.

The case was heard by the District Court of Appeal (First District, Division 1), and the judgment of the lower court affirmed. Thereafter the cause was transferred to this court, and the judgment again affirmed. The judgment here, and likewise the judgment of the District Court of Appeal, was grounded upon the assumption, the record failing to show the date of the filing of the original complaint, that the action was commenced January 28, 1918, the date upon which the amended complaint was filed. The appellant,

upon discovering this omission, sought a diminution of the record, and to that end produced and filed here a certified copy of the original complaint, at the same time moving, which motion was granted, for an order vacating the said judgment of this court. The record, as thus corrected, establishes, which is a controlling circumstance, that the date of filing the original complaint was December 13, 1917. The following are the material facts of the controversy, the statement of which, with some changes and additions, is taken from the opinion of the District Court of Appeal:

On September 17, 1913, at San Francisco, Cal., the Madera Realty Company, a corporation, executed its three certain promissory notes, each for \$5,000, and payable as follows: One on or before December 15, 1913, and the remaining two on or before January 15, 1914. Each of said notes was indorsed, and its payment guaranteed by the plaintiff, defendant, and several others. Payments were made on account of the note due December 15, 1913, but no payment was made upon the other two. After their maturity the Navilla Investment Company, a corporation, organized under the laws of this state, and hereinafter called the company, took an assignment of the notes from the holders thereof, the note first maturing being assigned on April 1, 1914, and the others on January 17, 1914. At all the times embraced in the period covering the transactions material to the inquiry plaintiff was the owner of all the outstanding shares of the capital stock of the company, some of which, though standing upon its books in the names of others, was in fact held in trust for plaintiff. Plaintiff was at all times in control of and dictated the management and affairs of the company, and advanced it the moneys which it paid for said notes when they were assigned to it, the company having theretofore acquired all of the assets of plaintiff, who at that time and at all times mentioned in the pleadings was making use of the company for the purpose of conducting his business for his own personal convenience. The company purchased the notes for the reason that the then holder of them was pressing plaintiff for payment as an indorser. On November 17, 1917, plaintiff paid the company the full amount then due upon the notes, not in cash, but by the company charging the account of the plaintiff with such amount; his account at that time showing a credit balance in his favor in excess of the amount then due and unpaid on the notes.

The trial court found the foregoing facts, and also made a finding that plaintiff's cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which was the only provision of

the statute of limitations set up in the answer, and rendered judgment accordingly in favor of defendant. It is from this judgment that this appeal is prosecuted.

Defendant contends that the foregoing facts establish that the company and plaintiff were not separate entities, but one and identical, and that, in legal effect, when the company took assignments of the notes, it amounted to payment by plaintiff, that such payment extinguished them for all purposes, and forthwith set the statute of limitations in motion against any claim or right he might have against defendant for contribution, and that the "only cause of action which accrued to plaintiff against the defendant was upon assumpsit, which the law implies, arising where one of two or more joint obligors is compelled to pay more than his share of the obligation, and therefore the plaintiff's cause of action was barred absolutely two years after he so took up the notes and had the same assigned to his company." We cannot concede the correctness of defendant's contentions.

[1] While it is the general rule that a corporation is an entity separate and distinct from its stockholders, it is also equally well-settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard this distinct existence, and treat them as identical. As said in *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 97 C. C. A. 144:

"While we recognize the legal principle that a corporation does not lose its entity by the ownership of the bulk or even the whole of its stock by another corporation, * * * yet it is equally well settled courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms."

To the same effect is the following language of Circuit Judge Lurton in *Richmond & I. Construction Co. v. Richmond, N. I. & B. R. Co.*, 68 Fed. 105-108, 15 C. C. A. 289, 292 (34 L. R. A. 625):

"The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock or through the identity of stockholders operate to make either the agent of the other, or to merge the two corporations into one."

Again, in *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, it is said:

"Equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes

necessary to do so to promote justice or obviate inequitable results"

—and the law will follow equity in this respect.

[2] There is no occasion for the application of this rule of unity in the present case. The facts do not warrant, much less demand, it. There is no finding, neither is there any evidence, to the effect that the organization of the company by plaintiff and the transfer to it by him of all his property were in any manner fraudulent or prompted by dishonesty, or that the company, in purchasing the notes, which as we have seen were indorsed by both plaintiff and defendant, committed, or intended to commit, any fraud whatsoever. It is true that plaintiff personally advanced the money with which the company purchased the notes, but such advancement was entirely consistent with honesty and fair dealing, and bears no earmarks other than those of an open, legitimate transaction. It liquidated the obligation so far as the then owners of the notes were concerned, and in no respect whatsoever wronged or prejudiced the defendant, who was an indorser upon each of the notes, and upon failure of the maker to discharge them became responsible for the payment thereof.

The finding of the trial court that the company acquired the notes because the then holder of them was pressing plaintiff in his capacity as indorser for payment does not negative the separate entity of the company. In the absence of any dishonest motive or intention to accomplish a wrong, and as we have said, none was proven, we fail to discover any objection whatever to plaintiff directing the company to purchase the notes. If it be assumed that he caused their purchase for the reason that it was not then convenient for him to meet his obligations as indorser, there would still be wanting the elements to which we have referred, and the presence of which we hold is essential to justify treating plaintiff and the company as identical—as a unit. In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it "merely an instrumentality, conduit or adjunct" of its stockholders, but it must further appear that they are the "business conduits and alter ego of one another," and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the

complete destruction of the primary object of their organization.

There is abundant authority in addition to the cases we have mentioned, sustaining our view of the law. Indeed, our attention has not been directed to a case holding the contrary. While some text-books contain passages pointing to a different conclusion, an examination of the cases cited by the author demonstrates that they not only do not support the text, but are predicated upon a version of the law similar to the one herein declared. Likewise, some of the decisions contain passages which, when taken alone, lend some basis for a different interpretation, but, when read in the light of the facts of the case, which is always essential when construing and applying judicial expressions, it is clear there was present the demand that corporate entity be ignored in order that fraud or some kindred wrong be defeated. All of the cases, so far as we are advised, in our own and other jurisdictions, which involved the abolition of corporate entity and the facts which warrant it, such as *Kelly v. Ning Yung Ben. Ass'n*, 2 Cal. App. 460, 84 Pac. 321, *Chater v. S. F. Sugar, etc., Co.*, 19 Cal. 219, *Shorb v. Beaudry*, 56 Cal. 446, *Deming v. Maas*, 18 Cal. App. 330, 123 Pac. 204, and *Rutz v. Obear*, 15 Cal. App. 435, 115 Pac. 67, are in thorough accord with what precedes, and support the rule we announce.

Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 Pac. 986, is in harmony with what we have said touching the rule governing the rejection of corporate entity. In that case *Abbott Kinney*, the president of the *Abbott Kinney Company*, verified an answer of the latter in an action brought against it for an unpaid subscription to the capital stock of the corporation, notwithstanding, as *Abbott Kinney* then knew, the company had at a prior date forfeited its charter, the result of which was that *Kinney* had knowingly and deliberately led the plaintiff to believe that the corporation was an existing one, and induced plaintiff to prosecute its action to final judgment. An estoppel was asserted, concerning which the court said:

"To countenance this conduct would be to permit *Abbott Kinney* and the defendant corporation to escape the payment of a just debt, * * * by the concealment of a fact which it was incumbent on *Abbott Kinney* to disclose. * * * We entertain no doubt of their [findings] sufficiency to raise an estoppel against *Abbott Kinney* personally. And upon a proper showing that the *Abbott Kinney Company*, a corporation, was but the instrumentality through which *Abbott Kinney* for convenience transacted his business, by all of the authorities not only equity, looking through form to substance, but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation. [Citing cases.] But the evidence,

however, is insufficient to establish this unity of interest and ownership, the only stipulation upon this matter being that '*Abbott Kinney* was and now is the president of the *Abbott Kinney Company*, a corporation, and was and is the owner and holder of the greater portion of the stock of the said *Abbott Kinney Company*, a corporation.'

"

We have quoted thus at length from the *Llewellyn Case*, in order to point out that it involved an estoppel, which, had it been upheld and applied, would have thwarted a fraud which otherwise would have been effectual.

Counsel for respondent direct our attention to a number of decisions of this court, which they earnestly maintain support their contention that the assignments of the notes on the 17th of January and the 1st of April, 1914, to the company was in reality absolute payment, and accomplished their extinguishment, but we think each of such cases is clearly distinguishable from the one we are considering, and that none of them is controlling here.

The rule that payment by one of several joint obligors of the obligation, or by any one acting for him, or who takes an assignment of the obligation, extinguishes it, is not applicable here, for such payment or assignment is by, or runs to, one who is responsible, which was not the case here. There was no duty whatsoever resting upon the company to pay the notes in question, and it is for this reason that *Wright v. Mix*, 76 Cal. 465, 18 Pac. 645, *Gordon v. Wansey*, 21 Cal. 77, *Yule v. Bishop*, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094, and similar cases, are not decisive of this controversy. Equally without application, and for the same reason, are the numerous cases to the effect that payment by a surety puts an end to the obligation. In the instant case we repeat, the company was in no manner liable, but was a stranger to the obligation; it did not pay, but purchased the notes, and under such circumstances it cannot be said, upon reason or authority, they were extinguished.

The court found, and there is a similar finding, except as to dates, as to each of the notes:

"That on the 17th day of January, 1914, the *Navilla Investment Company* purchased said note."

Under the facts appearing, we hold it was an absolute, bona fide purchase by the company acting in its separate entity, and by reason thereof, as was its intention, it became, in its distinct capacity, the owner and holder of the notes. *Frank v. Brady*, 8 Cal. 47.

Having determined that the company and the plaintiff were separate entities, it follows that section 1473 of the Civil Code, which

declares that "full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it," is not applicable, for the reason that, as we have said, the transaction was a purchase and not payment of the notes by the company, and that there was no evidence of an intention upon the part of the company, or of the assignor and holder, to extinguish them. As we have said, there was no "duty" resting upon the company to pay the notes; neither was the act of the company a payment on behalf of the plaintiff and with his assent, one or the other of which conditions is essential to bring the transaction within the provisions of the section. Civ. Code, § 1473. There was manifest here a definite design on the part of the company to keep the notes alive and hold them as its property, all of which, we declare, did not or could not prejudice the defendant, and was not to his disadvantage.

While the court found that the payment of the notes by the plaintiff on November 17, 1917, was not made by him as indorser, we think such finding was error, and that there is no substantial evidence supporting it. In fact, the record establishes the contrary. The finding is predicated upon the theory, which we declare to be untenable, that the company and plaintiff were identical.

From what precedes, it follows that when, on November 17, 1917, plaintiff paid the notes to the company, which was then the sole owner of them, the effect was to vest in him the right to compel contribution from the defendant, his coindorser, for his proportion of the amount so paid, which he is endeavoring to do in this action, and the same having been commenced December 13, 1917, was in time. Code Civ. Proc, § 339.

Judgment reversed.

We concur: SHAW, J.; SLOANE, J.; WILBUR, J.

186 Cal. 703

ROHN v. IRON CHIEF MINING CO.
(L. A. 6279.)

(Supreme Court of California. Aug. 24, 1921.)

I. Mines and minerals ⚡26 — Locator, who fails to do development work, may relocate and obtain title.

Under Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620), the locator of a mining claim, who has not done any of the development work required by the section during the calendar year following the date of his location, immediately at the beginning of the next year may relocate the same claim, and claim title thereto under such location.

2. Mines and minerals ⚡38(15)—Evidence sufficient to support finding defendant's claims not valid, when plaintiff's conflicting claims located.

Evidence held sufficient to support the finding of the trial court that defendant's two claims were not valid and subsisting mining claims on January 1, 1901, when plaintiff's conflicting claims were located.

In Bank.

Appeal from Superior Court, Riverside County; George H. Cabaniss, Judge.

Action by Orlando Rohn against the Iron Chief Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Oscar Lawler, of Los Angeles, Sarau & Thompson, of Riverside, and James E. Degnan, of Los Angeles, for appellant.

Goodrich & Martinson and Alfred H. McAdoo, all of Los Angeles, for respondent.

SHAW, J. Two actions were brought by the plaintiff against the defendant, in each of which judgment was given in favor of the plaintiff in the court below, after a consolidation of the cases for trial. From this judgment the defendant appeals.

In both cases the complaints set forth causes of action to quiet title to certain mining claims, 9 in number, of which he claimed ownership. In its answers the defendant set up a claim of ownership to 12 mining claims which conflicted with or overlapped the ground claimed by the plaintiff. The sole question in the case is whether or not the plaintiff or the defendant has the better title to the respective mining claims in controversy.

The main proposition involved in the case may be stated by the following question: Under section 2324 of the United States Revised Statutes (U. S. Comp. St. § 4620), can the locator of a mining claim, who has not done any of the development work required by that section during the calendar year following the date of his location, immediately at the beginning of the next year relocate the same claim and obtain title thereto under such relocation? The provisions of section 2324, upon which that question must be decided, are as follows:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, * * * and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * Provided, that

the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim."

The defendant insists that the intent of the law was that the person who had made the location and had failed to do the assessment work during the next ensuing calendar year should be incompetent to make a relocation of the same ground. The main reliance for authority for this position is found in *Lindley on Mines*, at section 405. The author there says that, if the original locator—

"has the same right as a stranger to relocate under these circumstances, he has the same length of time allowed to a stranger to perform the first year's labor after the date of relocation. * * * On January 2 * * * he must repeat this proceeding and obtain an additional two years, and so on indefinitely. It seems to us that this is a manifest fraud upon the government. It is a perversion of the law, and in direct violation of its spirit and intent, to say that the original locator may take advantage of his own dereliction, and use his own neglect and wrong as a foundation to either perpetuate an estate or create a new one. The law under which he obtained his first privilege provides the only method by which his neglect can be condoned, and that is by resuming work prior to relocation. It is illogical to say that he may accomplish this result in any other way than by strictly pursuing the methods provided for by the statute."

Mr. Lindley, in the section referred to, enters upon an elaborate discussion of the proposition and a review of the cases on the subject, all of which, except one, are against his position, in so far as they touch upon the question at all. The one he refers to as sustaining him, *Ingemarson v. Coffey*, 41 Colo. 407, 92 Pac. 908, is not in opposition to the doctrine of the other cases, as he contends. It does not refer to or construe section 2324 aforesaid, but is based on the provisions of the Colorado mining law, which required the performance of the development work there mentioned within 60 days after the posting of the location notice, and in that case the facts were that the relocater did not post a new notice, nor did he do any of the other things required by the Colorado law to accomplish a location, but merely erased the date on the original notice and inserted a new date.

We are of the opinion that the language of section 2324 does not have the effect contended for by the learned author above mentioned. It expressly declares that, if the work required is not done within the year specified, the claim or mine "shall be open to relocation as if no location of the same had ever been made." In other words, it is then to be considered as vacant public land of the United States, subject to entry by any qualified person, as provided in section 2319 (U. S.

Comp. St. § 4614). If the original locator is a qualified person, he is as eligible to make a relocation under this language as a stranger would be. The proviso immediately following this language, to the effect that a relocation cannot be made if the original locator has in the meantime resumed work upon the claim after the failure, was not intended to prevent such original locator from making a relocation, but was intended to give him an additional privilege, that of maintaining his title by a mere resumption of work.

The principal argument advanced in support of the appellant's claim is that the object of requiring \$100 worth of labor or improvements to be performed upon the mine each year was to promote the development of mines, and that if by successive relocations a person could maintain his right to a mining claim from year to year without doing any development work, he would be able to act as a "dog in the manger," to use the language of the Supreme Court of the United States in *Chambers v. Harrington*, 111 U. S. 355, 4 Sup. Ct. 428, 28 L. Ed. 452; that is to say, to keep others away from the property while doing nothing with it himself. There may be some force in this argument. But the doing of \$100 worth of work on an ordinary quartz mine would go but little way toward the development of such claim. It would not accomplish anything of importance in the way of development or production of precious metals. Its main purpose obviously was to compel the locator to do some work on the premises during the interval between the date of his location and the expiration of the time allowed, so as to leave visible evidence of his claim for the information of other prospectors, to enable them to avoid taking up the same ground. This purpose would be accomplished when the same person relocates the same ground, for the relocation must be made by him in the same manner as by any other person; that is, as the section declares, it "must be distinctly marked on the ground so that its boundaries can be readily traced." This evidence of relocation would be as effectual to warn others of the claim thereto as was the similar evidences of the original location, or as the similar evidences of the location by a third person after the forfeiture, would be. We perceive nothing in the language of the section purporting to abridge the rights of the original locator in this respect.

The right of the original locator, or one of several locators, to relocate the mine after the expiration of the time for doing development work without any having been done, has been recognized by the supreme court of this state in a number of decisions. *Conway v. Hart*, 129 Cal. 480, 62 Pac. 44; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31; *Strang v. Ryan*, 46 Cal. 33; *Thompson v. Spray*, 72

Cal. 528, 14 Pac. 182; *Richards v. Wolfing*, 98 Cal. 195, 32 Pac. 971; In *Warnock v. De Witt*, 11 Utah, 324, 40 Pac. 205, the exact question here presented was before the court, and that court, in considering the interpretation of section 2324, said:

"The fact that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator; but to give the proviso above quoted the effect claimed by appellant would be to deny to such prior locator a substantial right allowed to strangers. In other words, such a construction, while it would allow to a prior locator the right to resume work, would destroy his right to make a new location. We do not think the proviso to the act should be construed to mean anything more than that a prior locator, in addition to the rights of a stranger, should also have the right to resume work, and thus relieve himself from the forfeiture incurred."

In *Legoe v. Chicago Fishing Co.*, 24 Wash. 175, 64 Pac. 141, the court was considering a statute of the state of Washington regarding the location of claims for fishing trap sites in the rivers of that state, the language of which is substantially identical with that of section 2324. With respect to the rule applying to such statutes the court said:

"The right to fish in the public waters, in the absence of express prohibitory legislation, is a right common to all of the citizens of the state; and while the Legislature has ample power to regulate the right, or grant it to one to the exclusion of others, for a limited time, at least, the statute expressing such intent must have the directness and certainty of a penal statute, or at least not be capable of a different construction, before it will be given that effect."

The court then refers to the argument in *Lindley on Mines* aforesaid, and repudiates the conclusion there reached, at the same time approving the decision in *Warnock v. De Witt*, *supra*. The right of the original locator to make a new location at the expiration of the time allowed for doing development work has also been recognized by the courts of the United States. *Lockhart v. Johnson*, 181 U. S. 528, 21 Sup. Ct. 665, 45 L. Ed. 979; *Hunt v. Patchin*, 13 Sawy. 304, 35 Fed. 818; *Leedy v. Lehfeldt*, 162 Fed. 304, 89 C. C. A. 184. See, also, *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361.

[1] We are therefore of the opinion that the question first above stated, regarding the meaning and effect of section 2324, should be answered in the affirmative. It follows that the claims of the plaintiff under relocations made by him or his predecessors in interest in the year immediately following the expiration of the time for doing the development work upon a previous location of the same ground by the same person are valid and effectual as against persons subsequently attempting to locate the same ground prior to the expiration of the period allowed by

section 2324 for development work after the date of the relocations under which plaintiff claims. This covers all of the locations claimed by the plaintiff, and supports the findings of the court in his favor, with the exception of two claims, designated as the *Stratton* and *Electric* claims, respectively. The right to these two claims depends upon other conditions, which we will proceed to discuss.

[2] The plaintiff claims ownership of the *Electric* and *Stratton* mining ground under locations thereof made on January 1, 1901, by one *Robinson*. The defendant claims the same ground under three locations, two of which were made on January 1, 1907, and the other on January 8, 1907. It is not disputed that the location of the *Electric* and *Stratton* claims were made in the manner required by the law, nor that the necessary assessment work has been regularly performed thereon in each year since the date of the location. The defendant challenges their validity on the ground that at the time the respective locations were made the ground embraced therein was not then open to entry or location, for the asserted reason that it was then covered by two valid subsisting mining claims, under locations previously made by other persons, designated, respectively, as the *Bald Eagle* claim and the *Golden Eagle* claim. Thus the question is presented whether or not the two claims last named were valid subsisting mining claims on January 1, 1901, when the plaintiff's claims were located. The finding of the court below was, in effect, that they were not on that date valid and subsisting claims. We think there is sufficient evidence to support this finding.

There was evidence showing a location of these two claims by one *Bailey* on January 1, 1896. On the question whether the required development work thereon was done for the year 1900 there is conflicting evidence. A witness for the defendant testified that he actually did work thereon to the value of \$100 in that year. A witness for the plaintiff testified that no work whatever was done on these claims during that year. According to the testimony for the defendant, a large part of the work for 1900 on the two *Eagle* claims was done upon a tunnel designed to be used for the common benefit of a group of mines, 26 in number, including the two *Eagle* claims, situated near together. None of this work was done upon either of said claims, but it was done in pursuance of a contract between the six persons who were the respective owners of the 26 claims, to the effect that they would "do the assessment work for the year 1900 upon said claims by the construction of a tunnel." The evidence showed that only 60 linear feet of the tunnel was constructed, and that its value was \$10 a foot, or \$600 in all. Apportioning this among the 26 claims, there would be only \$22 worth of work to apply to each,

The court was fully authorized, by the character of the evidence regarding this and the other work claimed to have been done upon these two claims, in concluding that work of the value of \$100 had not been done on either of them. This evidence is sufficient to show that on January 1, 1901, when the Electric and Stratton claims were located by Robinson, the Bald Eagle and Golden Eagle claims were not valid and subsisting claims, and that the ground covered by the Electric and Stratton claims was open to location for mining purposes. The finding to that effect is therefore supported by the evidence.

The defendant contends that Robinson, the original locator of the Electric and Stratton claims, was estopped to make said location, and that plaintiff is estopped to assert their validity, because of the fact that Robinson was at that time in possession of the Bald Eagle and Golden Eagle claims under an option from the owners thereof under their previous location. We are not referred to any exhibit or testimony showing the terms of the option contract. Respondent's counsel assert that it had expired prior to January 1, 1901. Under these circumstances we will assume that the court below correctly held that there was no existing option to Robinson on January 1, 1901, and that no estoppel arises therefrom.

A considerable part of the defendant's argument is devoted to the proposition that the conduct of the plaintiff and his predecessors in interest in relocating some of the mining claims described in the complaint at intervals of two years each on the 1st day of January of the respective years, without doing any assessment work in the meantime, was made in pursuance of a conspiracy to defraud the government and other persons who might be desirous of locating the ground covered thereby as mining claims in their own behalf. It is sufficient to say that under the construction we give to section 2324, as above set forth, the United States has by its laws consented to the conduct which it is claimed constitutes the fraud, and consequently such conduct could not amount to fraud either upon the United States or persons desiring to claim under it.

The judgment is affirmed.

We concur: SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

186 Cal. 736

BIRCH et al. v. ORANGE COUNTY.
(L. A. 6018.)

(Supreme Court of California. Aug. 29, 1921.)

1. Taxation $\S$ 40(8)—Property must be assessed on uniform valuation.

A taxpayer is entitled to have his property assessed on the same basis of valuation as

that applied to other property of like character and similarly situated; inequality of taxation being produced as surely by inequality of valuation as by inequality of the rate of tax.

2. Taxation $\S$ 459—Assessment conclusive, in absence of disregard of law or fraud.

The decision of a taxing board as to the value of property and the fairness of an assessment, constitutes a judgment of a tribunal created by law for the determination of that question, which cannot be avoided unless the board has proceeded arbitrarily and in willful disregard of law, with the evident purpose of imposing unequal burdens on certain of the taxpayers, or unless there is something equivalent to fraud in their action.

3. Appeal and error $\S$ 927(3)—All evidence favorable to plaintiff to be taken as true on nonsuit.

On appeal from a judgment of nonsuit, all evidence in favor of plaintiff must be taken as true, and all evidence in conflict therewith must be disregarded, and every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of plaintiff, and where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to plaintiff.

4. Taxation $\S$ 459—Grossly excessive overvaluation constructively fraudulent.

A grossly inequitable and palpably excessive overvaluation of property for taxation may be held constructively fraudulent.

5. Taxation $\S$ 543(2)—Verified claim before suit to recover taxes paid under protest unnecessary.

Presentation to the board of supervisors of a verified claim is not necessary before suit to recover taxes paid under protest, under Pol. Code, §§ 3819, 4075, 4078, in view of section 3804, even though permissible for the board to make payment on a verified claim in such cases.

In Bank.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Consolidated actions by A. Otis Birch and others, as copartners doing business under the firm name and style of the Birch Oil Company, against the County of Orange. From a judgment of nonsuit, plaintiffs appeal. Reversed.

See, also (App.) 195 Pac. 931.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for appellants.

L. A. West and W. F. Menton, both of Santa Ana, and A. P. Nelson, of Los Angeles, for respondent.

SLOANE, J. These consolidated actions were brought by the plaintiffs against the county of Orange to recover first and second installments of taxes paid under protest, un-

der the provisions of section 3819 of the Political Code. The complaints in both cases charge the county assessor and the county board of equalization with having acted arbitrarily and fraudulently in fixing a disproportionate and excessive valuation upon the property of the plaintiffs. Upon the trial, and after the plaintiffs had rested their case, the trial court made its order granting a judgment of nonsuit. This appeal is from the judgment.

The two suits covered, respectively, the first and second installments of state and county taxes for the year 1916. The assessment and levy were upon 20.16 acres of oil land in Orange county, the property of plaintiffs. The assessment complained of placed a valuation of \$645,120 upon this tract. Following a hearing before the board of equalization, the above assessment was reduced to \$600,000. The amount of taxes levied and paid under protest, and sought to be recovered in these actions, is \$19,143.94.

The fact upon which appellants chiefly rely to maintain their allegations of an unfair, unjust, excessive, and exorbitant assessment, and of willful and fraudulent discrimination on the part of the assessor and board of equalization, is the extravagant disparity between the assessed valuation placed upon this tract and that upon adjacent lands of the same quality and value. The undisputed evidence on this point is such as to justify the expression "astounding," which was used by the trial judge who granted the judgment of nonsuit. The difference in valuation is, indeed, so astonishing, excessive, and unaccountable as to impress upon the transaction a very strong inference of discrimination, unfairness, and oppression, either through design or through such gross error or negligence as to amount to the "equivalent of fraud."

The evidence of plaintiffs presented on the hearing before the board of equalization, and on the trial, discloses that this tract is surrounded by other oil lands almost identical in character, development, production, and value, compared acre for acre of proved and producing oil lands alone, which, under the same assessment, were valued at a rate from 10 to 15 times less than was placed on plaintiffs' lands. The trial judge reviewing the evidence makes this further statement:

"There is no question that there has been a great disparity in assessing these properties by the assessor, and that the assessor has placed a valuation on plaintiffs' property out of all proportion with other contiguous properties similarly situated approximately of the same value per acre."

We take the following summary of the proved facts from appellants' opening brief, as it appears to conform to the evidence, and the accuracy of the statements is not questioned by the reply brief of respondent:

"The property of the Birch Oil Company [the appellant] in said field consists of 20.16 acres of oil land. It will be noted by reference to said Exhibit No. 14 that said property is surrounded by other developed oil lands owned by other companies. The record shows that the Fullerton Oil Company owns 61.52 acres of oil land adjoining the Birch property on the west; the Crown of the Valley Oil Company owns 108.91 acres of oil land under lease to the Columbia Oil Producing Company, adjoining the Birch property on the north; the Brea Canyon Oil Company owns 203 acres of oil land adjoining the Birch property on the east; and the General Petroleum Company owns 80 acres of oil land adjoining the Birch property on the south. Immediately east of the property of the Brea Canyon Oil Company, and adjoining the same, the Union Oil Company owns 670.89 acres of oil land.

"It also appears that all of the Birch Oil Company property, 20.16 acres, is proven oil land; that of the 61.52 acres belonging to the Fullerton Oil Company approximately 25 acres are proven oil land; that from 17 to 20 acres of the 108.91 acres owned by the Crown of the Valley Oil Company are proven oil land; that about 60 acres of the 203 acres owned by the Brea Canyon Oil Company are proven oil land; that of the 80 acres belonging to the General Petroleum Company about 15 acres are proven oil land; that approximately 500 acres of the 670.89 acres owned by the Union Oil Company are proven oil land. By 'proven oil land' is meant that the acreage specified has been proven by wells already drilled thereon to be oil-bearing and oil-producing land.

"On the first Monday in March, 1916, the day on which the assessment in question was made by the county assessor of Orange county, there were 9 producing wells on the Birch property, yielding a total monthly production of 44,686 barrels of oil [Tr. pp. 273-275]; there were 9 producing wells on the proven 25 acres of the Fullerton property, yielding a total monthly production of 47,154 barrels of oil [Tr. pp. 239-244]; there were 5 producing wells on the proven 17 acres of the Crown of the Valley or Columbia property, yielding a total monthly production of 31,724 barrels of oil [Tr. pp. 252-254]; there were 23 producing wells on the proven 60 acres of the Brea Canyon property, yielding a total monthly production of 48,619 barrels of oil [Tr. pp. 262-266]; there were 19 producing wells on the proven 500 acres of the Union Oil Company property, yielding a total monthly production of 59,987 barrels of oil [Tr. p. 308]; and there were 8 producing wells on the proven 15 acres of the General Petroleum property, yielding a monthly production of 28,124 barrels of oil [Tr. p. 199]. The evidence clearly shows that the oil produced from these various properties is of about the same quality and quantity, and that the formation and general geological structure, as well as the depth of the oil sand and the drilling conditions and all other surface and underlying features of the properties, are remarkably uniform and similar throughout the entire Brea Oil Field in which the properties referred to are located [Tr. fols. 927-1014; also fols. 1231-1283].

"The assessor of Orange county placed valuations upon the above respective properties for

assessment purposes for the year 1916-1917, as follows:

Birch Oil Company, 20.16 acres, valued at	\$645,120 00
Fullerton Oil Company, 61.52 acres, valued at	34,915 00
Crown of the Valley Oil Company, including leasehold interest of the Columbia Oil Producing Company, 108.91 acres, valued at	132,645 00
Brea Canyon Oil Company, 203 acres, valued at	130,000 00
General Petroleum Company, 80 acres, valued at	48,000 00
Union Oil Company, 670.89 acres, valued at	244,525 00
Total value of properties, exclusive of the Birch property.....	\$590,085 00"

It will be observed that the assessment on this 20.16 acres of the appellants' land exceeds by \$55,000 the assessment of the entire 1,123.43 acres of the adjoining oil properties, comprising 617 acres of proven or tested oil lands, and producing monthly 215,608 barrels of oil of like character as against 44,686 barrels from the plaintiffs' property. The only change made in these assessments by the board of equalization was a reduction of \$45,000 on plaintiffs' lands, and an aggregate increase of \$59,490 on the remaining 1,123 acres. The assessor testified that the basis of his real estate assessments throughout the county was one-third of its cash value; that in assessing oil properties he took into consideration the average production of oil for the three months next preceding March 1st; that he considered in each case the gravity of the oil, the water content, the drilling conditions, the portion of the land actually proven to be oil-bearing, as well as the unproven portion of the land and the cost of developing the property past and present, and probable future production of the property.

All of these elements of value are substantially covered in plaintiffs' evidence and on the very basis used by the assessor, the excessive and unreasonable disparity between the assessments upon plaintiffs' lands and others of like value and similarly situated is so obvious and inconsistent with any theory of fair dealing that it cannot be reconciled on the mere presumption that the assessor and board of equalization did their duty as they saw it. In the absence of any explanation or justification for this inequality (and there is none offered) it stands out so glaringly and out of all reason that of itself it raises an inference of bad faith.

[1, 2] What the taxpayer is entitled to is the exercise of good faith and fair consideration on the part of the taxing power in assessing his property, at the same rate and on the same basis of valuation as that applied to other property of like character and similarly situated. Inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax. *Los Angeles Gas & Elec. Co. v. County of Los Angeles*, 162

Cal. 164, 121 Pac. 384, 9 A. L. R. 1277. It is true, as said in the decision last cited:

"The board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question," and that this adjudication "cannot be avoided unless the board has proceeded 'arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers,' * * * or unless there be something equivalent to fraud in the action of the board."

See, also, *So. Pac. Land Co. v. County of San Diego*, 191 Pac. 931.

[3] In the case before us the board of equalization reviewed the action of the assessor and made a reduction of \$45,000 in the assessments, but, in view of the evidence of comparative values presented on the hearing, its action only emphasizes the apparent lack of consideration given to an equitable equalization of the tax. This appeal is from a judgment of nonsuit and—

"All the evidence in favor of plaintiffs must be taken as true, and all the evidence in conflict therewith must be disregarded. 'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor' of the plaintiff and where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If with all these aids the evidence is in such condition that a verdict or decision in favor of plaintiff would be held by an appellate court to have sufficient legal support in the evidence, a nonsuit should not be granted." *Davis v. Crump*, 162 Cal. 513, 123 Pac. 294; *Freese v. Hibernia Sav. & Loan Soc.*, 139 Cal. 392, 73 Pac. 172; *Goldstone v. Merchants', etc., Co.*, 123 Cal. 625, 56 Pac. 776.

[4] "A grossly inequitable and palpably excessive overvaluation" of property for taxation may be held constructively fraudulent. *First Thought Gold Mines v. Stevens County*, 91 Wash. 437, 157 Pac. 1080; *Southern Or. Co. v. Coos County*, 39 Or. 185, 193, 64 Pac. 646; *Danforth v. Livingston*, 23 Mont. 558, 562, 59 Pac. 916; *Olympia Water Works v. Gelbach*, 16 Wash. 482, 48 Pac. 251; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, 609; *Keokuk & H. Bridge Co. v. People*, 161 Ill. 514, 44 N. E. 206; *People's Gaslight Co. v. Stuckart*, 286 Ill. 164, 121 N. E. 629.

[5] Respondent seeks to justify the nonsuit in this case on the ground that it was necessary that plaintiffs should have presented their claim or demand to the board of supervisors under the provisions of section 4075 of the Political Code before commencing suit. It would appear from the opinion of the learned judge who tried the case that his de-

cision was largely influenced by this contention. We do not reach the same conclusion. Section 4075 does not purport to declare what claims shall be presented to the board of supervisors as a prerequisite to bringing suit, but prescribes the manner in which certain claims shall be itemized and presented before the board may pass upon them. It requires that the board shall not—

"credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and when, character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor."

These are not particulars which would seem to relate to the sort of demand sued on in this action. Section 4078 of the same Code, which provides when claimants may sue on demands under section 4075, provides that on failure or refusal or neglect of the board to allow or reject a claim for a period of 90 days the claimant may treat it as rejected and sue the county therefor at any time within 6 months after the final action of the board. Section 3819, providing for the recovery of taxes paid under protest, under which this action is brought, makes no reference directly or indirectly to any demand upon the board of supervisors, but provides that after the disputed taxes have become payable, and are paid under written protest, the protesting taxpayer may at *any time within six months after such payment* bring his action against the county. (Italics ours.)

If he must first present his claim to the board of supervisors it is plain that he is precluded from bringing suit at "any time" after payment, and that he could not have the full 6 months after such payment in which to commence his action. It was held in *Clear Lake W. W. Co. v. Lake County*, 45 Cal. 90, under a special statute for recovering damages from a county for property destroyed by a mob, that the limitation of the time to bring action to 6 months negated any presumption that the Legislature meant to require the claim to be presented to the board of supervisors before suit was begun. The reason, moreover, for a previous claim and demand upon the supervisors would seem to be lacking in this class of demands, as the facts upon which they are based must necessarily already have been considered and passed upon by the supervisors as a board of equalization. *Henne v. County of Los Angeles*, 129 Cal. 297, 61 Pac. 1081.

Farmers' & Merchants' Bank v. Los Angeles, 151 Cal. 655, 91 Pac. 795, cited by respondent, was an action brought to recover taxes paid to the city of Los Angeles under protest, and it was there held that the claim should have been presented to the city council be-

fore suit was commenced. But that decision was in pursuance of an express provision of the Los Angeles charter that—

"No suit shall be brought for any claim for money or damages against the city of Los Angeles * * * until a demand has been presented as herein provided and rejected in whole or in part. * * *"

That action was not brought directly under the state law, but under a similar ordinance of the city of Los Angeles, which, of course, was subject to the limitations of the city charter. Under earlier decisions in this state the same rule was applied in suits against a county, but these decisions were under a statute which expressly required such presentation to be made to the board of supervisors in all cases before action could be maintained. *McCann v. Sierra County*, 7 Cal. 121; *Alden v. Alameda County*, 43 Cal. 272; *Rhoda v. Alameda County*, 52 Cal. 350; *Keyes v. San Francisco*, 177 Cal. 313, 319, 173 Pac. 475. We have no such sweeping requirement at the present time which would hold against a reasonable implication under a special statute to the contrary.

In *Western Ranches v. Custer County* (C. C.) 89 Fed. 577, it was held, under an enactment in Montana similar to section 3819 of our Code, that the statute provided a special remedy as to taxes paid under protest, and that a condition to bringing suit, not named in the statute, was not required, and that therefore the claim did not require presentation before suit.

In addition to the foregoing reasons for holding that the presentation of a claim to the board of supervisors is not necessary, attention may be called to the fact that section 3804 of the Political Code, amended in 1913 by the same Legislature that amended section 3819 of the Political Code (Stats. 1913, p. 228, § 3804, and Stats. 1913, p. 948, § 3819) provided two different methods for the recovery of taxes paid. Section 3804 of the Political Code authorized boards of supervisors to return—

"any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor as to the excess in such cases, or any taxes heretofore or hereafter paid upon an erroneous assessment of improvements on real estate not in fact in existence when said taxes became a lien, may, by order of the board of supervisors, be refunded by the county treasurer. * * * No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor verified by the person who has paid said tax, * * * which said claim must be filed within three years after the making of the payment sought to be refunded. * * *"

No similar provision is contained in section 3819. There is no authorization to the board of supervisors to refund taxes recoverable under section 3819 and no provision for the filing of a verified claim for the recovery thereof. The fact that in section 3804 express provision is made for the filing of a verified claim for the recovery of taxes so paid is an indication that the Legislature did not consider that section 4075 included such a claim. In view of the express authorization in section 3804 to the supervisors to refund such taxes erroneously or illegally collected as therein specified, and the omission of a similar provision in section 3819 of the Political Code, it would seem clear that the filing of such a claim was not necessary under the provisions of section 3819 of the Political Code, even if it is permissible for the board of supervisors to make such a payment upon a verified claim in cases where the tax sought to be recovered comes within the purview of both cases. In such cases the remedy provided by the two sections is cumulative. *Stewart, etc., Co. v. County of Alameda*, 142 Cal. 660, 665, 76 Pac. 481; *Brenner v. City of Los Angeles*, 160 Cal. 72, 78, 116 Pac. 397; *Connelly v. City and County of San Francisco*, 164 Cal. 101, 103, 127 Pac. 834. See, also, *Perrin v. Honeycutt*, 144 Cal. 87, 77 Pac. 776.

In this case, the tax being void, section 3819 applies, and suit is authorized without presentation of a verified claim.

The judgment is reversed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; LAW-LOR, J.

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187 Cal. 15

NUSBICKEL et al. v. STEVENS RANCH CO.
(L. A. 6550.)

(Supreme Court of California. Aug. 31, 1921.)

1. Boundaries ⚡46(3)—Boundary established by agreement and acquiescence, where parties were uncertain as to the true location.

When two adjoining owners of land, being uncertain as to the true location of the boundary lying between their contiguous land, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the period of the statute of limitation, or under such circumstances that substantial loss will be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location as it may appear by subsequent measurements, and notwithstanding that the true position of the dividing line could always have been determined by a correct measurement or by a survey.

2. Boundaries ⚡46(3)—That adjoining owners did not intend to claim land beyond true line held not to preclude them from claiming to agreed line.

The fact that adjoining owners did not intend to claim beyond the true line does not preclude them from claiming to a line which for more than the statutory period of limitations had been the agreed boundary.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Frederick Henry Nusbickel and others against the Stevens Ranch Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Nicols, Cooper & Hickson, of Pomona, for appellant.

Newmire & Watkins, of Los Angeles, for respondents.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiffs in an action by the plaintiffs against the defendants to quiet their title to a strip of land lying along the eastern side of the land in their possession.

The real point in dispute at the trial was the location of the dividing line between the plaintiffs' land on the west and the defendants' land on the east. Plaintiffs' land is a part of the southeast quarter of section 34, township 14 north, range 9 west, in Los Angeles county. The defendants' land is the north half of the southwest quarter of section 35 in said township and range. These sections join each other, section 35 being the easterly of the two. The common boundary line between them would be the common boundary line between the lands of the plaintiffs and defendants, respectively. The true line between the sections, according to private resurveys of the official government survey, is the line now claimed as the boundary line by the plaintiffs. The defendants, owning the tract on the east, claim up to a line situated west of that claimed by the plaintiffs, and which has been treated and considered as the dividing line between the two parcels for more than 30 years prior to the beginning of the action. The distance between the two lines is 11.35 feet at the south end and 32.2 feet at the north end.

[1] The law on the subject of agreed boundaries differing from the true line is well settled by the decisions of this court. When two adjoining owners of land, being uncertain as to the true location of the boundary line between their contiguous land, "agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in

such location for a period equal to [the period of] the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements." *Young v. Blakeman*, 153 Cal. 481, 95 Pac. 890; *Loustalot v. McKeel*, 157 Cal. 640, 108 Pac. 707; *Price v. De Reyes*, 161 Cal. 484, 119 Pac. 893; *Silva v. Azevedo*, 178 Cal. 495, 173 Pac. 929.

The fact that the true position of the dividing line "could always have been determined by a correct measurement," or by a survey, does not prevent there being an uncertainty, within the meaning of this rule, in the minds of the parties as to the position of the line on the ground. "This condition exists in virtually every case in which the aid of the rule is sought." *Silva v. Azevedo*, 178 Cal. 498, 173 Pac. 930; *Loustalot v. McKeel*, 157 Cal. 641, 108 Pac. 707; *Price v. De Reyes*, 161 Cal. 489, 119 Pac. 893.

The land claimed by the plaintiff was originally in the possession of one Marjory Shuler, who entered the same as a homestead about the year 1879. Her death occurred a year or two thereafter, and thereupon her son, Eli W. Shuler, occupied the premises as an entryman under the United States, and subsequently obtained the patent therefor. He remained in possession thereof until 1915, when he conveyed the land to the plaintiffs. The land claimed by the defendants was in the possession of one Cunningham as a pre-emptioner in the year 1880, and in the year 1883 he sold his claim to John A. Stevens, who afterwards received a patent from the United States under his claim as pre-emptioner. When Stevens got possession of the land on the east he put up a fence on the line marked as hereinafter stated. From 1883 until 1917 Stevens and his successors in interest, the defendants herein, occupied the premises, and used and cultivated the same on the easterly side of the fence, and Eli W. Shuler occupied, used, and cultivated the land on the westerly side of the fence until 1915, when he conveyed the same to plaintiffs, and thereafter, until 1917, plaintiffs occupied and used the land up to said fence, but no further, and they did not claim title east of said fence until the year 1917.

The court found that Marjory Shuler, while she was in possession under the United States, employed some person to make a survey to establish a dividing line between the land so occupied by her and that so occupied by Stevens' predecessor in title, and thereupon caused furrows to be plowed along the line of stakes set up by the person employed to make said survey, and that said Stevens'

immediate predecessor in title inspected the same and acquiesced in their location; also, that more than 30 years ago a fence was built by Stevens along a part of the line so located as aforesaid, and that thereafter plaintiffs' predecessor, Eli W. Shuler, completed a portion of the same; that thereafter said fence was kept in repair by the respective occupants on both sides thereof, and that it has ever since remained on the line upon which it was originally constructed; that said fence was recognized and accepted by both Stevens and Shuler "so long as they remained the occupants and owners of their respective properties, and was treated by them as being on the line between their respective properties, and each of them occupied and cultivated and farmed the lands on their respective sides of said fence up to the same"; and that said Stevens and Shuler, "so long as they remained the owners of their respective properties, believed that said fence was located upon the true line."

The findings also state that the line so located was not the true location of the section line as laid out by the government surveyors, and that the surveyor employed by Marjory Shuler did not mark the true division line between said sections. The findings also state that there was not at that time any uncertainty in the true location of said line, but that "solely by and through the mistake of said surveyor the said true east line of said section 34 was not ascertained by the plaintiffs' predecessors, or themselves until the year 1917," at which time a new survey disclosed the error. There is another finding that the strip of land between the true section line as subsequently ascertained "and the fence so built and maintained as aforesaid has been, for a long time past, cultivated by the defendants, but that said cultivation was done solely through a mistake in the locating of the said fence line aforesaid, and not otherwise. The court finds that it has never been the intention of the plaintiffs and their predecessors to claim anything east from the east line of said section 34, and that it has never been the intention of the defendants to ever claim any land west of said east line of section 34."

It will be observed that all the findings aforesaid, except the one last mentioned and the one to the effect that there was no uncertainty in the line, bring the case precisely within the rule set forth in the authorities heretofore cited.

The finding that "there was no uncertainty in the true location of the said east line of section 34," at the time the survey was made for Marjory Shuler, must, in view of the other findings, be understood merely as a statement of the abstract proposition that it was possible to ascertain the true location

GUARANTY LOAN CO. et al. v. TREADWELL et al. (Civ. 3905.)

(District Court of Appeal, First District, Division 1, California. July 15, 1921.)

thereof by a correct resurvey of the line as marked by the government surveyors. This finding is immaterial in the application of the doctrine under consideration. The word "uncertainty" is used in the statements of the rule in the decisions to convey the idea that at the time of the location of the division line neither of the coterminous owners knew the true position of the line on the ground. In *Sneed v. Osborn*, 25 Cal. 626, in which the doctrine was first laid down in this state, the word "uncertainty" is not used. Even if the parties knew the position of the government monument at the southeast corner of the section, it would not necessarily follow that they knew the position of the line at a point a quarter of a mile north of that monument, especially where, as in this case, the ground between the north and the south ends of such section line is mountainous and extremely rough and steep. It should be remembered, in applying the doctrine, that it is only resorted to where the line agreed on is different from the true line. It is this fact that creates the necessity for the doctrine. 9 Cor. Jur. 231. The belief of the parties for the long period of 30 years following the location as shown by the findings, is a sufficient reason for the application of the doctrine, so far as that state of mind is essential thereto. The fact that it was founded on a mistake always appears, and must appear, else there would be no occasion to invoke the doctrine.

[2] The facts, as found, that the plaintiffs and Shuler never intended to claim anything east of the true section line, and that the defendants never intended to claim anything west of the true section line, may have been taken by the learned judge of the court below to have the effect of nullifying the doctrine above stated concerning the agreed boundary, since otherwise he could not have given judgment for the plaintiffs in the action for the strip of land in controversy. This intention, however, is entirely consistent with the doctrine of agreed boundaries. Having agreed upon the line as the true line, and believing that it is, it follows that neither one would intend to claim any land beyond that line, unless he was dishonest in making the agreement. The finding is therefore wholly without effect to justify the conclusion of law that plaintiffs are the owners of the strip of land in controversy. Our conclusion is that the judgment in favor of the plaintiffs was not justified by the findings.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

1. Corporations ⇨ 283 (1) — Stockholders' meeting and election of directors shown valid.

Evidence, in mandamus by a corporation against its ousted directors and officers, *held* to show that a meeting of the stockholders of another corporation, the beneficial owner of the stock of the first corporation, was valid, and consequently that the election thereof of a board of directors was regular and valid, so that any subsequent proceedings by the prior board, including the attempted removal of the office of the company, was a nullity.

2. Corporations ⇨ 194—Nominal stockholders cease to be entitled to notice of meeting after demand by beneficial owner for transfer of certificate.

Where the beneficial ownership of all the stock of the L. company was in the E. company, but certificates for 3 shares were issued, 1 to each of three persons, solely to enable them to act as directors of the L. company, they ceased to be stockholders in name in the L. company, and so were not entitled to notice of a subsequent meeting of the stockholders thereof, when pursuant to resolution of the directors of the E. company demand was made on them that they transfer the certificates to certain others; and this though they refused to make the transfer.

3. Corporations ⇨ 194—Notice of stockholders' meeting unnecessary, where all the real stockholders are present and acting.

Notice of stockholders' meeting required by statute is for the benefit of the real stockholders, and so is unnecessary where they are all present and acting.

Application by the Guaranty Loan Company and another for writ of mandate to James W. Treadwell and another. Peremptory writ ordered.

A. E. Shaw and Edwin H. Williams, both of San Francisco, for petitioners.

Fabius T. Finch, of San Francisco, for respondents.

PER CURIAM. Application for a writ of mandate to compel respondents to deliver over to petitioners papers, seals, and other documents belonging to the above-named corporation.

It is alleged that the company has issued an outstanding capital stock of 324 shares, of which amount 321 shares thereof are in the name of the Goewey Estate Company, the others being issued in three certificates for 1 share each, in the names of James W. Treadwell, Bernard E. Tormey, and R. H. Briare, respectively. These latter shares, it is recited, were issued for the sole purpose of qualifying the person in whose name it

stood to act as a director of the corporation, and for no other purpose, the beneficial ownership in the entire stock being in the Goewey Estate Company, which is a holding concern for its subsidiary, the Guaranty Loan Company.

On or about the 16th day of April, 1921, the Goewey Estate Company, by and through resolution duly passed, called a meeting of the board of directors of that concern, and at such meeting ordered and directed that the three certificates for 1 share of stock each in said Guaranty Loan Company standing in the names of the persons aforesaid be canceled and reissued in the names of Edwin H. Williams, Chalmer Munday, and Ernest Gendotti, and that thereafter and prior to April 23, 1921, written demand was served on respondents by said Goewey Estate Company, demanding that respondents transfer said certificate of stock in accordance with said resolution, but that they neglected and refused to comply with such demand, and still do so.

By further allegation it appears that on April 20, 1921, the Goewey Estate Company called a meeting of that concern, and at such meeting ordered and directed that a stockholders' meeting of the Guaranty Loan Company be called at its office located at 607 Bank of Italy building, San Francisco, for the purpose of ousting the board of directors of the Guaranty Loan Company, and electing a new board in its place. At this meeting Edwin H. Williams was duly authorized and empowered to vote the stock of the Goewey Estate Company in the Guaranty Company for the purpose of ousting the old board of directors and electing a new board in its place. Accordingly, on April 25, 1921, a meeting was held, at which time there appeared and was present Edwin H. Williams, said Williams being present as proxy and attorney in fact for the Estate Company, and Williams, Munday and Gendotti representing the remaining 3 shares of the outstanding stock of the Guaranty Company. Notice of the time and place of the meeting was waived, and consent to the holding of such meeting was given in writing by all the stockholders of the company represented as aforesaid. Thereupon, by resolution, Treadwell, Tormey, and Briare were ousted as directors and officers, and Williams, Munday, and Gendotti were chosen in their place. Immediately thereafter Williams was elected president and Munday secretary and they ever since have been and now are the duly acting president and secretary of such company. At this last-mentioned meeting a resolution was passed, instructing the president to demand and receive the books, records, papers, and seal of the corporation, and empowering him to do any and all acts necessary to procure possession of the same. Then follow allegations of demand on respondents for the rec-

ords and their refusal to comply therewith, which are followed by allegations that petitioners will suffer damage in consequence of such refusal.

Respondents by their return deny that the office of the Guaranty Loan Company was or is now located at the place mentioned, and allege in this connection that on April 12, 1921, and at all times subsequent thereto, it was and is located at the Hotel Wilson, No. 125 Mason street, and except as to the beneficial ownership of all of the stock of the Guaranty Loan Company being in the Goewey Estate Company, the allegations of the petition hereinabove enumerated, are denied. They further plead that no notice was ever given to them or R. M. Briare of any alleged or called meeting of the Guaranty Loan Company, notwithstanding, as they assert, that they and Briare were and had been continuously for more than ten days prior thereto stockholders of record of said company, and that no notice of any meeting was ever given as required by sections 301 or 310 of the Civil Code, or otherwise.

[1] The case is another of the many actions brought by the Goewey Estate Company and its subsidiary companies involving their internal management. It appears from the record that Williams and Gendotti, who control the new board of directors of the Goewey Estate Company, own out of the 1,000 shares of the issued stock of that corporation 598 shares thereof, and that respondents own 50 shares, and further, that all of the capital stock of the Guaranty Loan Company is owned by the Goewey Estate Company. The situation is thus presented of the minority stockholders seeking to control the affairs of the involved corporations. The solution of the situation depends for the most part upon the validity of the meeting of the Goewey Estate Company in April, 1921. A review of those proceedings therefore becomes necessary. It appears in evidence that a stockholders' meeting of that company was held on the 11th day of April, 1921, at its place of business, 607 Bank of Italy building, San Francisco. On that day the meeting was called to order by Treadwell, the then president of the company, and B. B. Tormey acted as secretary. The roll of stockholders being called, Williams answered as being the holder of 349 shares of the capital stock of that company and Gendotti answered as holding 249 shares, Tormey as holding 1 share and Treadwell as holding 50 shares.

Immediately after the calling of the meeting, Treadwell presented to Gendotti a restraining order issued in an action pending in the superior court by the Goewey Investment Company, another subsidiary concern of the Goewey Estate Company. This order restrained Gendotti from voting his stock at the meeting, the ownership of which was questioned in the action referred to. Upon

receiving the injunction, all parties seem to have been under the impression that the writ was directed against the meeting, and that an adjournment was necessary. Upon examining the order, however, Williams ascertained therefrom that such was not its purpose, and he thereupon announced that, a quorum being present, the meeting could proceed to the election of a board of directors. He then opposed a motion to adjourn put by Treadwell, but his right to do so was denied. Williams appealed from this ruling, voting his 349 shares of stock in support thereof, which shares constituted a majority vote. Notwithstanding this action on the part of Williams, Treadwell declared the meeting adjourned, Williams voting his stock against such adjournment. Treadwell and Tormey then left the meeting. Williams thereupon nominated himself chairman, and nominated and elected himself, Gendotti, and Tormey as directors, voting his majority stock in both instances. The meeting was then adjourned until April 16, 1921. The injunction in the meantime had been dissolved. The adjourned meeting was held, and the election of directors had on the meeting of April 11, 1921, was confirmed, Williams and Gendotti voting their 598 shares in favor of a resolution to that effect. To save all question and out of precaution, a new election was again held at this adjourned meeting, both Williams and Gendotti voting their stock for the same directors elected previously. From this evidence we think it clearly appears that the meeting of April 11, 1921, was a valid one, and that the election of the Williams board at that time was consequently regular and valid. This being so, any subsequent proceeding had by the Treadwell board, including their attempted removal of the office of the company, was a mere nullity.

[2, 3] We are of the further opinion that the evidence shows that the members of the Treadwell board received the demands made by the Williams board to transfer the stock held by them in the Guaranty & Loan Company, in accordance with the resolution of that company. Upon receiving these notices respondents ceased to be stockholders in name in the company, and were therefore no longer concerned with its management, and they were not entitled to notice of the meeting held by it on April 25, 1921, of the absence of which they complain. Even assuming that the giving of notice of such meeting was necessary, where, as here, all of the stock was present and represented, they owned no beneficial interest in the stock, and were therefore not such parties who could complain. See 14 Corpus Juris, p. 894. Statutes requiring notice are for the benefit of the real stockholders, and this necessity does not arise when all are present and acting. Thompson on Corporations, p. 1009, § 824. Nor does the fact that respondents refused

to make the transfer avail them. Their refusal was wrongful, and they cannot profit thereby. Guaranty Loan Co. v. Fontanel, 190 Pac. 177.

Further discussion is unnecessary. It is ordered that a peremptory writ of mandate issue, commanding respondents to turn over to petitioners the records, papers, seal, and other documents belonging to said corporation petitioner.

53 Cal. App. 568

MARKS v. JOS. H. RUCKER & CO.
(Civ. 3794.)

(District Court of Appeal, First District, Division 2. California. July 16, 1921.)

1. Principal and agent ⇨ 136(1)—Agent not liable if party dealing with him had actual knowledge of principal's identity.

To relieve an agent from liability to one dealing with him, it is sufficient that such person have actual knowledge, however acquired, of the identity of the principal.

2. Brokers ⇨ 106—Buyer, seeking to recover purchase money paid to agent, must sue principal.

Whether or not an agent to whom was paid a sum of money to be applied on the purchase price of an apartment belonging to his principals paid over such sum to them, the remedy of the buyer, seeking to recover such amount, on rescinding the contract, because of the agent's false representations, is against the principals, not the agent, in the absence of proof that they were undisclosed, or that the parties intended to rely on the agent's personal responsibility; such amount being the property of the sellers regardless of whether it had been actually paid over to them at the time of the action.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Abram M. Marks against Jos. H. Rucker & Co. Judgment for plaintiff, and defendant appeals. Reversed.

Lent & Humphrey, of San Francisco, for appellant.

Joseph E. Bien, and Abram M. Marks, both of San Francisco, for respondent.

LANGDON, P. J. This is an action by the assignee of Mrs. K. F. Merrill and Mrs. O. J. Schwab to recover \$500, alleged to be money had and received by the defendant for the use and benefit of said assignors.

The facts of the case are: Mrs. Schwab and Mrs. Merrill had agreed to become partners in the enterprise of purchasing a furnished apartment house in San Francisco. Mrs. Merrill had been negotiating with the defendant company, as agent, for the purchase of various apartments in the city, and had made offers upon some of these and de-

posited sums of money in accordance with such offers, all of which offers had been rejected by the owners, and on that account her various deposits had been returned to her from time to time. Mrs. Merrill discussed with Mr. Chambers, who was acting for the defendant company, the matter of the purchase by her of the Martinique Apartment House in San Francisco. Mr. Chambers testified that Mrs. Merrill told him at that time that she was thoroughly familiar with this apartment house, and had been through it with another agent, but wished to deal with the defendant company, and in order to avoid liability for commissions to the first agent she desired the contract to be signed by her partner, Mrs. Schwab, and not by herself. Mrs. Schwab corroborates this testimony of Mr. Chambers, testifying to substantially the same facts with relation to this matter. The contract was accordingly taken to Mrs. Schwab by the agent, and she signed it. Mrs. Merrill gave her check for \$500 as a deposit upon the purchase price. Mr. Chambers also testified that Mrs. Merrill discussed with him the reasons why the sellers, Mesdames Splane and Warford, were selling their property. He stated that Mrs. Merrill was aware that the sale was being made because of a disagreement between said owners, and was thoroughly informed about the condition of the property and of its furnishings. Mrs. Merrill contradicts this testimony in part, and states that at the time of making the deposit she had only seen the portion of the apartment house which was occupied by the manager's office. She testified that she had gone to this office with a friend. She was asked:

"Up to that time (the time of making the deposit) had you seen the house other than a visit to the owners of the apartment? A. No, I had not."

She also testified that when Mr. Chambers first spoke to her of this apartment house she told him that she "had been in the house a few days previously with a lady who was calling on one of the managers; I was in the manager's apartment only." She was asked in her deposition if Mr. Chambers had said anything to her about seeing the house. She answered:

"No. * * * Q. Did you ever see that house? A. I saw it afterwards. Q. When? A. First with Mrs. Schwab and Mr. Bernhard. Q. That is the first time? A. Yes, after going in with a lady to call on the owner of the building in her apartments."

From the foregoing it appears that Mrs. Merrill had visited the owner and manager of the building before Mr. Chambers began his negotiations for the sale of the property, and must have been aware of the identity of the principal for whom the agent was dealing. Furthermore, Mr. Chambers testified positively that he had told Mrs. Merrill who

were the owners of the Martinique Apartments, and this statement is nowhere contradicted in the record.

[1] It therefore appears that plaintiff's assignors were informed by the agent of the names of its principals. But even though we were to assume that the names of the principals were not actually disclosed to the purchasers by the agent, nevertheless it is apparent from the record that the identity of such principals was known to the purchasers from Mrs. Merrill's previous visit to the owner of the apartment house, and that they contracted with the defendant merely as an agent. To relieve the agent of liability, it is sufficient that the other contracting party have actual knowledge of the identity of the principal; it is immaterial how such knowledge was acquired. *Chase v. Debolt*, 2 Gilman (Ill.) 371; *Forrest v. McCarthy*, 30 Misc. Rep. 125, 61 N. Y. Supp. 853; *Johnson v. Cate*, 77 Vt. 218, 59 Atl. 830.

There is absolutely no evidence in the record that the defendant dealt with plaintiff's assignors as a principal, or that the parties intended that he should be held personally liable. On the contrary, the offer contained in the letter signed by Mrs. Schwab, which was later accepted by the owners of the apartment, and became the contract of purchase, was addressed to "Jos. H. Rucker & Co., Agent," and stated, "I hereby offer to purchase through you as agent. * * *"

[2] It is claimed in the present action that the plaintiff's assignors rescinded this contract of purchase because the furnishings of the house were not as represented by the defendant, as agent of the owners. The testimony concerning the condition and value of the furniture was conflicting, and it would be improper to discuss it here, because of the fact that, under our view of the case, a retrial will be necessary, at which time the testimony upon this question may vary somewhat from the testimony in the present record. But, merely for the purposes of this opinion, let us assume that the testimony shows facts warranting a rescission of the contract. Under such circumstances, it is apparent that the remedy is against the principal and not against the agent. Respondent attempts to support the judgment against the agent by invoking the rule applied in case of undisclosed principals, but the facts heretofore recited clearly show that the present case is not one of an undisclosed principal; nor is it a case where the parties intended to contract relying upon the personal responsibility of the agent.

Whether or not the agent has paid over this \$500 to his principal, or whether or not he yet retains it, is immaterial, and there is no evidence in the record upon this point. The agent did not produce a purchaser ready to buy, and has not earned the commission of \$500 agreed to be paid him by the sellers in their written acceptance of the offer of pur-

chase, and is therefore not entitled to retain such sum. The \$500 paid by the purchaser was paid to the agent to be applied by it upon the purchase price of the apartment. It was so stated in the contract of purchase and in the receipt given for the money. This amount is therefore legally, the property of the sellers, regardless of whether it had been actually paid over to them or not at the time of the present action. If the purchasers desire to recover back their deposit upon a rescission of their contract to purchase, the question of whether or not they had legal grounds for a rescission of such contract would be an issue to be tried between them and the owners of the apartment, on whose behalf and in whose interests the representations regarding the apartment were made by the agent, and the action should have been brought against such owners.

The judgment appealed from is reversed.

We concur: NOURSE, J; STURTEVANT, J.

53 Cal. App. 545

BRASHER v. WHITE. (Civ. 2286.)

(District Court of Appeal, Third District, California. July 15, 1921.)

1. Judgment ☞ 163—Merits not tried on motion to set aside default.

Merits of the action cannot be tried on affidavits on motion by defendant to set aside default judgment; the only question being whether or not the affidavit of the defendant of merits is sufficient in form and statement of facts.

2. Judgment ☞ 160—Affidavit of merits held sufficient in form and substance; "action"; "cause of action."

An affidavit of merits, filed with a motion by defendant to set aside a default judgment, held sufficient in form and substance; a statement that defendant stated to his attorney "all the facts pertaining or relating to said action" being the equivalent of the statement that he has so stated "all the facts of the case" to his attorney, and the term "action" meaning the "cause of action" stated in the complaint, and the phrase "cause of action" in law being generally understood as meaning the whole cause of action; that is, every fact which is material to be proved to entitle the plaintiff to succeed, and which the defendant would have the right to traverse.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Cause of Action.]

3. Judgment ☞ 139—Statute making vacation of defaults discretionary liberally construed.

While applications for relief from default judgments under Code Civ. Proc. § 473, on the ground of mistake, inadvertence, surprise, or excusable neglect, are addressed to the discretion of the trial court, with which discretion

when once exercised in a case interference by a reviewing court will not be justified, except upon a satisfactory showing that it has been abused, still the provisions of the section, like all others of the Code, are to be liberally construed, with a view to effect its objects and to promote justice, in view of section 4.

4. Judgment ☞ 139—Court abused discretion in refusing to set aside default.

Where defendant delivered copy of summons and complaint to attorney, and erroneously informed him as to the date of service, and by reason thereof attorney did not appear and prepare and file papers in defense within time, and default judgment was taken, held that court abused its discretion in denying motion to set aside the default judgment.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by F. F. Brasher against E. J. White. From an order refusing to set aside a default judgment, defendant appeals. Reversed.

Chester A. Pinkham, of San Francisco, for appellant.

David Cosgrave, of San Francisco, for respondent.

HART, J. The defendant having failed to answer or demur to the plaintiff's complaint herein within due legal time, a default therefor and thereupon a judgment were entered against him.

It appears that the default of the defendant for his failure to answer or demur to the complaint and judgment upon such default were entered against him upon the 13th day of September, 1920; that the defendant first received information of the default and the judgment having been entered on the 24th day of September, 1920, and that, on the 27th day of September, 1920—three days after the receipt of notice of said default—upon the authority of section 473 of the Code of Civil Procedure, he filed and served upon the plaintiff a notice that he would, on the 11th day of October, 1920, move the court for an order setting aside said default and said judgment. The motion was heard, being supported by affidavits and the records and files of the case, and the same was denied. This appeal the defendant prosecutes from the order denying said motion.

The action was brought by plaintiff by an unverified complaint to recover the sum of \$1,180.92, being the balance alleged to be due him on account of services performed and moneys paid out by him to meet the current expenses in managing as superintendent the ranch of defendant in San Joaquin county, which services and moneys were so performed and disbursed "at the special instance and request" of the defendant. The complaint

also counts on two other distinct claims against the defendant, which, it is alleged, were assigned to the plaintiff by the respective owners thereof prior to the commencement of the action.

The affidavits filed with the motion to open the default were by the defendant and his attorney, Chester A. Pinkham, and the facts as stated therein are not controverted by the plaintiff.

The affidavit of defendant is, in substance, as follows:

That at the time of the commencement of this action and ever since said time he has resided in the city and county of San Francisco, and that at no time did he ever reside in the county of San Joaquin; that the plaintiff in said action well knew that at the time of the commencement of said action defendant was a resident of said city and county; that in the month of August, 1920, the summons and the copy of the complaint in this action were served upon this defendant in the city and county of San Francisco, and that "within two or three days" after such service, and on or before the 19th day of August, 1920, he took the copy of the summons and complaint so served upon him to his attorney, Mr. Chester A. Pinkham, at his office, which was located in said city; that at that time defendant retained said Pinkham as his attorney, and instructed him to appear for him in this action and to answer the complaint herein and to make such motions in the action as he might deem proper; that he delivered to said Pinkham a copy of said summons and complaint, and "believed that he had informed his said attorney that the same were served on the 7th day of August, 1920, but that he is now informed that his said attorney inadvertently and mistakenly supposed and believed that this defendant stated to him that the date of service was on the 17th day of August, 1920, and that his said attorney by reason of inadvertence and mistake misunderstood this defendant, and believed and understood that the said summons and complaint had been served upon this defendant on the 17th day of August, 1920, instead of on the 7th day of August, 1920; that this defendant's said attorney undertook and agreed to appear for said defendant in said action within the time allowed by law therefor; that thereafter and on sundry occasions between the 19th day of August, 1920, and the 14th day of September, 1920, the said Chester A. Pinkham informed this defendant that he had until the 16th day of September, 1920, within which to plead or appear in said action, and that he would see that the proper papers and pleadings were prepared and filed in due and sufficient time, and that this defendant relied upon said promises and undertaking of his said attorney, and because of the advice and statements of his said attorney this defendant at all times believed that he had until the 16th day of September, 1920, within which to plead or appear in said action; that this defendant at all times desired and intended to contest the plaintiff's cause of action; that this defendant, at the time of employing said Chester A. Pinkham as his attorney to defend said action, fully and truly and fairly stated to said Chester A. Pinkham all the facts pertain-

ing or relating to said action, or to this affiant's defense thereto, and that this defendant was then informed by his said attorney * * * that he had a good and meritorious defense to said action, and that this defendant has been advised by his said attorney, and he verily believes and now states, that he has a good and sufficient defense to said action on the merits."

The defendant further deposes:

That he believed and understood at all times that his attorney would appear in said action at the proper time and plead to the complaint therein, and would do all things necessary and proper for the purpose of pleading to the complaint in said action within the time allowed to this defendant by law therefor. That prior to the 14th day of September, 1920, his said attorney prepared on behalf of the defendant the following papers in said action, to wit: A demurrer of this defendant to the complaint in said action; a demand upon the plaintiff in said action for a bill of particulars; a notice of motion for change of place of trial of said action; an affidavit as to the residence of this defendant; an affidavit of merits; and a demand for change of place of trial of said action. That each of said papers was on the 14th day of September, 1920, subscribed to by deponent, and the affidavits were sworn to before a notary public in said city and county of San Francisco, and each and all of said documents delivered to the said attorney for the defendant. That on the same day the said attorney signed each of the documents or papers just named as the attorney for defendant, and mailed the same to the clerk of the county of San Joaquin, in which county the action was instituted, together with the sum of \$5 as the clerk's fee for filing the same. That each and all of said papers were received by said county clerk and filed in his office in this action on the 16th day of September, 1920. That the attorney for the plaintiff, Samuel K. King, was, at the time of the commencement of the action, and at all times mentioned in the affidavit, a resident of and maintained and had his office at Escalon, in the said county of San Joaquin. That on said 15th day of September, 1920, a full, true, and correct copy of each and all of the aforesaid documents and papers was mailed in the city and county of San Francisco to the said Samuel K. King by inclosing the same in a sealed envelope addressed to the said King at his office in the said town of Escalon and by depositing the same so inclosed in said sealed envelope addressed as aforesaid, with the postage thereon fully prepaid in the United States post office in said city and county of San Francisco. That on the 16th day of September, 1920, "the said clerk of the county of San Joaquin wrote to the said attorney for this defendant in San Francisco, and acknowledged receipt of said clerk's fee of \$5, and informed this defendant's said attorney that the said demurrer and other papers had been filed in said action on said 16th day of September, 1920, and did not mention or state that any default had been entered in said action against said defendant. That thereafter, and on the 21st day of September, 1920, this defendant, by and through his said attorney, sent to the said county clerk \$2 as and for the calendar fee in said

action for placing the said demurrer of this defendant upon the calendar of said court for hearing. That on the 23d day of September, 1920, the said county clerk wrote to the said attorney for the defendant, acknowledging the receipt of said calendar fee, and stating that a default had been filed and entered on September 13, 1920, in said action, and that a judgment had been entered upon said default. That the said letter of said county clerk was not received by said attorney for said defendant until the 24th day of September, 1920. That neither the defendant nor his said attorney had any notice, information, or knowledge concerning said default or the entry of any judgment thereon until said letter from said county clerk was received by said attorney for this defendant on said 24th day of September, 1920. That immediately upon receiving the same the said attorney for this defendant wrote to this defendant and notified him of the fact that a default had been entered in said action, and that said notice was not received by this defendant until to-day, and not until this date did the defendant have any knowledge or information concerning the said default. That at all times up to the present time this defendant verily believed that his said attorney had appeared and pleaded in said action within the time allowed by law therefor, and that neither this defendant nor his said attorney knew or had any reason to believe that any default had been entered in said action until the said letter from said county clerk was received by said attorney for this defendant on the 24th day of September, 1920."

The defendant further deposes:

That the demurrer and the motion for a change of place of trial of this action were made and filed in good faith; that, "without waiving his said demurrer to the said complaint, and without prejudice to said demurrer, this defendant by and through his said attorney, has prepared his answer to the said complaint in said action, and his cross-complaint against the said plaintiff in said action, and that a copy of the said answer and cross-complaint of this defendant is attached hereto, and is hereby referred to and made part hereof; and that this defendant proposes to file the said answer and cross-complaint in said action; that the said default of this defendant in said action, and the said judgment by default taken against this defendant in said action, were entered and taken against him through his mistake, inadvertence, or excusable neglect."

The attorney for defendant, in his affidavit, states:

That the defendant called upon affiant at his office in the city and county of San Francisco, and delivered to him a copy of the summons and complaint in this action and then and there stated to affiant that the said summons and copy of said complaint had been served on him (defendant) in the city and county of San Francisco; that this affiant thereupon asked said defendant the date of said service, and that this affiant understood the said defendant to reply that the said papers had been served upon him on the 17th day of August, 1920, "and thereupon this affiant immediately made a mem-

orandum upon the back of said copy of said summons which reads as follows: 'Served on White in S. F. Aug. 17/20'—and made in his office register of the proceedings in the above-entitled action the following entry, to wit: 'Aug. 17, 1920, summons and complaint served on defendant in S. F.'; that the said notation and entry were made by this affiant because this affiant understood the said defendant to say that the 17th of August was the date upon which said summons and complaint were served upon him, but this affiant is now for the first time informed by said defendant that the said defendant said the '7th and not the 17th,' but this affiant at all times from and including the date on which the said copy of said summons and complaint were delivered by said defendant to this affiant, and from and including the 19th day of August, 1920, verily believed and understood that the date on which the said summons and complaint were served upon the said defendant was the 17th day of August, 1920; that at no time prior to the 24th day of September, 1920, did this affiant have any information, notice, knowledge, or understanding which would lead him to believe, or which did lead him to believe or suspect, that he was mistaken in understanding that the said summons and complaint had been served upon said defendant on the 17th day of August, 1920; * * * that until September 24, 1920, this affiant never had any reason to believe or suspect that he had misunderstood said defendant, or that the entry made in his office register or indorsed on said copy of said summons, was erroneous."

The attorney further deposes:

That, in pursuance of instructions from the defendant given on the said 19th day of August, 1920, to prepare the necessary papers for an appearance in said action, he did thereafter, and between the 10th and 14th days of September, 1920, prepare on behalf of said defendant the demurrer and other papers above mentioned; that, laboring under the honest belief, based upon his misunderstanding of the defendant in stating to him the day upon which the summons and copy of complaint were served, that he still had time within which to file said papers and appear in said action on behalf of defendant, he mailed each and all of said aforesaid papers, properly subscribed and sworn to on the 15th day of September, 1920, to the clerk of the superior court of the county of San Joaquin, to wit, the county clerk of said county, and served by mail a copy of each and all of said papers upon attorney for plaintiff in said action; "and that a full, true, and correct copy of each and all of said papers was actually received in Escalon, San Joaquin county, Cal., by the plaintiff's attorney on the 16th day of September, 1920, and that each and all of said original papers were actually filed in the above-entitled action, and in said court on said 16th day of September, 1920, and that each and all of said papers are now on file in said court in said action, and are hereby referred to and made a part hereof." The attorney's affidavit then proceeds with a statement of facts corroborative of the statement of defendant in his affidavit as to the sending of the \$2 calendar fee for placing the demurrer on the calendar of the court for hearing, and the receipt of a letter

by him thereafter from the county clerk of San Joaquin county, stating that a default had been entered in said action on September 13, 1920, against the defendant, and that a judgment had on said day been entered upon said default. The attorney also deposes that the said defendant at all times relied upon him to make the appropriate appearance in this action; " * * * that because of said mistake and inadvertence of this affiant he believed that the 16th day of September, 1920, was within 30 days from the date of such service, and that he acted accordingly, and informed and advised the said defendant that the said papers would be served and filed within the time allowed by law therefor; and that the said judgment in the above-entitled action was taken within said date through his mistake, inadvertence, surprise, or excusable neglect."

The answer (unverified) proffered by the defendant, and which, with an unverified cross-complaint, likewise proffered, was filed with the papers and affidavits on the motion to set aside the default, specifically denied each and every material allegation of the complaint, except the allegation that defendant had, during the period referred to in the complaint, paid the plaintiff the sum of \$2,557.46, which said sum, so the answer stated, was in full payment of any and all indebtedness of the defendant to plaintiff, and except also that, as to one of the claims alleged in the complaint to have been assigned by the owner thereof to plaintiff, of which it is said in the answer that full satisfaction thereof was made by defendant prior to the commencement of plaintiff's action.

The cross-complaint referred to above alleges that, upon the representations of plaintiff that he was a farming engineer and skilled in agricultural and horticultural pursuits, and in all matters pertaining to the planting and cultivation of fruit trees, and, relying upon the representations so made, the defendant entered into an agreement with plaintiff, whereby the latter agreed, for a certain specified consideration, to furnish, set out, and plant upon the ranch of defendant, in San Joaquin county, white Adriatic fig trees and such other trees and vines as the defendant might desire, and that he would skillfully and properly cultivate and irrigate the same for one year. It is then charged, with considerable detail, that the plaintiff negligently failed to cultivate properly said ranch for the purposes stated, and that, although there was conveniently available for the proper irrigation of the trees which the cross-complaint states that plaintiff did plant on said ranch, an ample supply of water, the plaintiff negligently failed to irrigate said trees, or any of them, properly; that by reason of such failure and neglect on the part of plaintiff in the carrying out of his part of said agreement the defendant was damaged in the sum of \$5,000, for which, by way of affirmative relief, defendant prayed judgment as against the plaintiff.

The defendant, after the motion was partly heard, filed by leave of the court, a supplementary affidavit, correcting his original affidavit, in the following particular: That, in his former affidavit, he deposed that he delivered the summons and copy of the complaint to his attorney "two or three days after said summons and complaint had been served," whereas he should have deposed, and intended to depose, that he gave the documents named over to his attorney "within a few days after" the service thereof upon him. This inaccuracy, he further stated in his supplementary affidavit, was due to the fact that he was greatly harassed by business reverses and financial losses and difficulties, "and was sick and under great mental strain and threatened with a nervous breakdown," and as a consequence was unable properly to attend to his business or personal affairs. He, however, stated therein that, notwithstanding his mental and physical condition as so described, he did deliver the summons and copy of the complaint to his attorney on the 19th day of August, 1920.

Thus there has been presented a résumé of the showing made by the defendant on his motion for an order opening up the default entered against him. To that showing there was not, as before stated, a counter showing made or attempted. The plaintiff, though, did file an affidavit, but therein he did not deny or controvert, or make any attempt at or pretense of denying or controverting, the facts set out in the affidavits filed by the defendant. Said affidavit amounted only to this: (1) An attempted impeachment of the statement contained in the defendant's later affidavit as to his mental and physical condition at the time the summons and the copy of the complaint were served upon him; (2) the negating of the defendant's claim, as set forth in his proposed answer to the complaint, that one of the assigned claims counted on in the complaint had been fully satisfied before plaintiff commenced his action; (3) reaffirming the validity of another of the assigned claims alleged in the complaint; and (4) justification for the alleged cutting down, destruction of, and carrying away from defendant's ranch and converting to his own use certain live oak trees and timber growing on said ranch, without accounting to defendant therefor, as set out in detail in the cross-complaint as a part of the second cause of action for affirmative relief to defendant.

[1] It is plainly manifest that the statements embraced in the affidavit of the plaintiff are wholly without relevancy to the issue before the court in this proceeding. They do not bear upon the question at issue, to wit: Whether the defendant's failure to appear in the action in legal time was or was not excusable. Indeed, the affidavit, in the latter part thereof, contained averments

which are addressed to the merits of the action, and in effect constituted an attempt to try the merits of the controversy as it is stated in the complaint in this proceeding by way of affidavits. The rule that the merits of the action cannot thus be tried is not only sound in principle, but has been time and again affirmed and reaffirmed by the cases. See *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53; *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; *Rauer's Law & Collection Co. v. Gilleran*, 138 Cal. 352, 71 Pac. 445.

[2] That the affidavit of merits made by the defendant is sufficient in form, as well as in the statement of facts, there can be no doubt. The affidavit, it will be noted, declares that—

Defendant "fully and truly and fairly stated to said Chester A. Pinkham [his attorney] all the facts pertaining or relating to said action, or to this affiant's defense thereto, and that this defendant was then informed by his said attorney * * * that he had a good and meritorious defense to said action, and that this affiant has been advised by his said attorney, and he verily believes and now states, that he has a good and sufficient defense to said action on the merits."

The statement that affiant (defendant) has stated to his attorney "all the facts pertaining or relating to said action" is the equivalent of the statement that he has so stated "all the facts of the case" to his attorney. The term "action," as used in the affidavit, means the "cause of action" stated in the complaint, and the phrase "cause of action," in law, is generally understood as meaning the whole cause of action—that is, every fact which is material to be proved to entitle the plaintiff to succeed, and which the defendant would have the right to traverse. 1 Cyc. p. 641; *Cooke v. Gill*, L. R. 8 C. P. 107. In *Larocque v. Conhaim*, 45 Misc. Rep. 234, 92 N. Y. Supp. 99, the affidavit of merits read:

"Deponent has fully and fairly stated his defense to said action and all the facts relative thereto to his counsel."

The court held that the word "thereto" referred to the word "action," and that the word "action" is in law synonymous with the word "case"; hence, so the court proceeded, the clause should read, "and all the facts relative to the action, i. e., 'case.'" See, also, *Hughes Mfg. & L. Co. v. Elliott*, 167 Cal. 494, 500, 140 Pac. 17; *Carter v. Broder*, 194 Pac. 527.

The single question here, then, is: Did the court below remain within the bounds of a reasonable judicial discretion, or did it transcend such bounds in its order denying the defendant relief upon the showing made? A painstaking consideration of the record has persuaded us to the conclusion that the court below, upon the uncontroverted showing

made by the defendant, should have relieved him from the serious consequences which would necessarily follow from the default entered against him should it be permitted to stand.

[3] While applications for relief under section 473 of the Code of Civil Procedure, on the ground of mistake, inadvertence, surprise, or excusable neglect, are addressed to the discretion of the trial court, with which discretion, when once exercised in a case, interference by a reviewing court will not be justified except upon a satisfactory showing that it has been abused, still the provisions of the section, like all others of the Code, are to be "liberally construed with a view to effect its objects and to promote justice." Civ. Code Proc. § 4. The particular provision of said section upon the authority of which the defendant asks for relief is of a remedial nature, and the design of the entire section was to enable the courts to call into requisition their equitable powers in this respect, and thus authorize them, where it is manifest that it is only in furtherance of justice to do so, to relieve against an honestly made mistake or an inadvertence or excusable neglect.

From the very earliest history of the jurisprudence of California to the present time it has been held that the power vested by section 473 in the nisi prius courts should be freely and liberally exercised by said courts to the end that they might "mold and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right." *Roland v. Kreyenhagen*, 18 Cal. 455.

The case of *Reidy v. Scott*, 53 Cal. 69, is as to the facts quite similar to the present case. There the defendant was served with process in Merced county, where the suit was pending, on April 25th, and delivered the papers to his attorneys in San Jose a few days thereafter, and erroneously stated to them that the service was on the 26th. The attorneys, acting on the information so given them, prepared an answer and sent it to Merced by express in time to reach that place on the morning of the 7th of May, which would have been ample time in which an appearance could have been made by the defendant in the action. The answer was given to the clerk shortly after 9 o'clock on the morning of the 7th, but default had just been entered, and the motion by defendant to set aside the default was denied by the court, and on appeal the Supreme Court held that, since the affidavit of merits disclosed a meritorious defense to the action, the defendant under the circumstances should have been relieved of his default, and reversed and remanded the cause.

In *Mitchell v. California*, etc., S. S. Co.,

156 Cal. 576, 578, 579, 103 Pac. 590, 592, the court in reversing an order denying defendant's motion for relief under section 473, said:

"The tendency of this court has always been to relieve parties from their defaults and mistakes, upon proper showing, to the end that matters may be heard upon the merits. Treating of this subject, and particularly of the interpretation of section 473 of the Code of Civil Procedure, the following language was used by this court in *Nicoli v. Weldon*, 130 Cal. 667, 63 Pac. 64: 'Section 473 * * * is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Harbaugh v. Honey Lake, etc., Water Co.*, 109 Cal. 70, 41 Pac. 792; *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932. It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court would impose as a condition to granting the motion.'"

In addition to the authorities above mentioned, we cite the following upon the proposition in hand: *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 479, 483, 82 Pac. 53; *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; *Watson v. San Francisco & Humboldt Bay R. R. Co.*, 41 Cal. 17; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Jergins v. Schenck*, 162 Cal. 747, 748, 124 Pac. 426.

[4] As shown there was no attempt by plaintiff at contradicting the showing made by the defendant, and we know of no just reason why, upon the record as it thus stands in this proceeding, he should not be granted the relief he has asked for. To the contrary, it seems to us, from the face of the showing made, that the denial of relief would not be in furtherance of justice. The answer and the cross-complaint proposed by defendant are attached to the defendant's affidavit of merits, and are by proper reference made a part thereof, and while those pleadings are not themselves verified (for the reason, no doubt, that the complaint is not verified), they are nevertheless as much a part of defendant's affidavit as any other statement of facts contained therein. They themselves are a sufficient affidavit of merits—that is, they clearly show upon their face that the defendant not only has a defense to the merits

of the action but is entitled to affirmative relief as against the plaintiff. Moreover, they clearly disclose the good faith of the defendant in making his application to be relieved from the default.

The fact should also be emphasized that there was no delay on the part of the defendant in applying for relief against the default, for he gave notice of his intention to apply for such relief on the 27th day of September, 1920, three days after the receipt of information by him and his attorney that the default had been entered.

Our conclusion, as previously stated, is that the learned trial court went beyond the limits of a sound judicial discretion in refusing the defendant relief in this proceeding, and the order appealed from is therefore reversed, and the cause remanded with directions to the court below to grant the defendant the relief asked for by him upon such terms as may be just and equitable.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 534

SAN RAMON VALLEY BANK v. WALDEN CO. et al. (Civ. 3864.)

(District Court of Appeal, First District, Division 1, California. July 15, 1921. Hearing Denied by Supreme Court Sept. 12, 1921.)

1. Corporations ⇨415—Mortgage executed by officers of corporation held authorized.

Officers of a corporation, authorized by resolution of the directors to execute a mortgage for \$1,000 to secure a temporary loan, which the resolution showed was to be repaid by loan of \$1,500 from another party with whom they were then negotiating, held authorized to execute a mortgage securing the loan for \$1,500.

2. Corporations ⇨432(4)—Presence of seal prima facie evidence of power of officers affixing it to documents.

The presence of the seal of a corporation is prima facie evidence of the power of the officers affixing it to transact the business evidenced by the documents to which the seal is affixed.

3. Corporations ⇨425(4)—Vendees held estopped to deny validity of a mortgage executed by vendor.

Where purchasers from a corporation agreed that vendor might execute a mortgage for \$1,500 on the premises, which they agreed to assume and pay as part of the consideration, they are estopped to deny the validity of the mortgage for want of power in the vendor's officers to execute it.

4. Corporations ⇨482(6)—Findings held sufficient to support judgment of foreclosure of mortgage by corporation.

Findings that plaintiff made to defendant corporation a loan secured by mortgage to the full amount of \$1,500, and that the sum of

\$1,250 remained due and unpaid thereon, is sufficient to support a judgment of foreclosure against the corporation and subsequent purchasers.

Appeal from Superior Court, Contra Costa County; R. L. Latimer, Judge.

Action by the San Ramon Valley Bank, a corporation, against the Walden Company, a corporation, and R. S. N. Burdick and wife. From a judgment of foreclosure for plaintiff, defendants Burdick appeal. Affirmed.

J. N. Young, of Oakland, for appellants.

J. E. Rodgers, and A. F. Bray, both of Martinez, for respondent.

RICHARDS, J. This action was instituted for the foreclosure of two mortgages covering a tract of land described as lot 21 in the Walden tract in the county of Contra Costa. The first of these mortgages was one purporting to have been executed by the Walden Company, a corporation, to the plaintiff herein on May 1, 1918, as security for a promissory note for the sum of \$1,500; the second mortgage was one executed on November 25, 1918, by the Walden Company to one C. R. Hook, as security for its promissory note for the sum of \$250, which last-named note and mortgage were assigned to the plaintiff herein on December 20, 1918. The defendants R. S. N. Burdick and Mary Burdick, his wife, who are the appellants herein, appeared in said action and filed their answer therein, setting forth certain defenses which they are now urging upon this appeal. A consideration of these defenses requires a brief recital of the facts showing the relation of the defendants Burdick to their codefendant, the Walden Company, and to the premises affected by these mortgages and by the foreclosure thereof. On and prior to the 5th day of April, 1918, the Walden Company was the owner of lot 21 in the Walden tract, and on that day entered into an agreement with R. S. N. Burdick and Mary Burdick, which, while of a somewhat involved nature, disclosing past dealings and differences between the parties to it, amounts in substance to an agreement for the conditional sale of said lot 21 in the Walden tract by the Walden Company to the Burdicks for a purchase price totaling \$2,659.10, which was to be made up in the following manner: The Walden Company was to negotiate a loan of \$1,500 secured by its mortgage upon the premises in question, upon obtaining which it was to deed the premises to the Burdicks, subject to the incumbrance thus created, which they were to assume and pay; and, in addition to this, they further agreed to pay the Walden Company the sum of \$1,159.10 in monthly installments of \$150 as the balance of the purchase price of said premises until the same was fully paid. Thereafter, and on May

1, 1918, the Walden Company, through its vice president and secretary, borrowed the sum of \$1,500 from the San Ramon Valley Bank, the plaintiff herein, giving the promissory note and mortgage therefor, signed by its aforementioned officials and attested by the seal of the corporation, which is the main subject of this foreclosure suit.

[12] It was the contention of the Burdicks at the trial, and is their contention upon this appeal, that the said officials of the Walden Company who executed said note and mortgage had no authority so to do. This contention is based upon a certain resolution of the directors of the Walden Company, passed by them on May 1, 1918, authorizing the vice president and secretary of the corporation to borrow the sum of \$1,000 from the San Ramon Valley Bank, to be secured by a mortgage upon the premises in question. This resolution, according to the appellants' contention, defines the limit of power of the said officials of said corporation to engage in the transaction with the San Ramon Valley Bank; but the resolution, when read in full, does not sustain this contention, since it not only shows that the loan of \$1,000, which it purports to authorize, was a temporary matter, but also expressly shows that these very officials of the Walden Company who were by the terms of the resolution to consummate this temporary loan from the plaintiff had already in process of negotiation a loan of \$1,500 from another party, which, when completed, would furnish the means of paying off the said temporary loan; in other words, the resolution, far from being or even suggesting a limitation upon the power of these officers of the Walden Company to borrow the sum of \$1,500, and execute a note or notes, secured by a mortgage or mortgages therefor, discloses the possession and exercise by them of such power, and this is further and most fully borne out by the fact that they affixed the seal of this corporation to the final transaction with the plaintiff, the presence of which is of itself prima facie evidence of the power of the officials affixing it to consummate the transaction evidenced by the documents to which it was affixed. *Mills v. Boyle Mining Co.*, 132 Cal. 97, 64 Pac. 122; *McKee v. Cunningham*, 2 Cal. App. 687, 84 Pac. 260; *Schallard v. Eel River Navigation Co.*, 70 Cal. 146, 11 Pac. 590.

[3] In addition to the foregoing, however, we are of the opinion that upon the facts as shown by the record in this case the defendants and appellants, Burdick, are in no position to question or dispute the authority of the officials of the Walden Company to make and execute the said note and mortgage to the plaintiff herein, since by the terms of their express agreement they had stipulated that the Walden Company might create an indebtedness in the sum of \$1,500 to be secured by a mortgage upon the said premises, and

which indebtedness they had agreed to assume and pay as a consideration in part for receiving a conveyance to them of said premises. Having so agreed, and having received such conveyance, they are estopped to call into question the validity of the transaction to which they have thus assented, and of which they have thus received the benefit. *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27.

The foregoing reasoning and conclusions apply also to the subsequent note and mortgage to Hook for the sum of \$250, assigned to plaintiff. The authority of the same officials of the Walden Company to execute these documents is also shown by the affixed seal of the corporation, and while this small loan does not seem to have been in contemplation at the time the original papers between the Walden Company and the appellants were drawn, the result is the same, since the total sum with which the property in question is charged, by virtue of these two mortgages, amounts to less than the sum which the said appellants had agreed might be placed as an incumbrance upon said property, and which indebtedness to the full extent of \$1,500 they had agreed to assume and pay.

[4] With respect to the appellant's plea and claim that they have been defrauded in the course of these transactions, there is not the slightest evidence in support of this contention; for, while it is true that there is some little confusion in respect to the transactions between the Walden Company and the plaintiff, as to the time and manner of the receipt of the money borrowed by it from the bank and as to the repayment by it of a small portion of the loan, the findings of the trial court, which are sufficiently sustained by the evidence, clear up this confusion. By the findings, the loan to the full amount of \$1,500 was made by the plaintiff to the Walden Company, and the sum of \$1,250 remains due and unpaid thereon. This finding is sufficient to fully support the judgment of foreclosure herein. The appeal is without merit.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 576

PROPER v. SUTTER DRAINAGE DIST. et al. (Civ. 2311.)

(District Court of Appeal, Third District, California. July 19, 1921. Hearing Denied by Supreme Court Sept. 17, 1921.)

1. Judgment ⚡239—Torts ⚡22—May be had against one or more joint tort-feasors.

Two or more persons who jointly commit a tort are jointly and severally liable to the in-

jured party, and the court may render judgment against one or more of them in its discretion, under Code Civ. Proc. § 579, and this applies to persons acting in official capacity.

2. Drains ⚡63—Drainage district not liable for negligence, but officers are.

Drainage district organized under the statute of 1885 was not liable for negligence resulting in the flooding of crops, but trustees of such a district having the management of the affairs thereof are liable for negligent maintenance resulting in such damage.

3. Drains ⚡63—Trustees of district held to owe duty to use ordinary care to prevent repetition of injury to adjoining lands.

Trustees of a district organized under the law of 1885 (St. 1885, p. 204), who knew of defective condition of a lateral and of prior flooding of adjoining lands therefrom, owed the duty to the landowner to use ordinary care to prevent a repetition of the injury, negligence not consisting simply in originating that which may be the cause of mischief or injury, but also in failing to control this cause so as to prevent inflicting of injury.

4. Drains ⚡63—Trustees of district held sued in individual capacity for negligent maintenance of ditch.

Where in an action by landowner whose crop was flooded through negligent maintenance of drainage ditch by trustees of drainage district, wherein the title indicated the trustees were sued as individuals, and it was alleged that "said defendants and all of them, in their management, control, and operation of said main and lateral drainage canals, collected therein large bodies of water," etc., held that the trustees were sued as individuals, and not in their official capacity, and a judgment against part of them without proper citation as to others was valid.

5. Officers ⚡116—Official individually liable for negligence.

One acting in his official capacity is individually liable for the negligent discharge of his duties.

6. Pleading ⚡407—Technical ambiguity waived by failure to demur.

Where no demurrer was interposed to a complaint in which there was a technical ambiguity, such ambiguity was waived.

7. Appeal and error ⚡1039(2)—Ambiguity in complaint not prejudicial unless misleading.

Where defendants were not misled to their prejudice by a technical ambiguity in the complaint, the ambiguity cannot be said to affect their substantial rights.

Appeal from Superior Court, Sutter County; W. A. Anderson, Judge.

Action by E. E. Proper against the Sutter Drainage District and others. Judgment for plaintiff, and defendants appeal. Reversed as to the Drainage District and affirmed as to other defendants.

A. H. Hewitt, of Yuba City, for appellants.

W. H. Carlin, of Marysville, for respondent.

FINCH, P. J. The plaintiff recovered judgment against all of the defendants excepting Hauss for damages to plaintiff's crop of barley, alleged to have been caused by water from the drainage canals of the defendant district. The defendants Giblin, Walton, and Hauss were trustees of the district at the time of the alleged damage.

The lands on which the crop of barley was growing were protected on the west by a ridge and on the east by an old railroad embankment, prior to the construction of the district's canals. The main canal of the district runs in a general southwesterly direction on the west side of the ridge. Lateral No. 4 was constructed immediately adjacent to plaintiff's south line, and was cut through the railroad embankment and the ridge. It was designed to drain some 1,500 acres of land lying northeasterly from plaintiff's land, and to carry the water therefrom to the main canal. In excavating lateral No. 4 the earth was thrown to the south, forming a levee, and leaving the north side of the lateral without any embankment other than the natural ground surface. The lateral was not cut down to grade at certain points to the west of the lands flooded, the bottom being a few inches higher in elevation than farther east. The flooding of plaintiff's land was largely by surface waters carried through the lateral from the east.

As bearing upon defendants' knowledge of the conditions described, it was shown that in the year 1911 the plaintiff filed an action against the defendants for damages from the flooding of the same lands in a manner similar to that set forth in this action. The defendants compromised that case by paying for the crop destroyed and agreeing to construct a levee along the north side of lateral No. 4 to protect the plaintiff's land. The levee on the north side, however, was not constructed until after the damages complained of herein, alleged to have been suffered between January 1 and June 1, 1914. Under the foregoing outline of the facts it is evident that a private individual would be held accountable for negligence. It only remains to consider whether, under existing laws, the defendants are so liable.

[1] Prior to the trial the defendant Hauss died. The administratrix of his estate was substituted, but she was not served with summons or notice or brought into court, and she did not appear in the action. Seasonable objection was made by the other defendants to proceeding with the trial until the administratrix had been served with appropriate process. Their objection was overruled, and the ruling of the court is assigned as error. Two or more persons who jointly

commit a tort are jointly and severally liable to the injured party, and the court may render judgment against one or more of them in its discretion. Code Civ. Proc. § 579; Cole v. Roebling Construction Co., 156 Cal. 447, 105 Pac. 255; Lang v. Lilley & Thuston Co., 20 Cal. App. 231, 128 Pac. 1028; Zibbell v. Southern Pacific Co., 160 Cal. 248, 116 Pac. 513; McNeely v. Superior Court of Los Angeles Co., 36 Cal. App. 602, 173 Pac. 102. There was no error in overruling the objection made.

[2] It is contended that the drainage district is not liable for negligence. Under an unbroken line of decisions in this state relative to reclamation districts, this contention must be sustained. The district was organized under the statute of 1885. Relative to the provisions of that statute it was said in Laguna, etc., Dist. v. Chas. Martin Co., 144 Cal. 212, 77 Pac. 934:

"Testing * * * the provisions of this act of 1885 by the provisions of the act of 1868, * * * we find no substantial difference in their respective provisions as to the purposes for which the respective organizations could be created. In fact, the only difference in them is, that the act of 1868 in terms referred to the reclamation of 'swamp and overflowed, salt, marsh, or tide lands' as such, and authorized the formation of a reclamation district upon petition of the owners of one-half of any such body of land 'susceptible of one mode of reclamation.' The act of 1885 in question is not, however, limited to the creation of districts for the drainage of any particular kind of land, but provides that on the petition of 'the owners of two-thirds of any body of land susceptible of one mode of drainage' and compliance with further provisions, they may be created. * * *. Both acts, too, provide for the reclamation—because the term 'drainage of land' has practically the same application as 'reclamation'; the one is the means employed, the other the result—of bodies of land susceptible of one mode of reclamation."

In San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374, the court had under consideration the question of the right to sue a reclamation district organized under the act of 1868, the district not being one against which suit was authorized by law. The court said:

"If it is a corporation, it is necessarily a quasi public corporation, similar to a county or school district, and therefore it could not be sued until such time as an action against it was authorized by law. * * *. The same rule would apply if it should be declared a public agency of the state. * * *. The right to maintain such an action is an exception, existing only when the right is expressly or by necessary implication authorized by law."

The act of 1885 does not authorize a suit against a district organized under its provisions or a suit by the district except for the collection of assessments and the condemna-

tion of land. In the case of *Perkins v. Blauth et al.*, 163 Cal. 782, there is dictum to the effect that a reclamation district of the character there under consideration is liable for negligence. Section 3453 of the Political Code, however, provides that reclamation districts organized under the chapter in which that section appears "shall have power to sue and be sued." There is much force in the reasoning of the court in the case of *Bradbury v. Vandalia Levee & Drainage District*, 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904, wherein it is said:

"To deny to the plaintiffs a recovery of the damages which they have suffered by the effort of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice."

The law under which that case was decided authorized such districts to sue and be sued. Until suits are authorized against such districts in this state, arguments in that regard must be addressed to the Legislature rather than to the courts.

[3] It is next urged that the trustees of the district are not liable for negligence. The trustees had the management of the affairs of the district and the maintenance of its system of canals. They knew of the condition of lateral No. 4 and of the prior flooding of the plaintiff's lands therefrom. A duty was cast upon them to use ordinary care to prevent a repetition of the injury. The court was justified in holding that they did not exercise such care. "Negligence is not simply in originating that which may be the cause of mischief or injury, but * * * consists also in failing to control this cause so as to prevent inflicting injury." *Chidester v. Consol. Ditch Co.*, 59 Cal. 205. As to whether such trustees are liable under the law for the results of their negligence, the case of *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50, cited by both parties, is decisive of the question contrary to the contention of the appellants. This is not a case of error of judgment in the construction of the canal system, but of continuing its use with knowledge of its defects and without reasonable effort to correct them.

[4-7] It is claimed that the defendants Giblin, Hauss, and Walton are not sued as individuals, but in their official capacity as trustees, and that therefore the judgment against Giblin and Walton as individuals must be reversed. The title indicates that they were sued as individuals. It is alleged

in the body of the complaint that at all times therein mentioned they were trustees. In charging the acts complained of it is alleged that—

"Said defendants and all of them, in their management, control and operation of said main and lateral drainage canals, collected therein large bodies of water for the purpose of draining the territory traversed by said main canal, * * * and said defendants in their said conduct and management of said canals did collect and convey down through said main canal where the same crosses the said lands of plaintiff and into said lateral canal a large volume of water far in excess of the carrying capacity of said canals, and did overflow the banks of both thereof, and did thereby, by the conveyance of such water down such canals, overflow the banks of said canals, and did precipitate water upon and flood the said lands of plaintiff," etc.

One acting in his official capacity, is individually liable for the negligent discharge of his duties. *Perkins v. Blauth*, 163 Cal. 787, 127 Pac. 50. It was negligence on the part of the trustees to collect and convey through the canals of the district "water far in excess of the carrying capacity of said canals." Since the trustees are individually liable for the negligent discharge of their duties, it was not inappropriate to allege that they were such trustees, and that the acts complained of were performed in their conduct and management of the affairs of the district. In any event, the most that can be said in support of appellants' contention is that the complaint is ambiguous. The case was tried upon the theory that the action was against the persons named as trustees in their individual capacities. No demurrer was interposed to the complaint. If there was technical ambiguity, it must be held to have been waived. The defendants were not misled thereby. Where a party has not been misled to his prejudice the ambiguity cannot be said to affect his substantial rights. *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206; *Alexander v. Central L. & M. Co.*, 104 Cal. 537, 38 Pac. 410; *Hawley Bros., etc., Co. v. Brownstone*, 123 Cal. 646, 56 Pac. 468.

The judgment as against the defendants Giblin and Walton is affirmed. The judgment as against the defendant Sutter Drainage District is reversed, with direction to the trial court to enter judgment, upon the findings as made, in favor of said district.

We concur: HART, J.; BURNETT, J.

52 Cal. App. 542

FORD v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 3628.)

(District Court of Appeal, Second District, Division 1, California. July 15, 1921.)

1. Master and servant ⇨405(2)—Evidence in Workmen's Compensation proceeding held insufficient to show employment not casual.

In proceedings under the Workmen's Compensation Act of 1917 against owner of house for compensation for injuries received in making interior repairs by paperhanger who had not been employed for any definite time, evidence held insufficient to show that the work which the employee had been engaged to perform was not to be completed in a period of time less than 10 working days within section 8, making act inapplicable to casual employment, and subdivision c, defining such employment as work contemplated to be completed in not exceeding 10 working days.

2. Master and servant ⇨361—Owner, who rents house, not engaged in a "trade" or "business" within Workmen's Compensation Act.

An owner, who lets house for profit, and at irregular times, when demanded, has labor performed in the repair thereof, is not engaged in the prosecution of a "trade" or "business" within the Workmen's Compensation Act, upon which a charge as compensation for injury sustained by an employee casually engaged in doing such work can be imposed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business; Trade.]

Proceedings under the Workmen's Compensation Act for compensation for injuries by George J. P. Ford, opposed by T. B. Cowan, employer. Award for petitioner, and employer brings certiorari. Award annulled.

Guy S. Pratt, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. Certiorari to review an award made to T. B. Cowan by the Industrial Accident Commission pursuant to the provisions of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 831).

Petitioner owned several storerooms and flats which he kept in repair and let to tenants. Other than this, he was engaged in no business, trade, or occupation. He employed Cowan at \$3.50 per day to do the work required in hanging paper and tinting the walls of the rooms in one of the flats. While so engaged his attention was directed to a leaky toilet in the building, which petitioner told him to repair, and while so engaged in the repair thereof he sustained injuries for which the award of compensation was made.

The particular finding attacked is as follows:

"T. B. Cowan, applicant, while employed at interior repair on April 23, 1920, at Los Angeles, Cal., by defendant George J. P. Ford, said employment not being casual and being in the course of the employer's business, and the parties being then subject to the provisions of the Workmen's Compensation, Insurance, and Safety Act of 1917, sustained injury occurring in the course of and arising out of his employment, as follows: He fell down a stairway, sustaining injury to the back and hips."

Petitioner's contention is that the work was both casual and not in the course of trade, business, profession, or occupation of Cowan's employer. In our opinion this contention must be sustained. Section 8 of the act excludes from its operation persons whose employment is both casual and not in the course of the trade, business, or occupation of the employer. Subdivision (c) of the section provides that—

"The term 'casual' as used in this section shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days."

It also provides that—

"The phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer"; and that "the words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity."

[1] It appears that, in response to a question as to how long he had been working on the job for which he was employed, Cowan said: "Well, I had been working on that house perhaps a couple of weeks." And again replying to the question, "And you had been working on that particular house how long?" he answered, "Some two or three weeks; I couldn't hardly tell unless I had brought my books." And to the question, "You testified that you had been on this particular job where you were injured between two and three weeks?" he answered, "Yes, sir." On cross-examination, in response to the injury as to how many days he worked, he replied, "I cannot tell you." Whereupon he was asked, "Was it less than 10 days?" to which he replied: "Maybe it was not 10 days, but it was right in there; I won't say positive." In our opinion, since it appears the employment was not for any definite time (Blood v. Industrial Accident Commission, 30 Cal. App. 274, 157 Pac. 1140), this testimony is insufficient to establish the fact that the work which the applicant was engaged to perform was not to be completed in a period of time less than 10 working days. His testimony upon the subject was not only vague, indefinite, and uncertain, but he himself expresses

grave doubt upon the question as to whether his employment was other than casual, as defined by the act. On the contrary, if the burden of showing the employment was casual, devolved upon the employer, his testimony is positive to the effect that the employment contemplated the completion of the work within 10 days, and that in its performance Cowan worked less than 10 days thereon.

[2] The question whether the making of repairs necessary and incidental to the upkeep of a building or buildings which the owner lets for hire constitutes a business within the meaning of the statute, was before this court in the case of *Lauzier v. Industrial Accident Commission*, 185 Pac. 870, wherein it was said:

"The mere owning and renting of a house or houses by an individual for purposes of investment, conceding that such owner has no particular or principal business, does not come within the purview of the act," as amended in 1917.

As in that case, the petitioner herein had no business other than renting the building for profit. Upon the authority thereof we can but repeat that where an individual invests his money in a house or houses which as owner he lets for profit, and at irregular times when demanded has labor performed in the repair thereof, he is not engaged in the prosecution of a trade or business, within the meaning of the act and upon which a charge as compensation for injury sustained by an employee casually engaged in doing such work can be imposed. *Miller & Lux Incorporated v. Industrial Accident Commission* 179 Cal. 764, 178 Pac. 960.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 572

RUSSELL v. H. W. JOHNS-MANVILLE CO. OF CALIFORNIA. (Civ. 3799.)

(District Court of Appeal, First District, Division 1, California. July 16, 1921.)

1. Master and servant §72—Notice of bonus held not binding.

A notice by employer to all employees, "In recognition of efficient service during the year, the company will pay as additional compensation for 1918 to all salaried employees who have been in the company's employ for the calendar year of 1918 20 per cent. of the yearly salary in each case," did not entitle an employee, discharged during such year, to the increased compensation, there being nothing to show that employee was legally bound to remain, or that he in so remaining did anything other or further than that which he was willing to do and would have done if such notice had never been issued by his employer, or re-

ceived by himself, there being no consideration to render the employer's offer binding in law; and a suggestion in such notice that the bonus would aid in purchase of Liberty Bonds was immaterial.

2. Master and servant §72—Notice of bonus held not to affect employer's right to discharge.

A notice by employer that salaried employees remaining with the company during the year would receive a bonus, being in the nature of a voluntary gratuity, did not affect employer's right to discharge an employee, hired from month to month, at any time before the expiration of the year.

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by Samuel P. Russell against H. W. Johns-Manville Company of California. Judgment for plaintiff, and defendant appeals. Reversed.

James M. Thomas, of San Francisco, for appellant.

W. J. Hayes, of Oakland, for respondent.

RICHARDS, J. This appeal is from a judgment rendered and entered in the plaintiff's favor in an action brought by him to recover the sum of \$600 alleged to have become due and payable by virtue of the following state of facts: The plaintiff in the month of October, 1918, was a salaried employee of the defendant upon a month to month employment, at a monthly salary of \$250, and had been such for several years prior to that time. In October, 1918, the defendant issued to all of its salaried employees the following notice:

"Office Notice No. 1451

"October 15, 1918.

"To all Employees S. F. & L. A.:

"Mr. —: In recognition of efficient service during the year the company will pay as additional compensation for 1918 to all salaried employees who have been in the company's employ for the calendar year of 1918 20 per cent. of the yearly salary in each case, payable 10 per cent. January 1, 1919, and 10 per cent. March 1, 1919.

"We are notifying you at this time so that it may help you in making your subscription for Liberty Bonds.

"[Signed] W. S. Greenfield."

After receiving this notice the plaintiff continued in the employ of the defendant until the 16th day of November, 1918, when he was discharged, and on November 30, 1918, was paid his salary in full to that date, according to the terms of his former employment. He thereafter commenced this action to recover the sum of \$600, alleged to have become due by virtue of the above-written notice received by him in common

with all the rest of the defendant's salaried employees.

Upon the trial of the cause the plaintiff testified and the court found:

"That said plaintiff, relying upon the additional compensation promised by said defendant, in said notice, remained in the employ of said defendant, and intended to remain in its employ for the balance of the year 1918, and subscribed through said defendant for \$700 worth of said Liberty Bonds, which subscription said defendant, subsequently, and after plaintiff's discharge, hereinafter alleged, canceled without the knowledge or consent of said plaintiff."

Having made the foregoing finding, and having also found that the plaintiff on or about November 16, 1918, was discharged from his said employment by the defendant without just or any cause, the trial court gave its judgment in the plaintiff's favor for the amount sued for, and from such judgment the defendant has prosecuted this appeal.

[1] We are unable to perceive upon what theory this judgment in the plaintiff's favor can be sustained. The written notice issued to its salaried employees was in form and upon its face a voluntary gratuity to such of said employees as might be in its service during the entire year 1918. It did not purport to change the terms of their past, present, or future employment, nor in the case of month-to-month employees did it purport to bind the corporation issuing it to a different term of employment than that already existing; nor did it exact or require of such employees that they should make any surrender of their right to quit the corporation service at the close of any month thereafter. The respondent himself does not here contend that he was either required to make, or did in fact make, any such surrender, his utmost claim and proof being that he was willing to remain, and did in fact remain, in the employ of the defendant after receipt of said notice and up to the time of his discharge; but he neither pleaded nor testified, nor did the trial court find, that he was legally bound to so remain or that he in so remaining, did anything other or further than that which he was willing to do and would have done if such notice had never been issued by his employer or received by himself. We do not discover any real distinction between the facts of this case and those of the case of *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171, upon which the appellant chiefly relies for a reversal of this judgment, for while in that case the plaintiff's employment was for a year instead of from month to month, as in this case, the difference is not material, since in each case there was lacking the essential element of a sufficient consideration to render the defendant's offer one which, however bind-

ing in conscience, it was bound in law to perform. The language of the court in the case cited is quite apt in its application to the instant case:

"When one receives a naked promise and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damage cognizable by courts. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law."

In the case of *Duncan v. Cone, Inc.*, 16 Ga. App. 253, 85 S. E. 203, the court also uses the following apt expression regarding offers by employers similar to that presented in the case at bar:

"Where, during the pendency of a term of employment at a stipulated salary per month, a voluntary agreement, entirely apart from the contract of employment, is made by the employer, to pay the employee as a bonus some indefinite and undetermined share in the profits of the business, 'contingent on continuous and satisfactory services,' and this voluntary agreement is not supported by any change in place, hours, character of employment, or other consideration, the agreement is not enforceable at law, as it is nudum pactum, and the grant of the bonus so promised is altogether optional, because dependent upon whether the services of the employee are 'satisfactory' to the employer, and of this he is in such a case the sole judge."

The case of *Haag v. Rogers*, 9 Ga. App. 650, 72 S. E. 46, cited by the respondent as supporting his contention, is clearly distinguishable from the case at bar, since in that case the obligation to pay the added compensation of the employee arose from an express contract between the employer and employee to that effect and was not in the nature of a voluntary gratuity. The Georgia Court of Appeals in the case just cited expressly notes the distinction between it and the case of *Davis & Co. v. Morgan*, supra, in these words:

"In that case the extra compensation was purely a promised gift or bonus; in this case it was a part of the wages promised, though it was only conditionally promised."

[2] That portion of the notice issued by the defendant and above quoted, which relates to the purchase of Liberty Bonds by its employees, while referred to by the trial court in its findings to the effect that the plaintiff, relying upon the terms of said notice, did invest in Liberty Bonds, has not been and could not well be relied upon by the respondent as a basis for this action or as a ground for upholding this judgment, since plaintiff's pleadings allege and the findings of the court show that whatever investment in Liberty Bonds the plaintiff made through his said employers and after the

issuance of said notice was subsequently canceled by the latter, and even though it is alleged and found that such cancellation was without the plaintiff's knowledge and consent, it nowhere appears that he suffered any detriment either by his subscription to said bonds or by his employer's cancellation of such subscription after his discharge. It may be finally noted that neither in the plaintiff's complaint or proofs, nor in the findings of the court is there any showing or claim that the defendant acted fraudulently or in bad faith in respect to the plaintiff's discharge from its employment further than the plea and finding that his said discharge was without cause. Under its month-to-month employment of the plaintiff, unaltered as we think it was by the offer of this bonus, the defendant had and retained the full legal right to discharge the plaintiff at any time without cause, and, this being so, we are of the opinion that the judgment in this case cannot be upheld.

Judgment reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

53 Cal. App. 582

BRASELTON v. VOKAL et al. (Civ. 2275.)

(District Court of Appeal, Third District, California. July 19, 1921. Hearing Denied by Supreme Court Sept. 17, 1921.)

1. Evidence ⚡432—Parol evidence admissible to show want of consideration for option.

Want of consideration in written executory contracts may be shown by parol proof, under Civ. Code, §§ 1614, 1615, and Code Civ. Proc. § 1962, subd. 2, and such is true as to a written option to purchase land.

2. Vendor and purchaser ⚡18(1)—Presumption that written option was supported by consideration.

A written option to purchase land is presumed to be supported by consideration under Code Civ. Proc. § 1963, subd. 39.

3. Evidence ⚡591—No claim of presumption against own admission.

No party can claim the right of a presumption against his own admission under oath.

4. Vendor and purchaser ⚡18(1)—Option without consideration may be withdrawn.

A written option to purchase land, not supported by consideration, is a mere offer of performance on the part of the owner, which may be withdrawn before it has been accepted and acted upon by the other party, while it cannot be withdrawn if given for a valuable consideration, whether adequate or not.

5. Specific performance ⚡49(1)—Option without consideration may be specifically enforced if accepted before withdrawn.

A written option to purchase land, although not supported by a consideration, may be specifically

enforced when accepted before withdrawn, and the party to whom the offer is made may manifest his acceptance by payment, or tender of payment, of the consideration mentioned in the written option.

6. Specific performance ⚡121(10)—Finding that option was not withdrawn supported by evidence.

In an action for specific performance of a written option to purchase land, a finding that the option was not withdrawn *held* sustained by the evidence.

7. Frauds, statute of ⚡129(3)—Parol agreement to convey sufficiently executed to take case out of statute.

Where a deed was signed and acknowledged and put in a bank where grantee was to deposit money, and when the title was clear grantor was to receive the money and grantee was to receive the deed, and the money was so deposited, and grantee waived his right to demand a clear title, there was a sufficient execution of a parol agreement to convey to take the case without the statute, or, at any rate, to estop grantor from a repudiation of the oral agreement.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by W. A. Braselton against J. J. Vokal and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Clyde Thomas, of Chico, for appellants.
Lon Bond and Bond & Deirup, all of Chico, for respondent.

BURNETT, J. Plaintiff brought the action to compel defendants, J. J. Vokal and Mary Vokal, to execute a conveyance to him of a certain lot in the city of Chico, and he had judgment, from which said defendants have appealed. The action was based upon a certain written instrument, executed by said defendants in the following form:

"For and in consideration of the sum of ten dollars, paid the undersigned, the receipt of which is hereby acknowledged, I agree to sell and convey to W. A. Braselton free from any lien and incumbrance whatever, on demand, within thirty days from date, at his option, the following described property, to wit [describing the property], and in consideration of fifteen hundred fifty dollars cash, upon delivery of deed having clear title. Dated at Chico, county of Butte, state of California, this 28th day of October, 1919."

There is no contention that the complaint fails to state a cause of action, or that the findings are insufficient to support the judgment, but appellants do claim: (1) That the option was given without consideration; (2) that it was revoked before the tender of performance; and (3) that the whole transaction was vitiated by the fraudulent representations of plaintiff, and therefore the pur-

ported contract should not be enforced by a court of equity.

As to the first the court found:

"That it is not true that said option contract set out in the complaint and in paragraph 3 of these findings was made and executed without consideration."

Respondent insists that the statement of consideration in the so-called option cannot be questioned in this suit, his position being:

"That the amount of consideration as recited in an instrument is never conclusive, but where it is attempted to defeat the instrument by showing it had no consideration in the face of a recital in the instrument that there was a consideration, the courts have uniformly held that this cannot be done, in the absence of fraud or mistake."

In support of this contention he cites certain cases, among them being the following California decisions: *Hendrick v. Crowley*, 31 Cal. 471; *Coles v. Soulsby*, 21 Cal. 47; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Arnold v. Arnold*, 137 Cal. 291, 70 Pac. 23; *Aitchison v. Carruthers*, 161 Cal. 8, 118 Pac. 239; *Dollar v. International Banking Corporation*, 13 Cal. App. 338, 109 Pac. 499; *Burkett v. Doty*, 32 Cal. App. 338, 162 Pac. 1042. Concerning these decisions we deem it unnecessary to say more than that they have no application to a case like this involving an executory and not an executed covenant. In *Page on Contracts*, the distinction is clearly made between deeds or other conveyances and executory covenants. On page 3790 (2d Ed.) it is stated:

"The recital of a valuable consideration in a deed or other conveyance cannot be contradicted for the purpose of destroying the legal effect and operation of the deed."

On page 3796 in reference to simple executory contracts containing the recital of a consideration as a fact, we find this:

"The weight of authority is that such recital of a consideration may be contradicted for the purpose of showing that such apparent contract was in reality a gratuitous, unenforceable promise. * * * The recital of a consideration, such as \$1, in an option to purchase realty, may be contradicted for the purpose of showing that such offer was not for value."

[1] That the law in California permits parol proof to show the want of consideration in written executory contracts is beyond question. This follows from a consideration of section 1614 and 1615 of the Civil Code and section 1962, subdivision 2, of the Code of Civil Procedure. Moreover, it has been so decisively held by the courts of this state. In *Stanton v. Weldy*, 19 Cal. App. 374, 126 Pac. 175, the court points out that the rule is the same whether the named consideration be money or any other article of personal property. Therein it is said:

"On principle, we can discover no reason for allowing proof of no consideration where money is the consideration named and denying it where some article of personal property is named as the consideration. If the promisor received nothing in either case, he may show the fact in defense."

The latest decision upon the subject is found in *Royer v. Kelly*, 174 Cal. 70, 161 Pac. 1148. The case involved two contracts, both reciting facts which would constitute valuable considerations. The court said:

"The recitals of the two agreements furnish presumptive evidence of a valuable consideration. But the rule is that the parties are not estopped by recitals in agreement with respect to its consideration. The true consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration. *Chaffee v. Browne*, 109 Cal. 220, 41 Pac. 1028; *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881; *Stanton v. Weldy*, 19 Cal. App. 374, 126 Pac. 175. The question must, therefore, be determined by an examination of the evidence."

[2, 3] In viewing the evidence we can hardly escape the conclusion that there was no valuable consideration to support the option. The consideration, of course, would be presumed, since we are concerned with a written instrument. Section 1963, subd. 39, Code Civ. Proc. This presumption is evidence, and might be sufficient to support the finding of the court under ordinary circumstances. But in the case at bar it would seem to be entirely overcome by the testimony of the plaintiff himself to the effect that there was no consideration for said option. His statement under oath was that of an interested party in whose favor said presumption would have to be indulged. No party can claim the right of a presumption against his own admission under oath. If the testimony as to the want of consideration had come from the opposite party alone, this court would be justified in upholding the finding upon the strength of said presumption. *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677.

[4] But notwithstanding that we must hold that said finding is unsupported, it does not follow that the judgment must be reversed. In some jurisdictions it is held that specific performance may not be compelled in case of an option not founded upon a valuable consideration, even though accepted by the holder. However, in 25 R. C. L. 37, the true rule is stated as follows:

"Unilateral contracts are not favored in equity, and the want of mutuality of obligation and risk may generally be urged as a bar to their specific enforcement. But while great care is observed in enforcing unilateral contracts, certain contracts are constantly recognized as legal and binding, such as bonds and similar obligations which are unilateral in form

if not in effect. Options constitute an important class of unilateral contracts which form an exception in certain respects to the general rule as to the necessity of mutuality. The privilege given in options to the holder either to enforce or cancel the contract does not prevent him from obtaining the specific performance of the contract, provided the option itself is founded on sufficient and valuable consideration. The right of a holder of an option, based on a valuable consideration, to the specific enforcement thereof is not lost by the fact that the vendor refuses to perform the contract before the purchaser demands performance. A mere naked option, not supported by any consideration, is not enforceable. It may be withdrawn at any time before it is accepted. By his election to accept and exercise the option the contract becomes binding on the holder, and any objection to its enforcement on account of want of mutuality is removed. The contract may then be specifically enforced in equity."

The above quotation shows the distinction between an option founded upon a valuable consideration and one not so supported. In the latter, the option is a mere offer of performance on the part of the owner, which may be withdrawn before it has been accepted and acted upon by the other party. This distinction is clearly made in section 125 of Warvelle on Vendors, wherein it is said:

"A mere proposal or offer, though made in writing and signed by the proponent, creates no obligation on the part of the person making the same, unless accepted by the person to whom the same is made according to its terms. Being made without consideration, and not possessing the essential element of mutuality, the party making an offer has a right to withdraw it at any time before the one to whom it is made accepts it. * * * If the option is given for a valuable consideration, whether adequate or not, it cannot be withdrawn or revoked within the time fixed, and it will be binding and obligatory upon the owner, or his assigns with notice until it expires by its own limitation."

[5] That a voluntary offer in writing to convey may be enforced when accepted before withdrawal is the undoubted rule in this state. *Mitchell v. Gray*, 8 Cal. App. 423, 97 Pac. 160; *Brown v. San Francisco Savings Union*, 134 Cal. 448, 66 Pac. 592; *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522. Up to the time of acceptance, it is characterized as a nudum pactum, but when the proposal is assented to and acted upon it assumes the aspect of a valid and binding contract. It is equally true that the party to whom the offer is made may manifest his acceptance by payment or tender of payment of the consideration.

[6] These principles are conceded by appellants, but they claim, as before stated, that they withdrew the offer before it was accepted by respondent. It may be admitted that a finding to that effect would be supported,

but such conclusion is not compelled by the evidence. There is a sufficient legal showing to the contrary. Plaintiff's testimony justifies the finding of the court in that respect. It is true that he was asked on cross-examination, "When did Mr. Vokal first tell you, Mr. Braselton, that he would not sell the property?" and he answered, "That was the 27th of November, Thanksgiving." But that he did not understand the question as construed by appellants is quite plain, not only from his direct-examination, but also from a following statement on the cross-examination that Mr. Vokal "never mentioned such a thing." What he referred to in said answer was the disinclination of Mr. Vokal to renew the option. But that Mr. Vokal did not withdraw his offer, or, if he did, he waived his withdrawal, is evidenced by the undisputed testimony of plaintiff that on November 28th, when plaintiff tendered the money Mr. Vokal said "he would not do anything then, that he would be up in the afternoon and see me," that he came in the afternoon, and he said "he would see about it and talk it over with his wife;" and in a day or two afterward he said, "Well, make out the deed and bring it down, and they would sign it;" and as a matter of fact, appellants did sign such deed. This conduct was manifestly inconsistent entirely with the theory of a repudiation or revocation of said option. In view of the whole record it seems utterly out of the question to hold that there is no support for the finding of the court that—

"It is not true that defendants, or either of them, thereupon or ever elected to rescind said agreement hereinbefore referred to, or that they immediately thereafter, and before any tender of performance by the plaintiff, or at any other time, notified the plaintiff that they or either of them would not be bound by said contract or agreement, or would not sell the said property."

[7] Moreover, if we assume that said finding is unsupported as far as the first offer is concerned, then another feature of the case justifies an affirmance of the judgment. As we have seen, Mr. Vokal agreed that he and his wife would execute a deed to the premises. This deed was signed and acknowledged on November 28th, under an agreement between Mr. Vokal and plaintiff that the former was to put it in the First National Bank of Chico, and the latter was to deposit the money in the same bank, and, as stated by plaintiff, "when the title was clear he was to receive the money, and I was to receive the deed." The deed and the money were so deposited. After the deed was executed Mr. Braselton made a trip to Hamilton City, and secured the release of an old mortgage against the property, and subsequently waived his right to demand a clear title, expressing his willingness to accept the conveyance subject to a certain tax lien. The

court made a finding upon this phase of the case, and we discover in the record ample evidence to support it. We thus have, according to familiar principles, a sufficient execution of a parol agreement to convey, to take the case without the statute of frauds, or at any rate, to estop the appellants from a repudiation of such agreement.

The principles which must prevail in cases like this have been set forth in many of the text-books and decisions of the courts, and, of course, are well known to the profession. We would look in vain for a more felicitous and cogent expression of them than is found in the quotation made by appellants from Pomeroy's Equity Jurisprudence, volume 1, paragraph 400. But, manifestly, in applying these principles we must remember that the trial court has given credit to the testimony in favor of plaintiff's position. That testimony justifies the conclusion that plaintiff's conduct was not "unconscientious, inequitable, or characterized by bad faith"; to the contrary, that the transaction was "fair and just," and not "harsh and oppressive upon the defendant." We may add that the agreed price was the fair market value of the land.

In brief, whatever testimony may appear to the contrary, a careful reading of the record warrants the declaration that the evidence constitutes a rational basis for the conclusion that no advantage was taken of appellants, that no imposition was practiced, that it was within the discretion of the trial court to decree a specific performance, and that no just ground exists for interfering with that discretion.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

185 Cal. 622

WOLLENSHLAGER et al. v. RIEGEL et al.
(L. A. 7009.)

(Supreme Court of California. Aug. 4, 1921.)

Appeal and error ⚡477—Supersedeas cannot be granted to stay execution sale which court below refused to enjoin.

The Supreme Court is without power to grant an application for a supersedeas to stay an execution sale which the court below refused to enjoin.

In Bank.

Action by John A. Wollenshlager and others against Andrew Riegel and others for an injunction. Injunction denied, and plaintiffs apply for a supersedeas. Application denied.

See, also, 193 Pac. 160.

John B. Haas, of Los Angeles, for appellants.

Frank L. Sobbs, and Hyman Schwartz, of Los Angeles, for respondents.

PER CURIAM. The petition of appellants for a supersedeas shows that the action in the court below was to procure an injunction to stay an execution sale. The injunction was refused. Appellants ask a supersedeas to stay the execution which they sought to have enjoined in the court below. The effect would be that this court would grant the injunction which the court below refused to grant. It is well established that this court is without power to exercise original jurisdiction of this character. *Napa, etc., Co. v. Calistoga, etc., Co.*, 174 Cal. 411, 163 Pac. 497; *Hicks v. Michael*, 15 Cal. 109.

The application for a supersedeas is denied.

53 Cal. App. 589

CORDTS v. SUPERIOR COURT OF STATE OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al. (Civ. 2348.)

(District Court of Appeal, Third District, California. July 20, 1921.)

1. Criminal law ⚡614(3)—Nonappearance after continuance of witness for whom subpoena had been issued not ground for further continuance.

Where witness for the state, who had been subpoenaed to appear on certain date, was informed by the district attorney that trial had been continued, and that his attendance would be required on the date to which it had been continued, but was not subpoenaed or required by order of the court to attend on such date, though the district attorney knew his address, the failure of such witness to appear on date to which the trial had been continued was not ground for discharge of the jury and further continuance over objections of defendant.

2. Criminal law ⚡576(2) — Defendant not tried within 60 days after filing information entitled to dismissal, where no cause for delay shown.

Where the trial was continued over defendant's objections beyond the 60-day period following the filing of the information within which the defendant was entitled to be tried, under Pen. Code, § 1382, without a showing of sufficient cause for such continuance, the defendant was entitled, under such statute, to dismissal of the prosecution.

3. Criminal law ⚡576(11) — Good cause for holding defendant more than 60 days without trial must be shown by prosecution on defendant's motion for dismissal.

On motion of the defendant not tried within 60 days after the filing of information for dismissal of prosecution under Pen. Code, § 1382, requiring the court to order the prosecution to be dismissed where defendant is not brought to trial within 60 days after filing of information, good cause for holding the defendant for a longer time without a trial cannot be presumed by court, but must be shown by the prosecution.

Application for writ of mandamus by E. Cordts against the Superior Court of the State of California in and for the County of Mendocino, and Hon. H. L. Preston, Judge of said court. Writ granted.

Charles Kasch, of Ukiah, for petitioner.

Hale McCowen, Jr., Dist. Atty., of Ukiah, for respondents.

FINCH, P. J. This is an application for a writ of mandate directed to the superior court of the county of Mendocino, requiring the dismissal of an information for misdemeanor filed on the 16th day of February, 1921.

The petition alleges that the trial of the action was set for April 18th, and prior to said date was continued to May 2d; that on May 2d both parties answered "ready"; that thereupon "a jury was impaneled, but just prior to being sworn, upon motion of the district attorney, based upon the absence of the witness Bailey," the court "discharged the jury and continued the matter for trial and refused to try the said matter; all against the objections and against the protests of your petitioner." It is further alleged that the said Bailey is a material witness for the prosecution; that he was subpoenaed to attend the trial on April 18th; that on the 15th day of April he went from his home in Eureka to attend the trial at Ukiah, and was then informed by the district attorney of the continuance of the trial, and that his attendance would be required on May 2d, whereupon the witness returned to Eureka; that the district attorney knew the street address of the witness in Eureka, and on the 27th day of April wrote him that he would be required to attend the trial on May 2d, but that no subpoena or order of court

was issued or served upon the witness to attend the court on May 2d; that no showing of any character was made by the district attorney in support of his motion for a continuance; that no continuance of the trial was had at the request of the defendant; that thereafter the defendant moved the court for a dismissal of the action on the ground that he had not been brought to trial within 60 days after the filing of the information, and, upon the denial of said motion by the court, this application was made.

The district attorney filed a demurrer herein on behalf of respondents on the ground that the petition does not state facts sufficient to warrant the issuance of the writ. On June 13th the matter was submitted on briefs, the petitioner being given 15 days to file his points and authorities and the respondents 15 days after the filing of petitioner's brief within which to reply. Petitioner's brief was filed June 17th, and the district attorney has offered nothing in reply, and has made no request for permission to make a counter showing herein. The fair inference is that no cause can be shown in opposition to the facts alleged in the petition.

[1-3] The petition shows that there was good cause for the continuance of the trial to May 2d. From the facts stated in the petition, it appears that no sufficient cause was shown for the discharge of the jury on May 2d, and the further continuance of the case. Section 1382 of the Penal Code provides:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed * * * if a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the * * * filing of the information."

"The statute is imperative. * * * Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it. The court could not presume it." *People v. Morino*, 85 Cal. 517, 24 Pac. 893; *In re Begerow*, 133 Cal. 351, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178; *Matter of Ford*, 160 Cal. 334, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; *Ford v. Superior Court*, 17 Cal. App. 1, 118 Pac. 96.

The right of petitioner to a dismissal of the action seems clear.

It is therefore ordered that a peremptory writ of mandate issue out of and under the seal of this court to the superior court of the county of Mendocino, and to the Honorable H. L. Preston, judge thereof, commanding and directing that the action herein referred to against petitioner be forthwith dismissed.

We concur: BURNETT, J.; HART, J.

53 Cal. App. 724

PEOPLE v. BROWN. (Cr. 754.)

(District Court of Appeal, Second District, Division 1, California. July 26, 1921.)

1. Homicide — 230—Evidence held to prove that automobile driver intentionally ran down deceased.

In prosecution of automobile driver unlawfully transporting liquor, for murder of officer of the United States immigration service run over by automobile, evidence held to prove that driver intentionally swerved automobile at great speed toward the deceased with intent to run him down.

2. Criminal law — 371 (4, 12)—Testimony as to defendant's unlawful transportation of whisky held admissible in prosecution for homicide.

In prosecution of automobile driver for murder of an officer of the United States immigration service, stationed at a point on the highway to apprehend persons engaged in the unlawful transportation of liquor, in which it was claimed that such driver swerved automobile toward such officer with intent to run over him, the admission of testimony as to the transportation of whisky by the defendant, the hiding thereof after the killing, and of the whisky itself, held admissible to show motive and to present a theory inconsistent with defendant's claim that the killing was accidental.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

G. E. Brown was convicted of murder in the second degree, and he appeals. Affirmed.

Willis O. Tyler and Thomas Pearson, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SHAW, J. Upon an information charging him with the crime of murder, defendant was convicted of murder in the second degree, followed by a judgment of imprisonment from which he appeals.

[1] It appears from the record that, in the performance of their duty as officers of the United States immigration service, Alphonse G. Bernard and Henry Y. Hackett were, on the night of July 10-11, 1920, stationed at a point near Campo on the highway leading from Calexico to San Diego, for the purpose of apprehending persons engaged in the unlawful transportation of liquor by automobile, the drivers of which they signaled to stop by the waving of flash lights, with which both were equipped. At about 3 o'clock on the morning of the 11th of July, at which time Hackett's position was on the north side of the highway and that of Bernard was on the south side at a point a short distance west of the former, an automobile driven by defendant approached from the east, going westerly toward San Diego. When first seen by them it was distant about one-fourth of

a mile and was being operated at a speed of 30 to 35 miles per hour. By waving their flash lights they signaled defendant as the driver thereof to stop the car, but instead of doing so he increased the speed thereof, and, when near the point where Hackett stood, swerved his car toward him, to escape a collision with which he was compelled to jump back to the side of the roadway, whereupon defendant immediately turned his car to the left or south side of the road, to the place farther west where Bernard was stationed, at which point he caused the car, traveling at high speed, to collide with Bernard, as a result of which the latter was instantly killed. At the time the car contained 244 pints of whisky which the defendant was unlawfully transporting from the town of Mexicali, in Mexico, to some place in the United States. After striking deceased, whose body, being badly crushed and stripped of its clothing, was dragged some 200 or 300 feet, the car, at increased speed, was run a distance of a mile or so over the highway, when it was driven off the road into the brush, and the liquor taken therefrom and cached, after which the automobile returned to the highway, over which it proceeded to San Diego. It further appears that, some two or three weeks prior to the time in question, defendant, in discussing the efforts of officers to apprehend whisky smugglers, had said:

"If anybody undertakes to stop me, I will put on all the gas I have and run them down."

That defendant knowingly refused to recognize the stop signals of the officers and intentionally swerved his car at great speed, first toward Hackett on the right of the roadway and then to the left, where deceased was standing, and with the purpose of causing the same, which in both instances as shown by the wheel tracks left the driveway, to collide first with Hackett and then with Bernard, admits of no doubt; indeed, his counsel does not question the sufficiency of the evidence to justify the verdict of guilty reached by the jury.

[2] The alleged errors complained of, and upon which appellant bases his claim for a reversal, are rulings of the court in admitting testimony of the transportation of the whisky, the hiding thereof after the alleged killing, and its introduction in evidence, all of which evidence was admitted over defendant's objections. That the evidence was material and competent, in our opinion, ad-

mits of no doubt. While defendant admitted the killing, he claimed it was not intentional, but accidental. Hence any evidence was material that tended to show the commission of the act was prompted by a motive inconsistent with defendant's innocence of the offense for which it was sought to apprehend him. As said by Mr. Wharton in his work on Criminal Evidence (section 899):

"Facts and circumstances are relevant on a homicide charge, to show that the motive for the homicide was the concealment of a prior crime, when they tend to prove that the accused was guilty of a prior crime, and knew that he was suspected by the deceased to be so guilty, or that the deceased was likely to discover the fact." Id. § 897.

In *People v. Pool*, 27 Cal. 575, it is said that—

"Whenever it is important to determine the character of the act perpetrated and to ascertain the intent of the accused, the existence of any motive likely to instigate him to the commission of the crime may be proved, and is relevant and competent for the purpose of fixing or tending to fix the crime upon him."

Conceding the attempted smuggling and transportation of the liquor by defendant was not illegal under the laws of this state, it nevertheless constituted a criminal offense, for which he was punishable under the federal statutes. The evidence offered tended to show that defendant, with full knowledge of such fact, and knowing that if he stopped his car a search thereof would be made, and conclusive evidence of his unlawful act obtained, sought to avoid discovery of the crime and apprehension therefor by escape, and as a means to such end propelled his car against Bernard and killed him. Its effect was to present a theory inconsistent with defendant's claim that the killing was accidental.

The fact that defendant was engaged in transporting the 244 pints of liquor in the car appeared from the testimony of the witness Miller, who also testified to the fact that the liquor was cached at a certain point near the highway by defendant. Upon going to the point designated, officers found the liquor, and it was properly introduced in evidence as corroborating the testimony so given by Miller.

The appeal based upon the grounds stated is without merit.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 667

OLDERSHAW v. KINGSBAKER BROS. CO.
(Civ. 3829.)

(District Court of Appeal, First District, Division 2, California. July 26, 1921.)

1. Sales ⇐32—Letters held to evidence binding contract.

Letters held to evidence a binding contract to take plaintiff's entire output of hothouse tomatoes for a given period.

2. Contracts ⇐10(4)—Agreement to take entire output not void for want of mutuality.

A contract to purchase the entire output of a plant for a given period is not void for want of mutuality.

3. Sales ⇐384(5)—Measure of damages for refusal to accept stated.

In action for damages for refusal to accept plaintiff's entire output of hothouse tomatoes during a certain period, plaintiff was entitled to recover the contract price for tomatoes actually delivered, and the difference between the contract price and the market price for those not accepted.

Appeal from Superior Court, Kern County;
J. W. Mahon, Judge.

Action by C. D. Oldershaw against the Kingsbaker Bros. Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ingle Carpenter and M. J. Finkenstein, both of Los Angeles, for appellants.

Kaye & Siemon, of Bakersfield, for respondents.

NOURSE, J. Plaintiff recovered judgment against defendant for \$3,754.55 damages for breach of contract to purchase the entire crop of hothouse tomatoes grown by plaintiff in his plant at Bakersfield during the winter of 1917-18. The contract is found in a series of letters passing between the parties following the sale by plaintiff of a large amount of tomatoes during the previous winter on a basis of 15 cents a pound. While these deliveries were being made, the plaintiff, on February 7, 1917, wrote to defendant that he was contemplating the construction of two new hothouses in order to increase his output for the 1917-18 season, and asked if defendant would be able to take the increased supply. To this defendant replied:

"We will have no trouble in disposing of 50 lugs or more every day, and mention this to assure you that we have the distribution for the full capacity you will be able to turn out."

On March 10th following, defendant wrote to plaintiff that it preferred to have deliveries begin close after the 1st of December; that the most desirable period for hothouse tomatoes was in December, January, and February, and advised him to plant his seed so that the tomatoes would mature for ship-

ment during that period. On April 2d following, the plaintiff wrote defendant that he would construct four instead of two new hothouses and hoped to be able to give defendant plenty of tomatoes during the next season. Also that "I will plant my seed in time to have ripe tomatoes for you on December 1." On April 7th defendant replied:

"We will look forward to receiving all your tomatoes next year, and trust that your contemplated plans will materialize."

From this correspondence it is apparent that the parties intended the plaintiff should increase his production adding four new hothouses, and that the defendant would purchase the entire output on the basis of the transactions of the previous winter—that plaintiff should ship the tomatoes, when ready, to the defendant in Los Angeles, and that the defendant should receive them—up to 50 lugs a day at least—paying therefor 15 cents a pound on semimonthly statements.

Relying upon this agreement plaintiff made the contemplated improvements, and on October 14, 1917, wrote the defendant that he had about three times the acreage in tomatoes over the last season, and that the crop looked like a big yield. He also stated that some of the tomatoes would be ready for shipment about November 15, but that the main crop would come in about December 15. Not having received any reply to this letter, plaintiff again wrote to defendant on October 25th, and in reply to this defendant stated:

"Wish to say that we have anticipated and still expect to handle your entire crop of tomatoes this coming season."

At that time defendant also notified plaintiff that it would be able to handle his tomatoes when the crop started about the middle of November. On November 6th defendant's agent called on plaintiff to look over the crop, and expressed himself as well pleased at the prospect of a large yield. This call was made in answer to plaintiff's written request that defendant send some one from the firm for that purpose. During the conversation plaintiff notified the agent that, owing to the advanced cost of fertilizer, he would have to charge 16 cents that season instead of 15. To this the agent agreed, and some tomatoes were shipped and billed to defendant on that basis.

Soon thereafter the agent informed plaintiff that his firm was unable to sell the tomatoes at a profit if billed at 16 cents, and asked that he sell at the market price. Plaintiff informed the agent that he would write the defendant, and on November 21st did write, offering to reduce the price to 10 cents a pound for all shipments prior to December 1st. This was accepted by defendant in a letter of November 24th, in which defendant stated that it had no trouble in disposing of

plaintiff's tomatoes, but that on account of local weather conditions there were so many field-grown tomatoes on the market that plaintiff's tomatoes were being sold at a loss.

"We are perfectly willing to lose a little on these first shipments and appreciate your attitude in reducing the price to 10 cents per pound on certain mentioned shipments up to December 1."

Shipments were continued throughout the month of November, billed at 10 cents a pound, and from December 1st to December 30th, billed at 16 cents. No objection was made by defendant, except that its agent requested plaintiff to make a further extension of the reduction in price, which was not agreed to. On December 29th, the market for hothouse tomatoes still being poor because the warm southern California weather, which was not anticipated, was still producing field-grown tomatoes, defendant wired plaintiff asking his permission to sell his tomatoes to best advantage on the market. When plaintiff replied that he would insist upon fulfillment of his contract, defendant, on December 30th, refused to accept further shipments. Plaintiff then endeavored to sell the remainder of his crop in other markets. The proceeds of such sales as were made were taken into consideration in estimating plaintiff's damages, and the judgment covered the price of the shipments made to defendant and not paid for and the loss of profits from those which defendant refused to accept.

[1, 2] The facts recited do not constitute mere negotiations preliminary to the execution of a formal contract. There is no evidence that any formal contract was contemplated, but, on the other hand, it is apparent that the parties at all times treated the correspondence as the contract, and intended it to be such. There was no essential feature which was either indefinite or uncertain except the matter of price, and that was supplied by oral evidence. Though there was a conflict in this evidence the court was justified in finding that the 16-cent price was agreed to. The contract called for the entire output of plaintiff's plant; there was no estimate of the amount which defendant might take—it agreed to take the entire crop. The defendant was notified that plaintiff contemplated the construction of four new hothouses and agreed to take the output of the entire plant. Then its agent was shown the plant while the tomatoes were ripening, and expressed satisfaction over the prospect of a large yield. Such a contract to take the entire output of a plant for a given period is not void for want of mutuality. *McIntyre Lumber Co. v. Jackson Lumber Co.*, 165 Ala. 268, 271, 51 South. 767, 138 Am. St. Rep. 66, 67; *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 672, 117 Pac. 934; 13 Corpus Juris, 338.

[3] Defendant insists that the trial court erred in awarding damages above the amount tendered in defendant's answer. The argument is that for the 6,783 pounds received by defendant prior to the repudiation of the contract plaintiff was entitled to recover the current market rate of 6 cents, which would make \$406.98, the amount tendered. Then it is said that, because plaintiff endeavored to sell the remainder of the crop in Bakersfield and Fresno only, and did not seek other markets in San Francisco and Los Angeles, he should be denied any damages for the loss suffered by the breach.

As to the tomatoes actually delivered to defendant, they were sold under an express contract for 16 cents a pound, and plaintiff was entitled to recover on that basis. As to the portion of the crop not taken, the court awarded damages at the contract price for such of the crop as was marketable, less the sum received by plaintiff through other sales. In this there was no error. There was evidence which would have supported a larger award of damages for the portion of the crop not taken, and defendant is in no position to complain of the judgment on this score.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 673

KOENIGSTEIN v. KOENIGSTEIN.
(Civ. 3540.)

(District Court of Appeal, Second District, Division 2, California. July 27, 1921. Hearing Denied by Supreme Court Sept. 22, 1921.)

1. Divorce ⚭129(9)—Circumstantial evidence of adultery requires showing of criminal disposition and opportunity to commit crime.

In proving adultery by circumstances, a criminal disposition or desire in minds of both alleged guilty parties and an opportunity to commit the crime must both be established.

2. Husband and wife ⚭297—Evidence held sufficient to support findings of adultery.

In an action for divorce, evidence held sufficient to support finding of adultery on part of plaintiff as charged by cross-complaint for separate maintenance.

3. Husband and wife ⚭300—Finding of trial court supported by substantial evidence not disturbed.

The court's finding of adultery being supported by substantial evidence, it will not be disturbed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action for divorce by William A. Koenigstein against Minnie B. Koenigstein, in which

defendant filed a cross-complaint for separate maintenance. From judgment for defendant, plaintiff appeals. Affirmed.

Warren L. Williams, of Los Angeles, for appellant.

Mulford & Dryer, of Los Angeles, for respondent.

CRAIG, J. In this action the plaintiff sought a divorce. The defendant answered and filed a cross-complaint for separate maintenance. The cross-complaint alleged habitual intemperance and adultery on the part of plaintiff. The case was tried, and the court gave judgment against the plaintiff and in favor of the defendant. The court found both the allegations of adultery and habitual intemperance to be true. The grounds of the appeal are that the evidence does not support certain findings.

Finding VI is as follows:

"That plaintiff, at divers times, did commit adultery with one Rose L. Geist Lee, formerly Rose L. Geist, at the city of Norfolk, Neb., and elsewhere; that each and all of said acts of adultery were committed without the consent, connivance, procurement, or previous knowledge of defendant, and that defendant has not lived or cohabited with plaintiff since she became cognizant of the commission by plaintiff of the said several acts of adultery."

In the case of *Goldsmith v. Goldsmith*, 26 Cal. App. 458, 147 Pac. 214, cited by appellant, it was held that the evidence was insufficient to support a finding of adultery. In that case the entire evidence concerning that matter was contained in certain letters written by defendant to a man named Gordon. The decision is expressly based upon the provisions of our Civil Code, section 130, and our Code of Civil Procedure, § 2079, to the effect that a decree of divorce cannot be based upon the uncorroborated statements, admissions, and testimony of the parties to the action. These sections apply to divorce cases only and the case is therefore not in point in this action for separate maintenance.

[1] With reference to the degree of proof required to establish adultery we may quote the language of the court in *Hartshorn v. Hartshorn* (Okla.) 168 Pac. 822, as follows:

"The party relying on the charge of adultery has the burden of proving it by a fair preponderance of the evidence. In proving adul-

tery by circumstances two facts must be established, a criminal disposition or desire in the mind of both the defendant and the particeps criminis, and an opportunity to commit the crime."

[2] In the case at bar, the principal evidence to support finding VI is a letter written by Koenigstein to Rose L. Geist Lee. It refers to a telegram sent by her and which Mrs. Koenigstein had opened. The letter is a long one and it would serve no useful purpose to quote it here in full, but throughout it contains a strong inferential admission that the defendant and "Dearest Rose," to whom it is addressed, had occupied so close a relationship as to permit a reasonable and just man, viewing the matter with guarded discretion, to be satisfied that both opportunity and the desire to commit adultery had existed between them.

From the letter it appears that the defendant had visited "Rose" on different occasions in Omaha; the writer asserts that he had been square with her; had sent her 10 dollars a week since she had left; that he "had no one else all the time I have been with you"; that somebody had "spilled the whole thing" of defendant going to see her.

The trial court, no doubt, also considered the fact that this letter was written by a married man to one not his wife, and the entire circumstances, involving guilty conduct of the defendant, such as his immediate departure from his home as soon as he knew that his wife had the information he mentioned in his letter to "Rose."

[3] Where there is substantial evidence to support the decision of the trial court, it is a familiar rule that its finding will not be disturbed. *Clopton v. Clopton*, 162 Cal. 27, 121 Pac. 720. On this principle, we are satisfied that a reversal would not be justified, upon the ground that the evidence is insufficient to support finding VI. It will be unnecessary to consider the contentions of appellant concerning the other findings of which complaint is made because the existence of a cause for separate maintenance under the finding which we have examined is sufficient to justify the judgment rendered in favor of the plaintiff on her cross-complaint.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

53 Cal. App. 660

ORLY v. RUSSELL. (Civ. 3504.)

(District Court of Appeal, First District, Division 2, California. July 25, 1921.)

1. Forcible entry and detainer §29(4)—Evidence insufficient to show entry by defendant.

In a forcible entry and detainer proceeding by tenant against another person, evidence held insufficient to show entry on the premises or unlawful detainer thereof by the defendant.

2. Landlord and tenant §120(1)—Tenancy at will terminated in 30 days.

Tenure of a tenant at will may be legally terminated in 30 days, under Civ. Code, § 789.

3. Forcible entry and detainer §30(2)—Tenant at will entitled to damages only for one month.

Since tenant at will's tenure may be terminated in 30 days under Civ. Code, § 789, the longest period of time for which he is entitled in a forcible entry and detainer case to charge a loss of profits as an element of damages is 30 days, under Civ. Code, § 3334.

4. Forcible entry and detainer §30(4)—Verdict held not to be considered as including exemplary damages.

In forcible entry and detainer case, where plaintiff asked for exemplary damages, and maximum damage shown by the evidence could only have been \$258, a verdict for \$450 cannot be considered as including exemplary damages, as the jury should have fixed the damages, and then, if plaintiff so desired, he should have appealed to the court to have the damages trebled.

5. Forcible entry and detainer §30(4)—No exemplary damages in absence of overt or malicious act.

Plaintiff in forcible entry and detainer was not entitled to exemplary damages where no evidence was introduced showing any overt or malicious acts on the part of the defendant.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by George Orly against Charles O. Russell. Judgment for plaintiff, and defendant appeals. Reversed.

John H. Riordan, of San Francisco, for appellant.

Daniel Barton, of Richmond, for respondent.

STURTEVANT, J. The plaintiff sued the defendant in an action of forcible entry and unlawful detainer; a trial was had before the court sitting with a jury; the jury returned a verdict in favor of the plaintiff for the restitution of the premises and \$450 damages. The defendant moved for a new trial on all of the statutory grounds, the motion was denied and the defendant has appealed under section 953a of the Code of Civil Procedure.

One Hamble owned a building on Macdonald avenue in the city of Richmond,

which building was divided into two compartments, one known as 1100 and the other as 1102 Macdonald avenue. In February, 1919, R. H. Curry held a lease on the building. While he was lessee the plaintiff rented, for no specified term, the compartment known as No. 1102. and paid his rent to the lessee in the sum of \$18 per month—that is, from the 17th day in the month to the 17th day of the next month. The lease which Curry held from the landlord contained an option that the lease could be canceled on the request of the lessee whenever prohibition was about to take effect. Accordingly the lessee took such steps that his lease was canceled July 1, 1919. Thereafter, during the month of July, the landlord leased some part of the building to Charles Russell, and on the same day the landlord called on the plaintiff and collected in cash one-half of one month's rent; at the same time the landlord and the plaintiff had a conversation in which it was discussed that the lease had been or was about to be made to Russell, and the future tenure of the plaintiff was discussed as being problematical. The record shows no conversation or communication between the plaintiff and the defendant except as will presently be stated. Between 7 o'clock Saturday, August 29, 1919, and Monday morning following, some one entered the premises known as No. 1102 by means of breaking off some hooks on a back door which led into the premises known as No. 1100. After so entering a board was so fastened across the front door as to prevent an entrance. On September 2d the plaintiff and his attorney served a notice on the defendant requiring the defendant to surrender possession to the plaintiff within five days. At that time the defendant is quoted as stating, "I can't give up that way, up the place;" in another part of his testimony the plaintiff quotes the language as being, "It is a nice way I could give you back now your place;" and in another place he uses the expression, "Fine way I could restore the shop now to you."

[1] Except as stated above, there is not a scintilla of testimony in the record showing who it was that entered the back door and barred the front door, nor is there a scintilla of evidence showing who, if any one, was in possession from August 29, 1919, down to and including the date that the action was commenced. There is evidence that after demand was made on him the defendant did not deliver possession of the premises, but there is not a word in the record showing that he was in possession, or that he had the least authority or power to deliver the same. It is patent, therefore, that the most material allegations of the charging part of the plaintiff's complaint are not sustained by the evidence. His proof

showed a trespass on the part of some one, but did not even show a trespass on the part of this particular defendant. *Polack v. McGrath et al.*, 25 Cal. 54; *Preston v. Kehoe*, 10 Cal. 445; *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 339; *Frazier v. Lynch*, 97 Cal. 370, 32 Pac. 319; *Davies v. Stark*, 25 Cal. App. 519, 144 Pac. 315.

In what we have said above we have not overlooked testimony to the effect that John B. Azevedo and the defendant desired to install an ice cream stand in the building, that they desired the use of the entire premises, and that the defendant entered and made some alterations in the building. When the defendant entered to make said alterations there is no evidence he entered through No. 1102. Conceding he committed a trespass against the plaintiff in altering the wall, this is not an action for a mere trespass.

[2-5] Plaintiff was a tenant at will. As such his tenure could have been legally terminated in 30 days. Civ. Code, § 789; *Martin v. Splivalo*, 56 Cal. 128. The longest period of time for which he was entitled to charge a loss of profits as an element of damage was therefore 30 days. The plaintiff testified that he was earning \$240 per month. He had been paying \$18 a month rental; the maximum damage shown by the evidence introduced by him was therefore \$258. Civ. Code, § 3334; *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291. However, the jury brought in a verdict for \$450. The amount was clearly excessive. True it is that the plaintiff asked in his complaint for exemplary damages, but the jury should have fixed the damages, and then, if plaintiff so desired, he should have appealed to the court to have the damages trebled. No such proceeding was had, and therefore the verdict cannot be considered as including exemplary damages. *San Francisco, etc., Soc. v. Leonard*, 17 Cal. App. 254, 119 Pac. 405. Furthermore as no evidence was introduced showing any overt act on the part of this defendant, far less was there any evidence showing malicious acts on his part, and there was no basis for awarding exemplary damages.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

53 Cal. App. 693

MOODY v. GOODWIN et al. (Civ. 3465.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1921.)

1. Factors — Person intrusted with automobile held not a "factor."

One permitted by the owner of an automobile to drive it to a prospective buyer's place of business for exhibition, without authority to

sell or deliver it to the latter was not clothed with the authority of a factor, defined by Civ. Code, § 2026, as an "agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Factor.]

2. Sales — 233(1)—Purchaser of registered automobile may sue for conversion, though failing to comply with statutory conditions of transfer of ownership.

Notwithstanding the requirement of Code Civ. Proc. § 367, that every action be prosecuted in the name of the real party in interest, one in the rightful possession of an automobile as a purchaser from the registered owner, though not complying with the requirements of the Vehicle Act, § 8, as amended by St. 1917, p. 391, as to transfer of a registered car, may sue in replevin or for conversion of the car, for actual possession of a chattel at the time of conversion thereof will sustain trover, except as to the true owner, or one claiming under him, though the title be in a third person.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by W. E. Moody against H. K. Goodwin, R. B. Moore, and another. Judgment for plaintiff, and defendant Moore appeals. Affirmed.

Jackson Mahon, for appellant.

E. F. Brittan, of Bakersfield, for respondent.

SHAW, J. Action for the recovery of damages for defendants' alleged conversion of an automobile. Plaintiff had judgment, from which defendant Moore has appealed.

While there is some conflict in the evidence, it sufficiently appears therefrom that plaintiff was in the rightful possession of the car as a purchaser thereof from the registered owner; that on or about September 18, 1919, he, for the purpose of having it shown to defendant R. B. Moore, who was represented to be a prospective buyer, permitted H. K. Goodwin to drive the same to Moore's place of business for exhibition. No authority, however, was given Goodwin to sell or deliver the car to Moore, but it was to be returned to plaintiff. Notwithstanding the fact that he was without authority so to do, Goodwin sold and delivered the car to Moore.

[1] Upon the facts so established, there is no merit in appellant's contention that Goodwin was clothed with the authority of a factor, which, as defined by section 2026, Civil Code, is "an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property." Having, as appears

from plaintiff's testimony, no authority to sell or dispose of the car, but intrusted with it for a special purpose only, Goodwin was not a factor, and had no more right to sell the car to Moore than if he had stolen it from plaintiff.

[2] At the time of the transaction section 8 of the Vehicle Act, as amended by the Legislature in 1917 (Stats. 1917, p. 391), prescribed certain things to be done, the performance of which is required as a condition of the transfer of ownership of a registered motor vehicle, and provided that, in the absence of a compliance therewith, title to the same should not pass, and the intended transfer should not be effective for any purpose. While the car was registered in the name of the vendor of plaintiff, there was no compliance on his part with the provisions referred to. Hence, by reason of such omission, appellant, relying upon the provision of section 367 of the Code of Civil Procedure that "every action must be prosecuted in the name of the real party in interest, * * *" insists that, conceding the conversion by defendant, no cause of action existed in favor of plaintiff therefor.

The general rule is that "actual possession of a chattel at the time of a conversion thereof will sustain trover, except as to the true owner, or one claiming under him, even though the title be conceded to be in a third person" (38 Cyc. 2046 and 2047), in support of which principle, among numerous cases cited, is that of *Sutton v. Buck*, 2 Taunt. 302, wherein it was held that possession of a ship under a transfer void for noncompliance with the register acts is a sufficient title in trover against a stranger. Therefore, assuming that by reason of noncompliance with the conditions prescribed by section 8 of the Vehicle Act, plaintiff was not the owner of the car, nevertheless he was, with the consent of the true owner, in the actual and rightful possession thereof; and hence by virtue of such possession, under the rule stated, he was entitled to maintain an action either in replevin or to recover damages for the conversion of the chattel.

We find no merit in the appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

53 Cal. App. 640

NELSON v. HOGE et al. (Civ. 3817.)

(District Court of Appeal, First District, Division 2, California. July 23, 1921. Rehearing Denied Aug. 22, 1921. Hearing Denied by Supreme Court Sept. 19, 1921.)

1. Mechanics' liens §132(4)—Time for filing runs from filing of notice of completion.

The time allowed a materialman within which to file a lien begins to run from the date

of the filing of the notice of completion of the building, though it was substantially completed and ready for occupancy prior to such date.

2. Appeal and error §930(1)—Evidence for successful party presumed true.

To uphold finding for plaintiff in action to foreclose mechanic's lien, his evidence will be presumed true.

3. Appeal and error §1010(1)—Finding supported by evidence not disturbed.

In action to foreclose a mechanic's lien, finding for plaintiff will not be disturbed where supported by plaintiff's evidence.

4. Contracts §300(1)—Finding that building completed within reasonable time and delay not contractor's fault held warranted.

Under a contract requiring the completion of a building in 120 working days, but providing that the time during which the contractor was delayed by the act or neglects of the owner or by inclement weather should be added to the time for completion, where only 131 days, after deducting Sundays, holidays, and Saturday afternoons, elapsed between the date of the contract and the date of practical completion, during which time considerable extra work was done, a finding of the court that the building was completed within a reasonable time and that any delay was acquiesced in by the owner, and was not due to the contractor's failure, default, or neglect was fully warranted.

5. Mechanics' liens §309—Judgment for lien claimant not reversed for failure to furnish written guarantee before final payment where ready and able to furnish same.

In an action to foreclose a mechanics' lien, where the court found that at the time final payment was demanded and at all times since plaintiff was ready, and able to furnish his personal guarantee, under the terms of the contract, to keep the building water tight for five years, and had filed such guarantee in court, and the evidence showed that plaintiff furnished a guarantee of the roofing contractor which was accepted by defendant's architect, there being some uncertainty as to whether the contract called for a guarantee by the roofing contractor or by the general contractor, a judgment for plaintiff should not be reversed because he failed to properly comply with a provision of the contract requiring him to furnish the guarantee before final payment.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Hans P. Nelson against L. B. Hoge and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

J. F. Riley, of San Francisco, for appellant.

H. F. Craig, of Oakland, for respondent Nelson.

Grant & Bailey, of Woodland, for respondent Bank of Yolo.

LANGDON, P. J. This is an appeal from a judgment for the plaintiff in an action to foreclose a mechanic's lien upon property owned by the defendant Hoge. The defendant, Bank of Yolo, is the mortgagee of the property, and as its rights were fully protected by the judgment of the trial court, it is not a party to this appeal.

The plaintiff is a general contractor who constructed for the defendant, under a written contract, an apartment house in Oakland. Payments were made by the defendant, from time to time, according to the terms of said contract, as the building operations progressed. On October 28, 1918, defendant accepted said building, and on October 29, 1918, made the completion payment to the plaintiff and recorded notice of completion in the office of the county recorder. According to the terms of the contract between the parties, the final payment of the balance of \$7,173.75 due upon the contract price of the building, was to be made 35 days after acceptance, i. e., on December 3, 1918. Defendant failed and refused to make said final payment, and on December 17, 1918, plaintiff filed for record his claim of lien, and later commenced this action to enforce the same.

[1] We shall consider first appellant's objection that the lien was not filed in time. This objection is based upon the finding of the court that the building was "on the 4th day of October, 1918, practically and substantially completed and ready for occupancy, and was thereafter, and to wit, on the 29th day of October, 1918, and from that time forward, actually occupied by said defendant Hoge." The building was actually accepted on October 28th, and notice of completion filed for record on October 29th. Claim of lien was filed December 17, 1918, which was well within the time allowed if computation be made from October 29th, but would be too late, if computation be made from October 4th. It has been expressly decided in the case of *Hughes Mfg. Co. v. Hathaway*, 174 Cal. 44, 161 Pac. 1159, that the time allowed a materialman within which to file his claim of lien begins to run from the date of the filing of the notice of completion. See, also, *Pioneer Paper Co. v. Hathaway*, 39 Cal. App. 405, 179 Pac. 227.

[2] Appellant argues that the contractor failed in many particulars to fulfill his contract; that in the matter of painting and plastering and roofing, and in the quality of the materials furnished, and in many other particulars, plaintiff failed to do what was required of him under the terms of his contract with the defendant. It would serve no useful purpose for us to discuss in detail the evidence regarding these various matters, nor to discuss each objection separately. It is admitted that there were some defects in the building, and that there

were some particulars in which it did not conform to specifications. In the light of the findings, however, we must accept as true the testimony which is in harmony with plaintiff's contentions. That testimony, given by the plaintiff and by Mr. Hall, representative of the bonding company, and by Mr. Doell, was to the effect that there had been numerous complaints by the defendant as to the manner in which the plaintiff had performed his part of the contract, and that a conference was held between these gentlemen and the owner, at which the owner pointed out, on the premises, the various matters of which he was complaining; that the parties then went to the Builder's Exchange, where the entire situation was discussed, the conference lasting the entire day; that at this conference, it was agreed between the parties hereto that certain allowances in money should be made to the defendant for some of the defects which he claimed, and that, in addition, the plaintiff should make certain changes and remedy certain defects, and that the defendant would accept the building and make the completion payment, after deducting therefrom the amount allowed for defects, etc.

By the terms of the contract between the plaintiff and defendant, payments were to be made only upon certificate of the architect employed by the defendant. The architect, after this conference and compromise agreement of the parties, gave his certificate for the completion payment, less the amount of the deductions allowed defendant. This payment was accordingly made by the defendant, who then accepted the building and agreed to pay the balance due within 35 days. After the expiration of this time, plaintiff received from the architect the required certificate, entitling him to the final payment of \$7,173.75. He presented this certificate to the defendant and requested payment. According to plaintiff's testimony defendant stated that he did not have his check book with him, but would bring it from San Francisco the next day. On the next day, plaintiff went to see the defendant, who again made an excuse for not making the payment, and said he would make it on the following Friday, but failed to make it at any time.

Appellant quotes numerous extracts from the record to show that there were many particulars in which the work of the contractor was not satisfactory, nor according to contract. This is, of course, obvious from the record; but the court has found that the building was accepted by the defendant after an adjustment of all differences between the parties and an allowance to the defendant. The appellant contends that this acceptance was conditioned upon the plaintiff remedying certain defects. The plaintiff testified that he has done the things required of him by this compromise agreement. Defendant

contents that by the compromise agreement plaintiff was to remedy all defects and make the work conform to the standard established by the contract. Taking this view of the situation, it is met by the findings of the court. The trial judge personally inspected the premises with counsel, and examined all the alleged defects in the building, and after such personal inspection and the testimony of plaintiff's witnesses, finds:

"That the work performed in the construction of said building and material furnished and used in the construction thereof under a fair interpretation of the contract, plans and specifications taken as a whole, was done and performed in a workmanlike manner and in substantial compliance with the plans and specifications throughout, and that such imperfections as appear or exist in the work are trivial in their nature and effect, both as to appearance and workmanship."

Under such circumstances, we may not inquire anew into the facts, but must accept the findings of the trial court.

[3] Appellant also contends that allowance should have been made to him for damage suffered by reason of delay in completing the building. The contract provided that the building should be completed in 120 working days. It was also provided in the contract:

"The time during which the contractor is delayed in said work by the acts or neglects of the owner or his employees, or those under him by contract, or otherwise, or by stormy and inclement weather which delays the work shall be added to the time for completion as aforesaid."

It appears that there was added to the contract extra work amounting to \$580, which would, of course, allow additional time. It is to be noted that deducting Sundays, holidays and Saturday afternoons, the total number of days which elapsed between April 16th, the date of the contract, and October 4th, the date of practical completion, was 131 days. This was only 11 days more than the time allowed by the original contract, and in that time extra work, amounting to \$580, was done. Furthermore, the testimony showed that there had been rain on September 12 and on September 23, which would also allow more time to the plaintiff within which to perform his contract. Under these circumstances, we think the finding of the court that the building was completed within a reasonable time, and that any delay in the time of completion was acquiesced in by the defendant, and was not due to the failure, default or neglect of the plaintiff was fully warranted.

[4] The only other point argued by the

appellants is that the payment for which this action was brought was not due to the plaintiff, because he did not properly comply with a provision of the contract requiring him to furnish to the owner, before the final payment, a written guarantee agreeing to keep the entire building perfectly water tight for a period of five years from the date of its final acceptance. The court found with relation to this matter that on December 7, 1918, plaintiff offered to make, execute, and deliver to said defendant his personal guarantee under the terms of the contract to keep the building water tight for a period of five years from date of completion, and did then and there demand from said L. B. Hoge payment to him of said sum of \$7,173.75, which payment, or any part thereof, said defendant Hoge failed, neglected, and refused to make. While the evidence on this question, perhaps, does not go to the extent of the finding made, nevertheless, it does appear from the evidence that the plaintiff furnished a guarantee of the roofing contractor which was accepted by the architect without objection as to its form or substance. It appears that there was some uncertainty in the minds of the parties as to whether the contract called for a guarantee by the roofing contractor or by the general contractor. The refusal of the defendant to make the final payment was not based upon the absence of the guarantee of the plaintiff with reference to the roofing, and it appears from the testimony of plaintiff that he was at all times ready, willing, and able to furnish his personal guarantee according to the terms of the contract.

The trial court has found that, at the time the final payment was demanded and at all times since, the plaintiff has been ready, willing, and able to furnish and deliver said guarantees according to his agreement, and has, in the course of the trial, produced, offered, filed and delivered in open court said written guarantees, and each thereof, and the same are now on file in the action for the use and benefit of said defendant Hoge. The record discloses that the personal guarantee with relation to the roofing, so filed in the trial court, is in strict conformity with the terms of the contract. It is apparent, therefore, that no injustice has been done the defendant in the matter of the guarantees and that the judgment should not be reversed upon that account.

There are no other matters in the briefs requiring discussion. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 628

KINNEY v. JOS. HERSPRING & CO. et al.
(Civ. 2317.)

(District Court of Appeal, Third District, California. July 22, 1921. Hearing Denied by Supreme Court Sept. 19, 1921.)

1. Appeal and error $\S$ 1011(1)—Findings of fact based on conflicting evidence conclusive.

A finding will not be disturbed on appeal where based upon conflicting evidence, no inherent discrepancies or weaknesses appearing in the testimony supporting it.

2. Guaranty $\S$ 36(3)—Telegram held unqualified guaranty of payment of note.

A telegram from creditor of maker of note to payee, "Advise you to indorse and make your note payable to me mailing same immediately I will guarantee payment on it you will have to do this so that I will be able to protect you otherwise I have no authority to hold out and honor any draft you may draw immediately upon settlement which will be next ten days I will mail you our check attend to this matter at once I will make F. (maker) believe I purchased the note from you at discount this is strictly confidential," held an unqualified guaranty of payment of the note, and not a mere agreement to pay if property in the hands of the sender should sell for more than the maker's indebtedness to the sender.

3. Frauds, statute of $\S$ 125(3)—Requirement of written guaranty mere rule of evidence and contract not per se invalid.

The provision in Civ. Code, § 2793, that a guaranty shall be in writing, is in effect a statute of frauds, and involves a mere rule of evidence, and such a contract not in writing is not per se invalid, simply being unenforceable in a judicial proceeding.

4. Guaranty $\S$ 16(4)—Agreement not to garnish consideration for guaranty of note.

An agreement of guaranty of payment of promissory note by creditor of maker having property in his hands, was supported by a valid consideration, where the payee of the note agreed not to put into execution a threat made by him to the creditor that he would garnish to satisfy the note, whether such payee could or could not have realized anything or obtained any benefit from an attachment of the property.

5. Guaranty $\S$ 25(3)—Held supported by consideration for previous oral agreement.

Where creditor orally guaranteed payment of a note executed by debtor to third person in consideration of payee's agreement to forego attachment of property in the hands of the creditor, held that court did not err in finding that a subsequent writing evidencing the guaranty embraced the terms of the oral agreement, and the consideration upon which it was made.

6. Guaranty $\S$ 50—Indorsement of note to guarantor for collection held not to transfer the guarantee.

Where promissory note was indorsed to the guarantor thereof merely for purpose of collection from the maker, such guaranty of payment of the note did not pass to the indor-

see so as to prevent the indorser from recovering on the contract of guaranty, the indorser never at any time parting with his beneficial interest in the note.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by A. T. Kinney against Jos. Herspring & Co., and Jos. Herspring, individually. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert H. Schwab, of Sacramento, for appellants.

Wachhorst & Wachhorst, of Sacramento, for respondent.

HART, J. This action is against Joseph Herspring & Co. and Joseph Herspring, individually, the complaint alleging that—

"Jos. Herspring is the sole owner of and the sole person interested in the firm known and designated as Jos. Herspring & Co."

The action is upon an alleged guaranty for the payment of a promissory note executed by one H. A. French to the plaintiff. Said note was dated at Sacramento, July 12, 1917, and was payable "one day after date, without grace," and provides that "in case suit is instituted to collect this note or any portion thereof" the maker would pay any additional sum as the court may adjudge reasonable as attorney's fees in said suit. The note is set out in the complaint. After stating that "the whole of said note is due, owing and unpaid," the complaint proceeds:

"That on the 14th day of February, 1918, at Sacramento city, county of Sacramento, state of California, defendants, for a valuable consideration received prior to said date, made and subscribed a memorandum in writing of which the following is a copy:

"Western Union Telegram

"Sacramento Cal Feb 14

"A. T. Kinney 1523 Rockefeller Bldg. Advise you to indorse and make your note payable to me mailing same immediately I will guarantee payment on it you will have to do this so that I will be able to protect you otherwise I have no authority to hold out and honor any draft you may draw Immediately upon settlement which will be next ten days I will mail you our check attend to this matter at once I will make French believe I purchased the note from you at discount this is strictly confidential. Jos. Herspring and Co."

"That the above and foregoing memorandum was delivered to plaintiff by defendants and thereby promised to answer to plaintiff for the debt of said H. A. French as evidenced by the herein set forth promissory note."

A demurrer to the complaint upon both general and special grounds was overruled, and thereupon the defendant answered, interposing, after certain admissions and denials,

a reply to plaintiff's claim of guaranty, a digest of which may thus be given:

That the maker of the note above referred to (H. A. French) was indebted to defendant in an amount in excess of the sum of \$22,000 as for and on account of advances made by defendant to French for the purpose of growing and harvesting certain bean crops; that, the beans having been harvested, the same were turned over to defendant to market for French, the former, upon the sale of the beans, to retain so much as might be realized on such sale as would satisfy his claim against French, and the balance to be paid to French; that, at some time in the year 1917, after the beans had been harvested and were in the possession of the defendant for the above indicated purpose, plaintiff offered "to sell to the defendant the promissory note set forth in the complaint for the sum of \$1,000, or desired an advance on behalf of said French of \$1,000;" that defendant declined to advance any money to plaintiff for French, and stated to plaintiff he would advance no more money for French, for the reason that the latter was already indebted to him (defendant) in the sum of \$22,000, etc.; that the defendant at the same time stated to plaintiff that if he (defendant), upon marketing the beans, had remaining in his possession of the funds derived from selling said beans any sum or sums of money in excess of French's indebtedness to him, he (defendant) "would protect said plaintiff, provided that said plaintiff would indorse over to said defendant the said promissory note;" that nothing further was said or done relative to the said note until the sending by defendant to plaintiff of the telegram set out in the complaint, and of which a copy is presented hereinabove; that at the time said telegram was so sent, the beans were about to be sold and that it was believed that the moneys received upon such sale would be sufficient to satisfy both the indebtedness of French to defendant and the note from French to plaintiff; that the beans were sold, but it turned out that, owing to the inferior quality thereof, the proceeds of the sale thereof were sufficient only to satisfy defendant's debt against French.

The answer sets up as a special defense that "there is no consideration" for the alleged contract of guaranty.

As may be implied from the foregoing, the defendant did not deny the due execution of the note set out in the complaint, or that it constituted, at the time of the commencement of the action, a subsisting obligation in favor of plaintiff and against French, and did not deny that he sent to plaintiff the telegram set out in the complaint. The findings are substantially of the facts as alleged in the complaint. The finding as to the alleged contract of guaranty is that it was executed "for a valuable consideration and in consideration that plaintiff indorse the promissory note (in question) to said defendant and deliver" same to him.

Judgment passed to plaintiff, and the defendant presents this appeal therefrom.

The defendant urges and argues these points as grounds for a reversal of the judgment: (1) That the telegram pleaded in the

complaint, "read and construed in its entirety," shows that it was not intended to evidence a guaranty of the payment of the note in suit by the defendant; (2) that, assuming that the telegram was intended as a guaranty or the written evidence thereof, there was no consideration therefor passing from the plaintiff to the defendant, and that, therefore, the alleged guaranty is without legal force or nonenforceable.

It will, it is conceived, clarify the discussion of the points advanced in support of defendant's demand for a reversal of the judgment to present first a history of the case as it is disclosed by the evidence.

In the year 1917, the maker of the promissory note in suit, H. A. French, was about to engage in the planting and cultivation of beans on about 1,000 acres of leased land situated in Sutter basin, Sutter county. In July of that year, finding himself without financial means with which to carry out said project, French entered into negotiations with the defendant (who was then doing a brokerage business under the firm name of Jos. Herspring & Co.) for a loan from the latter of sufficient money for his said purposes, and, after considering the proposition, the defendant agreed to and did provide French with such an amount of money as was found necessary to purchase the quantity of seed required for the entire acreage the latter had under lease. The beans were planted, but from time to time thereafter, and until they were harvested, the defendant, in response to calls for more money by French, to be used in harvesting the crop, made advances to French until the total sum so advanced and loaned amounted approximately to \$22,000. The beans, after being harvested, were given over to the possession of the defendant, with the understanding that he would market the same, and, after reimbursing himself for the advances made to French, deliver or pay to the latter whatever sum that might remain over of the amount realized on the sale of the crop.

It appears that the plaintiff was, at the time of the several transactions occurring between him and French and between him and Herspring, a resident of Cleveland, in the state of Ohio. It further appears that, in the year 1917, a son of the plaintiff was employed in the state motor vehicle department of the state of California, at Sacramento city, in said state; that, in the year 1917, said French was superintendent of said department. The plaintiff testified:

"In July of the year 1917—I think it was July 12, 1917— * * * Mr. French wired me and said he had gone into a proposition of raising beans, and he was short of money; if he could not raise \$4,000.00 immediately he would lose all he had invested. Following that telegram, a telegram from my son advised me to help Mr. French out; then I wired Mr. French that he should draw on me for \$4,000, which he

did, and wired a draft, and then he mailed me the note (the note in suit). The note was to be paid—I think it is a sight draft—the latter part of October (1917), but I heard nothing from him of any consequence, so I came out here in January, the following January (1918); he informed me that he had placed all of his goods in the lands of Mr. Herspring. Well, of course, I wanted my money, and he said the stock of beans had not been sold, and he did not think Mr. Herspring would pay anything until the property was disposed of. Then I asked him if he could give me a part of it; he said he would see what he could do. And he informed me he saw Mr. Herspring, and Mr. Herspring refused to pay anything until the property was disposed of. So then I called on Mr. Herspring, and my intention was—I told him so—if the matter was not settled I would garnishee the account. He said 'Mr. Kinney, don't do that; no occasion for doing that,' he said, 'I will give you my word of honor as a gentleman I will pay you every dollar so you won't lose a cent;' just exactly what he said; gave me his hand and shook hands with me. So, taking his word for it, I did not garnishee the account. And it ran along for some time. My attorney has letters there, signed by Mr. Herspring and Herspring & Co., stating that he would pay the money; 'for me not to worry about it;' that is right there, signed by him."

Plaintiff, continuing, testified:

That the defendant on the occasion above referred to "guaranteed to pay me and to pay me in full; he (defendant) said: 'You need not worry about it,' that it would be unnecessary to garnishee the account; * * * it was upon this conversation (with defendant) that I refrained from levying the attachment, or proceeding further to secure myself for the collection of the account."

Proceeding plaintiff stated:

That, while in Sacramento at the time mentioned, he bought a bungalow in said city for his son; that, being a little short of money then, he asked defendant to make a payment of \$1,000 on the note, so that he could pay the purchase price of the bungalow; that, at first, defendant said that he had not sold the beans, and that he could, therefore, not "pay" plaintiff then, but before plaintiff left the office of defendant, the latter said: "Mr. Kinney, if you are in need of money for that bungalow so badly, I will give you a couple of thousand dollars," to which proposition plaintiff replied: "I can make arrangements to get the money for the bungalow, I don't want to discommode you, because you claim you haven't sold the goods,' therefore I passed it along. That is all, absolutely the conversation in his office with Mr. Herspring."

Herspring, so plaintiff testified, said to the latter that the bean market then "was low," but that "the market will be up the beginning of March," he thought." Defendant promised the plaintiff that he (plaintiff) would have his money "by the first of March or early in February." To this, plaintiff replied: "Then I will make a draft on you." Defendant assented at first to that proposition, but almost immediately recalled such

assent, saying: "No, don't do it; I will send you a check."

At some time after the conversation between plaintiff and defendant related above, the plaintiff left California for his home in Ohio. No communication between the parties concerning the note in suit was had after plaintiff returned to his home until the receipt by him of the telegram from the defendant which is set out in the complaint and above reproduced herein. The date of said telegram, it will be noted, is February 14, 1918. The plaintiff could not exactly fix the period of time that elapsed between the date of the conversation with Herspring in Sacramento, in which the latter orally agreed to guarantee payment of the note, and the receipt of the said telegram. Plaintiff stated, however, that the conversation referred to took place near or about the middle of January, and from this it may be assumed, or at least inferred, that the period of time elapsing between the two events was approximately a month. But be that as it may, the plaintiff immediately upon receipt of said telegram forwarded the note in suit to defendant, indorsed upon the back thereof as follows: "Pay to Jos. Herspring & Co. or order, without recourse. A. T. Kinney."

Subsequently to the receipt by plaintiff of the telegram of February 14, 1918, from defendant, considerable correspondence, both by letter and wire, passed between the parties. The letters and telegrams were introduced in evidence. There is no necessity for presenting those documents herein. It is enough to state generally the substance of most of them, and so it may be said that, from the letters of defendant to the plaintiff, with the exception of one, it may fairly be implied that the first named regarded the transaction between him and plaintiff as involving a mere promise or agreement on his part to satisfy the French note only in the event that enough money was realized on the sale of the beans, after his own reimbursement out of the funds so received, to pay said note. The exception referred to embraces a letter to plaintiff dated March 19, 1918, in which defendant stated to the former, among other things, that he did "not want you to feel as though we had forgotten our promises to you regarding your note with French." The other letters of defendant to plaintiff were written after it had become evident to the former that the beans would not yield the returns that he had expected. The letters and telegrams of plaintiff to defendant, however, plainly indicate that he (plaintiff) regarded defendant as a guarantor of the payment of the note. In fact, they amounted to demands upon or requests addressed to defendant to pay the note.

Thus there has been presented substantially the evidence offered and received in support of the averments of the complaint.

[1] As might naturally be expected in a

case where, as here, issue is joined upon the facts relied upon by the plaintiff and the defendant to sustain their respective claims, there is a positive variance between the story of the defendant and that of the plaintiff of the purport of the conversation between them in January, 1918, when the latter was in Sacramento. The defendant emphatically denied that, on the occasion mentioned, he agreed to guarantee the payment of the note upon the promise of plaintiff that he would not execute a threat to levy an attachment on the beans to secure the satisfaction of his note. Indeed, defendant went so far as to say that no such threat was made by plaintiff in the course of the conversation referred to, or at any other time in his presence or hearing. But the net result of the denials or adversary showing by defendant was or is only the production of an evidential disparity, the solution of which by the trial court in favor of plaintiff, there being no inherent discrepancies or weaknesses in his testimony, is conclusive upon us.

[2] The position of the counsel for the defendant is, however, first, that, viewing the telegram of February 14, 1918, as a whole or in its entirety, it cannot reasonably be construed as importing or implying an intention in the defendant to guarantee the payment of the note; that, to the contrary (so the counsel proceeds), the telegram is capable of no other construction than that the agreement of defendant was that he would pay the note only upon the contingency that there was sufficient of the proceeds of the sale of the beans remaining in his hands to do so after his claim against French had been satisfied. The argument in support of that proposition is predicated mainly upon the words of the telegram:

"You will have to do this (indorse the note over to defendant) so that I will be able to protect you, otherwise I have no authority to hold out and honor any draft you may draw."

We are unable to discern any just reason for subscribing to counsel's position or the argument which he essays in support of it. The language of the telegram upon which the counsel relies to support his construction immediately follows language involving an unqualified and unconditional guaranty of the payment of the note, and, while doubtless it is true that there is to be implied from the telegram an intention or a desire or a purpose in the defendant to execute his contract of guaranty by means of funds obtained from a sale of the beans, we can perceive no just reason for holding that the language of the telegram affording that implication was intended to or does impair or detract from the force of the agreement of guaranty as it is embodied in the message. Indeed, we regard this a fair construction of the telegram: That, defendant having guaranteed the payment of the note for the reason above ex-

plained, and to be hereinafter considered, conceived that he could the better protect himself from loss as a result of his guaranty by having the note indorsed over to him, thus enabling him to reckon it in his account against French upon a settlement with the latter after the sale of the beans. But, whatever might have been his design or purpose in having the ownership of the note transferred to him, it is clear, as we have pointed out, that the telegram contains an agreement of guaranty by defendant of the payment of the note, unqualified by any of the other words or language thereof. Manifestly, it may be suggested, if the telegram had said, "I will guarantee payment of the note, provided there can be realized from a sale of the beans sufficient money to do so, after my claim has first been satisfied," a different question would be presented here. That, however, as has been shown, is not the telegram or the reasonable purport of its language.

The second proposition is that the guaranty is not supported by a consideration; that, if the alleged promise of plaintiff, in the conversation with defendant in January, 1918, that he would forbear attaching the beans on defendant's guaranty to pay the note, is counted on as the consideration supporting the written guaranty subsequently made, then it is insufficient to support the agreement for the reason that it is "a past consideration"—that is, a consideration without force when given and incapable, therefore, of being carried into the written agreement.

[3, 4] It is the law that a contract of guaranty must be supported by a consideration (Civ. Code, § 2792), and must be in writing (Civ. Code, § 2793). The provision that the guaranty shall be in writing is in effect a statute of frauds, and involves a mere rule of evidence. The fact that contracts which come within the provisions of statutes of frauds are not in writing does not render them per se invalid—that is, such contracts orally made are in themselves perfectly valid, but, by reason of the requirement that they shall be reduced to writing, they are not enforceable in a judicial proceeding unless committed to writing. In *re Balfour & Garrette*, 14 Cal. App. 261, 266, 111 Pac. 615, 618. The agreement of guaranty by defendant here, as originally or orally made, was supported by the agreement of the plaintiff that he would not put into execution the threat made by him to the defendant that, to satisfy his note, he would levy upon the beans. No one would say that if, at that time, the guaranty had been reduced to writing, it could not have been enforced in an appropriate action in court as a contract resting upon a valid consideration.

Whether the plaintiff could have realized anything on, or obtained any benefit from an attachment of the beans, is immaterial. He had the right to attempt to secure satisfac-

tion of the debt out of any property not exempt from execution that he might have reason to believe that French owned. The defendant presumably knew this. At any rate, it is very clear that for some reason, evidently satisfactory to himself, the defendant desired that the plaintiff should not complicate matters by levying an attachment on the beans, resulting in litigation which might (as perhaps he believed) diminish his chances for the full satisfaction of his own claim, and, so far as there is anything in this record to show to the contrary, it is equally clear that plaintiff, in agreeing to refrain from attaching the beans, surrendered, or forbore exercising, a legal right. This forbearance upon the part of the plaintiff continued and was, we may presume, intended by defendant to be carried into the written agreement of guaranty as a consideration therefor. If not, why did defendant put the guaranty in writing? But if the reply to this query again be that defendant thus merely intended to agree that he would pay the note only upon the condition that there was money enough realized out of the sale of the beans after his own claim had been satisfied to do so, the answer is that the plaintiff not only had the right to rely, but did rely, upon the agreement as being an unconditional promise to pay in consideration of his surrendering or giving up his right to attach. A party who induces another to give up or forbear exercising a remedial right which, if exercised at the time of promising to forbear, might have preserved to him important substantive rights, should not be permitted to escape the consequences of his promise except upon a very clear showing that his promise was not in fact or in legal effect what it appeared to be or the other party understood it to be.

We must accept the finding of the trial court here that the transaction was precisely as the plaintiff understood it to be, and that the consideration for the written guaranty was that agreed upon in the previous negotiations of the parties. As we view it, the situation presented here is no different in principle from that presented in the case of *In re Balfour & Garrette*, supra. There one Worley had been employed by Balfour & Garrette, a corporation, to sell, in tracts of small subdivisions, a large body of land, for which he was to receive as compensation, in addition to a stated monthly salary, certain commissions on each sale. The original agreement of the parties was made in the year 1907, and was oral. In March, 1908, after a few sales had been made by Worley, the corporation, by one of its authorized agents, addressed a letter to Worley, in which the terms of their agreement, as originally and orally made, were expressed. The court, replying to the point made by appellant that the agreement as originally made was not enforceable because it was not committed to

writing, and that the subsequent writing—that is, the letter—could not be regarded as being referable to the oral agreement, said:

“The foregoing letter clearly defines the terms of the oral agreement previously entered into between the parties. It is definite and certain, and leaves no ground for conjecture as to its meaning or the intention of the parties, or the terms and conditions upon which Worley’s employment rested. And we think it is clearly sufficient to satisfy the requirements of the statute, notwithstanding the fact that it was not written until after the execution of the terms of the agreement on Worley’s part.”

[5] Here, as we have seen, the plaintiff, before and down to the time he received the telegram in question, had carried out his part of the oral agreement—that is, he had refrained from levying an attachment on the beans as he agreed to do upon the promise of defendant that he would guarantee the payment of the note. It a word, the written guaranty here, as in the case of the written agreement in the *Balfour & Garrette* Case, embraces the terms of the oral agreement, and presumably the consideration upon which it was made.

There is an obvious dissimilarity between the instant case and the cases cited by the defendant. For instance, in the case of *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028, the wife mortgaged her separate property to secure an antecedent individual indebtedness of her husband, no new note or new promise having been made; or, as was said by Mr. Justice Shaw, in *McDonald v. Randall*, 139 Cal. 246, 252, 72 Pac. 997, 999, in speaking of the case of *Chaffee v. Browne*:

“The mortgage was given by the wife on her separate property a considerable time after the debt had matured, and not in consequence of any threat to sue, nor in consideration of any extension of time or other benefit or detriment to either of the parties. The mortgage contained no promise to pay the debt. There was a recital that the mortgagors were jointly and severally indebted to the mortgagee in the sum named, but this was properly held to be nothing more than an acknowledgment of the existence of the pre-existing debt. It is clear that it could not constitute a new promise. The case was nothing more than an application of the familiar principle that where a debt has been already created the entering into an obligation to pay the same by a third person as surety, after the creation of the debt, and without any new consideration, such as delay or extension of time, it is not a binding obligation upon the surety.”

The case of *Lagomarsino v. Giannini*, 146 Cal. 545, 80 Pac. 698, and the other cases named by defendant, will be found, upon an examination of them, to be altogether different in their facts from this. We will not take the time to review them herein. The question of guaranteeing or becoming a surety on an antecedent obligation of a third party

without a sufficient consideration therefor is not in this case, as we think the evidence clearly shows.

[6] Another point suggested by appellant is that, the note having been assigned or indorsed over to the defendant by the plaintiff, the debt evidenced by the note thereupon became the property of the defendant, together with any securities which might have been given for the payment of the note. The proposition here sought to be invoked by counsel is stated in 20 Cyc. p. 1423, as follows:

"Where one by assignment or indorsement becomes the owner of a debt, the transfer carries with it as an incident all securities for its payment. A general guaranty, written upon a negotiable promissory note of the payment of it, passes, by assignment and delivery of the note, to the holder thereof, although nothing is said touching the guaranty. Where the guaranty of the payment of the note is embodied in an instrument separate from the note, it will pass by delivery of the note without any written assignment."

A conclusive reply to this proposition is that the record unquestionably shows that plaintiff was at all times, even after the indorsement of the note in suit over to defendant, the owner of said note, or owned the beneficial interest therein. The evidence indisputably shows that the plaintiff never at any time parted with his ownership of the note, the same having been, as seen, assigned to defendant, at the request of the latter, for no other purpose than to enable defendant to recoup against loss from the payment of the note, when he finally had a settlement with French. There is absolutely no dispute upon this proposition. Indeed the defendant returned the note to the plaintiff after he discovered that he could not realize enough money out of the sale of the beans to satisfy it, after reimbursing himself for the moneys he had advanced to French.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 502

SACKETT et al. v. MORSE.

BRIGGS et al. v. REYNOLDS et al.

(Civ. 3595.)

(District Court of Appeal, Second District, Division 1, California. July 20, 1921.)

1. Records 9(11)—No power in court to set aside decree under act for certification of land titles except upon grounds provided.

Outside of the ordinary proceedings for obtaining a new trial in an action, a trial court has no power to set aside or vacate on motion a decree entered under St. 1915, p. 1932, certifying land title, except where void upon its face, unless the motion be made upon the

grounds and within the time limited by Code Civ. Proc. § 473.

2. Records 9(11)—Findings held not to show fraud in obtaining decree certifying land titles.

A finding that court was "led to believe" a certain fact when rendering a decree certifying a land title under St. 1915, p. 1932, was not a conclusive finding that such belief was result of any fraud, deceit, or false testimony of the petitioner, amounting to nothing more than a finding that court was mistaken, which would not affect the conclusive nature of a decree under such statute.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of petition for registration of title to lands of Horace David Sackett and others, plaintiffs; Kirke W. Reynolds and others, petitioners, against Kate Barnard Morse, and in the matter of like petition concerning lands of Solon Briggs and others, plaintiffs; Kate Barnard Morse, petitioner, against Kirke W. Reynolds and others. The cases were consolidated. From an adverse decree, Kate Barnard Morse appeals. Reversed.

T. C. Gould, of Los Angeles, for appellant.

Ticknor & Carter, of Pasadena, and J. S. Crail, of Los Angeles, for respondents.

CONREY, P. J. The foregoing cases were consolidated and tried as one case. Kate Barnard Morse, defendant in the one case and petitioner in the other, appeals from the "judgment and interlocutory decree" and from an order requiring her to sign and acknowledge a certain map and plat.

On November 10, 1916, application No. 6, in L. R. No. 112, was filed by Mrs. Morse. That was an application for the registration of her title to two parcels of land, being, respectively, the south half and the north half of lot 1 in Howell's subdivision, in the county of Los Angeles, as per map recorded in Book 23, page 92, Miscellaneous Records of said county, excepting a 20-foot strip on the north side of said first parcel and a 20-foot strip on the south side of the second, for road purposes. In each description in the petition it is stated that the easterly line of said lot is parallel with and 20 feet westerly from the center line of Marengo avenue. According to the map of Howell's subdivision as recorded, lot 1 is a rectangle measuring 550 feet on the east and west lines thereof and 198 feet on the north and south lines. Said petition alleged that the owners of the land adjoining said lot on the west are Ida M. Reynolds, Julia B. Reynolds, and Kirke W. Reynolds. Marie Reynolds is the wife of Kirke W. Reynolds. The statutory notice was personally served upon each and all of the respondents Reynolds. The notice contain-

ed the same description of property claimed as in the petition. The parties served having failed to appear, and their default having been duly entered, the matter was heard by the court. On March 7, 1917, a decree granting said petition for registration was entered and a certified copy thereof filed with the registrar of Los Angeles county. Thereupon the registrar issued to applicant Morse certificates of title, respectively numbered 1464 and 1465, declaring her to be the owner of the lands described. The descriptions contained in the decree and certificates were the same as in the petition and notice.

On September 28, 1917, the registrar of titles filed with the court in said matter a request for instructions under section 99 of the Land Title Law (St. 1915, p. 1948). He certified that there had been presented to him a request from Mrs. Morse, registered owner of the properties described upon certificates numbered 1464 and 1465, the request being that the registrar cancel said certificates and issue in lieu thereof new certificates covering the same property, but described as lot A of tract 2904, as per recorded map thereof, and lot A of tract 2985, as per recorded map thereof. The registrar, being in doubt as to his authority to grant such request, asked the court for instructions. On the same day, and without notice, the court ordered that the registrar cancel certificates 1464 and 1465 and issue in lieu thereof new certificates covering the same property. Thereupon certificates numbered 2958 and 2959 were issued in accordance with the request so made and the order of the court.

Thereafter, on the 29th day of October, 1917, the petitioners Reynolds filed a petition, being application No. 25 of L. R. 171, requesting registration of their title to property therein described, located in said Howell's subdivision. The land so described adjoins lot 1 on the west, and includes the west 5 feet of lot 1 as described in the decree of March 7, 1917, if, according to that description, each of said parcels in lot 1 measures 198 feet on the north and south lines thereof.

Thereafter the said parties Reynolds filed an application for a supplementary decree in L. R. No. 112. Referring to the application of Mrs. Morse, in No. 112, they alleged that the notice served upon them in that proceeding made no reference whatever to lot No. 2 of said subdivision (lot 2 being the lot next west of lot 1), nor to the westerly line of said lot 1; that they made no answer or objections to said registration because no part of lot 2 was described in the notice. They further alleged:

"That thereafter, and without the knowledge or consent of these defendants, and without any notice to them, or any of them, the said Kate Barnard Morse registered portions of lot 1 and also the easterly 5 feet of said lot 2 of said

subdivision, which said lot 2 is the property of these defendants; that the said registration of the easterly 5 feet of said lot 2 of the said subdivision was obtained through a supplementary decree of this court no notice of the application for which supplemental decree was given to these defendants, and the description in said supplemental decree described the property registered therein as lot A of tract No. 2985, and lot A of tract No. 2904. That the court had no jurisdiction over the said westerly 5 feet in said proceeding, land registration No. 112, for the reason that said 5 feet were not included in the petition and in the notice of said proceeding.

"As a further ground for reopening the decree in land registration 112 and for canceling the registration of said 5 feet in said proceeding," further facts were stated to the effect that the true line between lots 1 and 2 had been agreed upon between the parties in interest several years prior to the filing of these petitions.

It was further claimed in this petition for reopening the decree that at the time the notice was served upon them, the parties Reynolds were assured "by the representative of the said Kate Barnard Morse" that their rights up to the boundary line as agreed would be fully protected, and would not be disturbed in the proceedings. It was further alleged that Mrs. Morse falsely testified at the hearing of said application that she was in possession of said 5 feet, and had been in possession thereof for five years prior to the filing of her application, and had further falsely testified and by other means falsely represented to the court that tracts 2985 and 2904 included only the land described in her original petition and in the notice given.

To the foregoing petition for supplemental decree Mrs. Morse demurred on the ground that the petition did not state facts sufficient for granting the relief demanded or for reopening said cause or for granting a supplemental decree therein. The demurrer was overruled. A motion to strike out the petition on the grounds stated, including the ground that there is no authority of law for reopening a decree or for granting a supplemental decree, was also made by Mrs. Morse, which motion was denied. Thereafter, upon answer duly filed by Mrs. Morse, the matter was tried and determined, such trial resulting in the decree and order from which Mrs. Morse has appealed.

We are satisfied that the description of the land claimed by Mrs. Morse, as contained in the decree of March, 1917, covers the 5-foot strip which is the real subject of dispute in this proceeding. The eastern line of lot 1 was definitely described as being 20 feet west of the center line of Marengo avenue. The east and west lines of the two parcels claimed were each and all shown to be 198 feet, according to the recorded map referred to in the petition, notice, and the decree.

The decree of registration therefore established the western boundary of lot 1 as definitely as if the boundaries of the parcels had been completely run by courses and distances.

For the purposes of the appeal we may disregard the substituted certificates issued to Mrs. Morse under the instructions given by the court to the registrar. If those substituted certificates described exactly the same property as do the first certificates, the adverse parties are not injured thereby. If the substituted certificates include other land than that described in the original certificates, and as to such additional land were void for want of notice to the adverse parties, nevertheless Mrs. Morse would retain whatever rights she obtained by the original decree and the certificates issued thereon. The question to be determined is whether or not the court had jurisdiction authorizing it, at the instance of the parties Reynolds, to reopen the decree of March 7, 1917, and modify or set aside that decree.

The original petition of Mrs. Morse in application No. 6 asked to have the described land "brought under the operation of the act adopted by the people of the state of California at a general election held November 3, 1914, entitled 'An act to amend an act entitled, "An act for the certification of land titles, and the simplification of the transfer of real estate," approved March 17, 1897,' " and that she be decreed to be the owner in fee of the described property claimed by her. This initiative act of 1914, as printed in St. 1915, p. 1932, and as published in Deering's General Laws (Ed. of 1915, "Act 1049"), contains no title. Neither does the act in its text contain any reference to the act of March 17, 1897. Since no point or argument has been made herein having reference to the title of the act of 1914, we shall assume that the title of the act as submitted to the people was in the form hereinabove quoted, and that the provisions of law upon which we must rely are fully contained in the initiative act of 1914 as published.

In the decree of March 7, 1917, it was adjudged that the title of Mrs. Morse be forever quieted as to the land found to belong to her, "and this decree shall be final and conclusive as against the rights of all persons or parties, known and unknown, to assert any estate, interest, lien, claim or demand of any kind or nature whatsoever against said land, or any part thereof, except only as hereinbefore found and as in said act provided." This was in conformity with sections 15, 16, and 34 of the Land Title Act, which provide what the decree shall contain and declare the effect of the decree and certificate of registration. Section 16 reads as follows:

"A decree of the court ordering registration shall be in the nature of a decree in rem, shall forever quiet the title to the land therein or-

dered registered and shall be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand of any kind or nature whatsoever, against the land so ordered registered or any part thereof, except only as in this act provided."

[1] As counsel for respondents did not see fit to file any brief or make any argument herein, we are deprived of any suggestion which they might have made to justify the judgment and order from which these appeals are presented. Apparently the position of appellant is correct, and should be sustained. We know of no reason why, in a special proceeding of this character, the power of the court to set aside or vacate its judgment should not be limited as in other cases. Outside of the ordinary proceedings for obtaining a new trial in an action, the trial court has no power to set aside or vacate on motion any judgment not void upon its face, unless the motion be made upon the grounds and within the time limited by section 473, Code of Civil Procedure. *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *People v. Temple*, 103 Cal. 447, 37 Pac. 414. The application for supplemental decree herein was not made by respondents within six months from the entry of the decree, and therefore was too late to be within the terms of said section 473. By section 45 of the Land Title Act the right of any person to commence any action at law or in equity adversely to the title or interest certified in the first certificate, bringing land under the operation of the act, is limited to one year following the first registration. Nevertheless, it has been held that after the registration decree has become final the only action by which the land can be recovered, or an interest in it asserted except under the decree, is an action wherein it is sought to set aside the decree and then establish the asserted right to the land, or to an interest in it. *Cooper v. Buxton*, 199 Pac. 6. In that decision it was further stated:

"It is also to be noted that the one exception which the statute makes to the conclusive nature of the decree is the case of fraud, that this exception repeatedly appears in the statute, and that it is always confined to fraud alone, and never includes mistake. If there be any exception to the operation of section 45, it would seem to be only the case of fraud, and the failure of the statute to unite with it the companion case of mistake would seem to indicate that it was not intended that it should be an exception."

[2] Assuming, without deciding, that the petition of respondents Reynolds might be considered in the light of a suit in equity to set aside the decree, and that the allegations thereon contained constituted a sufficient charge of fraud to sustain the petition against the demurrer of Mrs. Morse, the find-

ings do not confirm the truth of those allegations. Finding 6 states:

"That the court at the time it signed the order including said 5 feet was led to believe that tracts 2985 and 2904 included only the land described in the original petition of said Kate Barnard Morse and in the notice approved by the court in said application, whereas, in truth and in fact, said tracts contained said additional 5 feet."

That the court was "led to believe" the stated fact is far from a finding that such belief was the result of any fraud, deceit, or false testimony of appellant. This finding declares nothing more than that for some reason the court was mistaken in its belief, but, as stated in *Cooper v. Buxton*, supra, the conclusive nature of the decree is not affected by mere mistake.

Again, we find in section 98 of the said Land Title Law certain provisions for "an order correcting or altering any certificate to comply with the true facts as shown by the petition and proof adduced," and that the court should have jurisdiction to hear and determine the petition after notice to all parties in interest. But it is further stated that—

"The provisions of this section shall not give the court authority to open the original decree of registration."

Appellants further claim that for sundry reasons set forth in their brief the court erred in its order requiring appellant to sign the map; that the decree deprives appellant of all property; that in various particulars the findings are not sustained by the evidence; and that appellant is equitably entitled to the property originally registered by her. We deem it unnecessary to enter into a discussion of these matters, since at all events we are of the opinion that for reasons hereinabove stated the court exceeded its jurisdiction in the matter.

The judgment and order are reversed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 616

ROSS v. KALIN et al. (Civ. 3571.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1921. Hearing Denied by Supreme Court Sept. 19, 1921.)

I. Appeal and error §965—Ruling on change of venue not disturbed unless discretion abused.

An application for change of place of trial is addressed to the sound legal discretion of the trial court, and, unless clear abuse of that discretion is shown, the judgment of trial court will not be disturbed on appeal.

2. Venue §50—Refusal to change venue for local prejudice held not an abuse of discretion.

Where numerous contradictory affidavits were presented on both sides, and where it appeared that out of more than 8,000 jurors prejudice against plaintiff existed in the minds of probably 300, the refusal of the court to grant a new place of trial is not an abuse of its discretion.

3. Venue §50—Change for local prejudice not granted on conjecture.

Although the existence of widespread prejudice against plaintiff would tend to make it difficult to secure proof of the prejudice, this circumstance would not justify the court in basing an order for a change of place of trial because of prejudice against plaintiff on evidence of suspicion, conjecture, or hearsay.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. Edgar Ross against A. J. Kalin and others. From an order denying motion for change of venue, plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

C. L. Brown, of El Centro, for respondents.

MYERS, Judge pro tem. This is an appeal by plaintiff from an order denying his motion for a change of place of trial on the ground that he could not have an impartial trial in Imperial county. The motion was made after answer filed, and submitted upon the pleadings and upon affidavits in behalf of both parties.

Appellant's contention is that the order should be reversed because the allegations of specific facts in the affidavits submitted in support of the motion, upon which the ultimate conclusion of the impossibility of securing an impartial trial is predicated, are not controverted, and therefore the trial court should have given no weight to the counter affidavits, which, in the main, stated merely the conclusion of the affiant that no prejudice existed which would interfere with an impartial trial.

From the voluminous affidavits in the record we cull the following allegations of fact which are substantially uncontroverted: Prior to the assault hereinafter referred to, plaintiff, by his exceptional activity in a crusade against vice conditions in the city of Brawley and other portions of the county, had incurred the enmity and hatred of "a large number of people," some of whom were socially and politically prominent and influential throughout the county. On October 3, 1918, plaintiff was assaulted by a mob, "consisting of a large number of persons," beaten, tarred and feathered, and

chained to a tree in a public place in Brawley. There was a Liberty Loan drive in progress at this time, and plaintiff was charged with being disloyal and pro-German. He was then arrested and tried on a criminal charge of uttering threats to do great bodily injury, and fined and imprisoned. On October 3d, and again on October 18th, the Brawley News published editorials approving the mob action. One of the sureties on plaintiff's appeal bond was assaulted, beaten, and threatened with further injury if he would not withdraw therefrom. The other surety received similar threats, and both were threatened with a boycott. One of the sureties on a bond given by plaintiff in a civil action was threatened, and several persons refused to do business with him because of his connection with plaintiff. The attorney who acted for plaintiff was, because thereof, assaulted, beaten, boycotted, and expelled from two fraternal organizations. The plaintiff now has pending three actions for damages, because of the assault, the imprisonment, and the newspaper publications. The defendants in these actions aggregate about 30 in number, many of them men of large wealth, and all of them men of prominence and influence in the community. Said defendants, their friends and associates, have constantly, since the date of the assault, circulated false and scandalous statements concerning the plaintiff for the purpose of prejudicing the minds of the people against him so that he could not obtain a fair trial.

Numerous other allegations of specific facts, presented in support of the motion, may be classified in one of two groups—either they are denied in affidavits submitted by the defendants, thus presenting a conflict of evidence, or they are obviously pure hearsay, and therefore of no evidentiary value.

Defendants' affidavits admit that prejudice against the plaintiff obtains in the city of Brawley, where he resides, but deny that it exists elsewhere in the county.

There remains to be considered numerous conflicting averments of the ultimate conclusion. Some of the affiants, basing their conclusion upon their observations, acquaintance, and conversations with many residents of the county, state their belief that an impartial trial of plaintiff's cases can be had there without doubt or difficulty. Others, upon a similar basis, state an equally positive belief that such a result will be impossible. The defendants submitted affidavits of 24 men, most of whom appear to be men of large affairs and of long residence and wide acquaintance in the county, who aver that there is no prejudice against the plaintiff in any portion of the county outside of the city of Brawley, and that there is no reason

why he cannot have an impartial trial in the county.

[1] The rule of law is established by an unbroken line of decisions in this state that—

"Applications like this are addressed to the sound legal discretion of the trial court, and its action cannot be disturbed on appeal unless it clearly appears that there was an abuse of that discretion." *J. I. Case T. Co. v. Copren Bros.*, 35 Cal. App. 70, 76, 169 Pac. 443, 445.

[2, 3] Applying this rule to the case at bar, it cannot be said to clearly appear that the trial court has abused the discretion committed to it, unless the uncontroverted facts above outlined necessarily afford "reason to believe that an impartial trial cannot be had" in that county. We do not think this can be said to appear.

The most that can be said with confidence is that at a time some 20 months prior to this hearing there had been a strong and bitter feeling of prejudice against the plaintiff in the minds of "a large number" of residents of the county (how large a number we are left to conjecture, except that it was probably in excess of 30 and possibly as many as 300), and that since said time the 30 defendants in appellant's several damage suits, and their friends, have been endeavoring to prejudice the minds of the people against him to prevent his having an impartial trial (with what success we are again left to conjecture).

From the figures submitted as to registered voters, it appears that there were probably more than 8,000, and possibly as many as 12,000 qualified jurors in Imperial county at the time of this hearing. From the affidavits submitted it could not be said with any confidence that more than 300 of those persons bore any prejudice against the plaintiff at any time, and the number may well have been very much less.

We are not unmindful of the circumstance that the very existence of such a widespread prejudice as the appellant claims would tend to make it difficult, if not impossible, to procure proof thereof. But this circumstance would not justify the court in ignoring the rules of evidence to base its order on suspicion, or conjecture, or hearsay.

The right of defendants to have their case tried in the county wherein they and their witnesses reside is a substantial one, and is not to be set aside unless it actually conflicts with the higher right of a plaintiff to have an impartial trial. The trial judge, in deciding that there was no such conflict in the instant case, did not exceed or abuse the legal discretion vested in him.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

53 Cal. App. 801

ROSS v. WITTER et al. (Civ. 3570.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1921. Hearing Denied by Supreme Court Sept. 19, 1921.)

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. Edgar Ross against M. D. Witter and another. From an order denying motion for change of venue, plaintiff appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

C. L. Brown, of El Centro, for respondents.

MYERS, Judge pro tem. This case involves the same questions as *Ross v. Kalin*, 200 Pac. 745, this day decided, and it was stipulated that the two cases should be heard together. While the affidavits in this case are fewer in number and go less into detail, it is tacitly agreed by the respective counsel in their briefs that the same reasons for and against the granting of the motion obtain in both cases. Therefore, and for the reasons stated in the opinion in *Ross v. Kalin*, the order appealed from is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

53 Cal. App. 676

RODABAUGH v. KAUFFMAN et al.
(Civ. 3832.)

(District Court of Appeal, First District, Division 2, California. July 27, 1921. Rehearing Denied Aug. 28, 1921. Hearing Denied by Supreme Court Sept. 22, 1921.)

1. Bills and notes  493(1) — Consideration presumed.

A note carries the presumption of consideration, which is evidence to be weighed against the maker's testimony.

2. Appeal and error  1011(1) — Finding on conflict of presumption against testimony not disturbed.

Finding of consideration of note on presumption in conflict with maker's testimony will not be disturbed.

3. Bills and notes  96—Maker bound, though having no personal interest in loan.

The maker of a note purporting to be his individual act is bound, though having no personal interest in the loan, and intending to use the money which was paid to him for a corporation.

4. Partnership  147—Authority of partner to make guaranty in firm name stated.

A partner has no authority to make a guaranty in the firm name unless expressly given or implied from the common course of the business of the firm or from the previous course of dealing between the parties.

5. Partnership  218(4)—Effect of finding as to authority of partner to sign firm guaranty stated.

The effect of the finding that a partner had authority to sign a guaranty, which was in the firm name and of a note, but that he was not expressly authorized to do so by his partner, is that the authority was implied from the common course of the business of the firm.

6. Partnership  217(3)—Finding that partner had authority to sign guaranty in firm's name supported.

Finding that a partner had authority to sign a guaranty in the firm name of a note, and that the entire transaction was a partnership affair, held supported by the evidence.

7. Guaranty  46(1)—Guarantor of payment liable on default of principal.

By express provision of Civ. Code,   2807, guarantor of payment is liable immediately on default of principal, without demand or notice.

8. Guaranty  82(3)—Guarantor may be sued with principal.

Guarantor of payment of note, may be sued with his principal, though the guaranty was executed on a separate paper; it being part of the same transaction, demanded and agreed to before the note was executed.

9. Guaranty  56 — Guaranty of payment to remain in force during renewals of indebtedness not discharged by extension of time of payment.

Guaranty of payment of a note and the debt secured, to remain in force during all renewals of the indebtedness, is not discharged by agreement for extension of time of payment; that not differing from a renewal so far as concerns rights of the guarantor.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Elmer Rodabaugh, executor of E. Milton Greene, against Milton Kauffman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Woodruff & Shoemaker, of Los Angeles, for appellant Kauffman.

Ernest C. Griffith, Loewenthal, Loeb & Walker, and Loewenthal, Collins & Loewenthal, all of Los Angeles, for appellants Goldschmidt and others.

Harry W. Hanson, of Los Angeles, for appellant American Steel Pipe & Tank Co.

A. P. Michael Narlian, of Los Angeles, Dan W. Simms, of Lafayette, Ind., and E. E. Hendee, of San Diego (Myron W. Silvertown, of Los Angeles, of counsel), for respondent.

NOURSE, J. Plaintiff recovered judgment against defendants Kauffman, Goldschmidt Bros., a copartnership, and Max and Herman H. Goldschmidt individually, upon a promissory note for \$5,000 executed by defendant Kauffman and upon the written guaranty of Goldschmidt Bros., a co-

partnership, and Max Goldschmidt, executed by Max Goldschmidt, as one of the partners and individually. Plaintiff also recovered judgment against defendant American Steel Pipe & Tank Company for \$1,550, the balance found due on its written guaranty of payment to the extent of \$2,500, which guaranty was executed on the same day but immediately following, the execution of the note and as a part of the same transaction. Max Goldschmidt defaulted, and the defendant Kauffman, the defendants Goldschmidt Bros. and Herman H. Goldschmidt, and the defendant American Steel Pipe & Tank Company separately appeal from the judgment against them.

The facts are that on September 15, 1916, the defendant Kauffman executed his promissory note in favor of E. Milton Greene, of whose estate plaintiff is the executor; that at the same time Max Goldschmidt made an unconditional guaranty of payment, by indorsement on the back thereof, on behalf of the partnership and himself individually, signing the indorsement, "Goldschmidt Bros., by Max Goldschmidt. Max Goldschmidt;" that \$2,500 was then due the American Steel Pipe & Tank Company from the Valencia Groves Company, a corporation which some of the defendants were promoting, and in consideration of the payment of said sum to it the American Steel Pipe & Tank Company guaranteed payment of the note to the extent of \$2,500. This written guaranty read in part as follows:

"Provided the security is not changed without notice to undersigned, we, the undersigned, guarantee payment of \$2,500.00 of the \$5,000.00 note and the debt secured thereby. * * * When \$2,500.00 of said note is paid, this guaranty is null and void; but it remains in force during all renewals of said indebtedness and until at least \$2,500.00 of said debt is paid."

The trial court found that the note was duly executed by Kauffman for a valuable consideration; that, as a part of the same transaction, Max Goldschmidt executed the written guaranty on behalf of himself and the partnership; that Herman H. Goldschmidt had no knowledge of the making of the guaranty at the time; that Max Goldschmidt had authority to sign the guaranty, but was not expressly authorized to do so by Herman; that at the same time the American Steel Pipe & Tank Company, for a valuable consideration, executed and delivered its guaranty in the sum of \$2,500; that but \$950 had been paid on said note; that Herman and Max Goldschmidt were both individually interested in the Valencia Groves Company, a corporation, and part owners thereof; "that the financing of said Valencia Groves Company, a corporation, was a part of the said copartnership business; and that the note sued upon herein, and the guaranteeing of the payment thereof by said copart-

nership, was a part of the business of said copartnership."

[1-3] The appeal of Kauffman rests entirely upon the claim that he did not receive any consideration for the note. The argument is that the money was borrowed to pay obligations of the Valencia Groves Company, a corporation, of which he was president, director, and manager, and that none of the money received by him from the payee of the note was retained by him for his own use. The money was actually paid to him, and the consideration then passed. The payee was not concerned with what use Kauffman made of the money after he received it. Then, too, the writing itself carries the presumption of consideration, which is evidence to be weighed against this defendant's testimony. With this conflict, the finding of the trial court that a consideration passed should not be disturbed. *Moore v. Gould*, 151 Cal. 723, 726, 91 Pac. 616. But Kauffman is not relieved from liability because he intended to use the money for the corporation. He did not purport to act for the corporation or to bind it upon the note. It was his individual act purporting to bind him alone, and, even if he had proved a lack of personal interest in the loan, he was nevertheless personally bound by the writing. *Hall v. Jameson*, 151 Cal. 606, 611, 91 Pac. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137; *Knoch v. Haizlip*, 163 Cal. 146, 151, 124 Pac. 998; *Hobson v. Hassett*, 76 Cal. 203, 205, 18 Pac. 320, 9 Am. St. Rep. 193.

[4, 5] The appeal of the partnership and Herman Goldschmidt really presents but two questions: (1) The sufficiency of finding No. 15 to support the judgment against them; and (2) the sufficiency of the evidence to support that finding. The material portions of this finding are quoted above. It is to the effect that the two Goldschmidt brothers, who alone constituted the partnership, were individually interested in the Valencia Groves Company, and that the financing of said corporation, including the execution of the guaranty in suit, was a part of the business of said partnership. Now, it may be stated as a general rule that one partner "has no authority to guarantee negotiable paper in the firm name, or to make contracts of guaranty or suretyship, without authority specially given him for the purpose, or implied from the common course of the business of the firm, or from the previous course of dealing between the parties unless the act of such partner is afterwards ratified by his copartners." 20 *Ruling Case Law*, p. 899. The trial court found that, though Max had general authority to sign the partnership name on the back of the note, he was not expressly authorized by Herman to do so. The effect of this finding is that the authority to make the guaranty was implied "from the common course of the business of the

firm." These findings taken together are sufficient to support the judgment.

[6] (2) There was evidence that for many years prior to this transaction the partners had both used the credit of the firm in real estate transactions in which one or both were interested. There was also evidence that this particular transaction had its origin in the profits of the sale of real property known as the Baldwin Park, which Max purchased with funds of the firm on the advice of Herman that "it looked A. No. 1 as an investment for the firm." Then it appears that the Valencia Groves transaction was entered into for the benefit of the firm as an investment for its funds, and was so carried on the books of the firm until May, 1917, a few weeks before the financial difficulties arose and the partnership was dissolved. At that time the account was transferred on the books to Max Goldschmidt. It does not appear that either of the partners were stockholders in the Valencia Groves Company. Apparently the agreement was that the money would be advanced to Kauffman for the benefit of the corporation which he controlled upon the understanding that the profits would be equally divided. It was not necessary to show a partnership relation between Kauffman and the Goldschmidts in this particular transaction. The evidence discloses a joint adventure between Kauffman and the partnership of Goldschmidt Bros. If the transaction had been a financial success, 50 per cent. of the profits would have gone into the treasury of Goldschmidt Bros. to offset the account carried on the books as a partnership investment. What adjustments of these accounts would thereafter be made could not alter the fact that the transaction was from its inception financed by partnership funds and on partnership credit. For a year or more this course of dealing was maintained; the partnership advancing its funds to both Kauffman and the corporation for the purpose of the development of the corporation property. The evidence that the partnership engaged in the business of financing the land company as an investment enterprise supports the findings that it was partnership business.

There was also evidence that in this particular transaction Max was the ostensible agent of the partnership and of Herman individually, that Max had been authorized to act for Herman in the entire transaction, and that, as the partnership agreed to advance all funds necessary for the development of the property, the guaranty of this note to raise funds for development purposes was within the authority so conferred. This evidence supports the finding that Max was authorized to sign the paper, and that the entire transaction was a partnership affair.

Stress is placed on the testimony that before Herman indorsed the notes for interest on a bank loan to the Valencia Groves Company he demanded that Max and Kauffman agree to give him one-third of the profits of the land transaction. From this it is argued that he had theretofore no thought of participating in the profits, and that, as his demand was refused, he was not at any time interested. But, as the agreement in evidence was that Kauffman and the Goldschmidts were to divide the profits fifty-fifty, Herman's share would have been one-quarter; so no significance can be attached to his demand for one-third or in Kauffman's refusal to grant his request.

Appellant American Steel Pipe & Tank Company urges three grounds for reversal of the judgment against it: (1) That it cannot be sued on its guaranty in the same action as that against the maker of the note; (2) that it is relieved from liability by a modification of the original undertaking; (3) that, if Goldschmidt Bros. are not bound as a partnership, this appellant is not bound, because its guaranty was conditioned on the guaranty of the partnership. None of the propositions has any substantial merit.

[7, 8] (1) If the guaranty is on the same instrument, the guarantor is properly joined as a party with the maker of the note. Section 383, Code Civ. Proc.; *Melander v. Western Nat. Bank*, 21 Cal. App. 462, 471, 132 Pac. 265; *Titus v. Woods*, 188 Pac. 68. Here, though the guaranty was executed upon a separate paper, it was a part of the same transaction, demanded by the payee and agreed to by the guarantor before the note was executed. The appellant was a guarantor of payment, and as such became liable on default of the principal without demand or notice. Section 2807, Civ. Code. It could have been sued separately or joined with the maker of the note at the option of respondent.

[9] (2) The appellant guaranteed payment to the extent of \$2,500, the guaranty to remain in force "during all renewals of said indebtedness and until at least \$2,500 of said debt is paid." The provisional agreement to extend time of payment if \$2,000 was paid within 20 days, an agreement which was never carried out, did not modify the original undertaking or in any way impair or suspend the rights of the creditor. So far as the rights of a guarantor are concerned, there is no essential difference between an extension of the time of payment of the old note and a renewal. *First Nat. Bank v. Spalding*, 177 Cal. 217, 222, 170 Pac. 407.

(3) Without holding that this appellant's guaranty was conditioned upon the proviso that the partnership had made a valid and enforceable guaranty of the original obligation, it is sufficient to say that, if having been held in this case that the partnership is

bound, this point is not available to this appellant. Other points suggested by counsel do not require consideration.

The judgment on each appeal is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 683

**MOBLAD v. WESTERN INDEMNITY CO.
OF DALLAS, TEX. (Civ. 3797.)**

(District Court of Appeal, First District, Division 2, California. July 28, 1921. Hearing Denied by Supreme Court Sept. 26, 1921.)

Insurance §424—Damage to automobile rolling down embankment after overturning held not "caused solely by collision with another object."

Where edge of roadway on which automobile had been swerved to avoid collision gave way, causing automobile to overturn and roll down mountain side, the damage to automobile from contact with the ground and objects thereon while rolling was not "caused solely by collision with another object," within automobile policy.

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by Emma C. Moblad against the Western Indemnity Company of Dallas, Tex. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry A. Jacobs and G. B. Blanckenburg, both of San Francisco, for appellant.

Eugene F. Conlin, of San Francisco, for respondent.

LANGDON, P. J. The only question presented upon this appeal is as to the construction of the following clause of a policy of insurance:

"In consideration of an additional premium of \$50, this policy is hereby extended to indemnify the assured against loss or damage to any automobile described in the schedule of statements, including operating equipment while attached thereto, if caused solely by collision with another object, while such automobile is used as described in said schedule. * * *"

The plaintiff and appellant was the owner of the automobile covered by said policy of insurance. The automobile was damaged as the result of an accident. The question presented is: Was said damage caused solely by collision with another object within the meaning of the clause above quoted?

The facts with reference to the accident were found by the trial court to be:

"While plaintiff's automobile was being driven by a person over the age of 21 years, along the Sky-line boulevard, in Redwood canyon,

Alameda county, Cal., on the said 13th day of October, 1918, the driver of said automobile, to avoid striking another automobile, swerved to the outer edge of the roadway, and said roadway gave way, causing said automobile to run down an embankment, and, after leaving said roadway, to overturn, and roll down the side of a mountain; that plaintiff's said automobile did not strike or collide with any object upon the said roadway, nor did said automobile strike or collide with any object upon the said embankment or mountain side prior to the time said automobile overturned; that after overturning, said automobile rolled down the side of said mountain, and, in so rolling, came in contact with the ground, and such objects as lay thereon; that none of the objects with which said automobile came in contact caused said automobile to leave the roadway or to go down said embankment, or caused said automobile to overturn, and that said automobile did not, in leaving said roadway, or in overturning and rolling down said mountain side, collide with or hit any tree or fence, but that said automobile, upon overturning, and in the course of rolling down said mountain side, came in contact with the ground along said mountain side, and at the bottom of the canyon, and brush and shrubbery, and other objects on the ground upon said mountain side and bottom of canyon."

These findings are sustained by the testimony of plaintiff's own witnesses, and from them the trial court concluded that the damage to the automobile was not caused "solely by collision with another object."

We are cited to no case in this state where the facts are similar to the facts of the present case, but our attention has been called to the recent case of *Bell v. American Ins. Co. (Wis.)* 181 N.W. 733. There the plaintiff while operating and endeavoring to turn his car, backed upon some soft ground, and the automobile gradually settled into the ground and tipped over. An action was brought to recover damages for injury resulting to the automobile by its coming into contact with the ground at the time of the upset. Plaintiff's claim arose out of a policy which insured him against damage resulting to his automobile "by being in accidental collision with any other automobile, vehicle or object." The court said:

"While it is true that insurance contracts should be construed most strongly against the insurer, * * * yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an accident, why should not such words, or words of similar import, have been used? We cannot

presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding."

See, also, *Stuht v. U. S. Fidelity & Guar. Co.*, 89 Wash. 93, 154 Pac. 137; *Wettengel v. U. S. Lloyds*, 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626.

In the instant case, the damage to plaintiff's car was caused proximately by its turning over on the edge of the road. Its subsequent revolutions and consequent damage were but the operation of physical laws set in motion when it turned over on the edge of the road. The proximate and only cause of the accident was not a collision, but the upsetting of the automobile.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

53 Cal. App. 686

BLANEY v. CLINE, Sheriff. (Civ. 3472.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1921.)

Fraudulent conveyances — 146(2)—Husband's transfer of automobile to wife held fraudulent as to husband's creditor.

Where husband gave wife a bill of sale of automobile, but continued to use the automobile in his business, the transfer was fraudulent as to husband's creditor under Civ. Code, § 3440, requiring an immediate delivery, followed by an actual and continued change of possession, though wife built a garage on property owned by her, but which was homesteaded for the joint benefit of herself and husband, and kept automobile therein when not in use.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Hattie F. Blaney against John C. Cline, Sheriff of the County of Los Angeles, State of California. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 192 Pac. 549.

F. D. R. Moote, Moote & Patterson, and Harold Ide Cruzan, all of Los Angeles, for appellant.

H. L. Sacks, of San Francisco, for respondent.

CONREY, P. J. On the 17th day of September, 1918, the defendant, as sheriff of the county of Los Angeles, and acting under a writ of execution upon a judgment against the plaintiff's husband, H. C. Blaney, seized and took into his possession a certain automobile described in the complaint in this action. The plaintiff made in due form a third-party claim, and demanded that the sheriff

return the automobile to her possession. This demand having been refused, she commenced this action. Judgment having been entered in favor of the defendant, the plaintiff appeals therefrom.

The evidence was sufficient to establish the fact that on January 26, 1917, H. C. Blaney purchased the automobile with his own funds. The automobile license was taken out in the name of H. C. Blaney at that time, and the 1918 license also was in his name. On or about the 1st day of February, 1917, H. C. Blaney executed and delivered to the plaintiff a bill of sale of the automobile, but it does not appear that this fact was known to any one except Mr. and Mrs. Blaney and their daughter. The family lived on property owned by the plaintiff, which was homesteaded for the joint benefit of the plaintiff and her husband. She built a garage there, and in that garage the automobile was kept when not in use. Blaney used the automobile in his business after making the bill of sale the same as before. He drove it to his office most of the time, although sometimes it was driven by the plaintiff.

The points alleged in support of the appeal are: First, that the plaintiff, in building a garage on her own separate property and storing the automobile therein, sufficiently took manual possession thereof to set the rest of the world upon notice of her claim of title. Second, that the rule as to what change of possession is sufficient to render a conveyance fraudulent as to creditors should not be as strictly construed where no credit is given by reason of the conveyance or the possession of the chattels by the judgment debtor, as in cases where credit is secured because of the possession of the chattel by the debtor. No authorities are cited in support of the second proposition, nor are any reasons given in support of the assertion. The plaintiff cannot recover if the transfer of the property to her was "not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred." If not thus transferred, the transfer is deemed to be fraudulent and void against those who are creditors of the transferor while he remains in possession. Civ. Code, § 3440. Under analogous circumstances of attempted transfer of personal property by a husband to his wife, it was held in *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200, that the transfer was void as against an attaching creditor of the husband. The court there referred to *Morgan v. Ball*, 81 Cal. 93, 22 Pac. 331, 5 L. R. A. 579, 15 Am. St. Rep. 34, which is the leading case relied upon by appellant in the present case, and refused to accept that decision as authority sufficient to sustain the plaintiff's demand. Referring to the claim (also asserted here) that where the parties to the transfer

are husband and wife, a set of facts may be sufficient to show a change of possession between them which would not be sufficient under ordinary circumstances, the court in *Murphy v. Mulgrew* disposed of this contention as follows:

"The fact that a vendor and vendee are husband and wife, or parent and child, is no reason why the provisions of the statute should receive a different or more liberal construction. Those conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial."

To the same effect see *Tennant v. Cline*, 190 Pac. 1065.

We are satisfied that the evidence is sufficient to support the court's findings.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 524

BANK OF SOUTH SAN FRANCISCO v. PIKE et al. (Civ. 3810.)

(District Court of Appeal, First District, Division 2, California. July 15, 1921. Hearing Denied by Supreme Court Sept. 12, 1921.)

1. Quietting title § 47(2)—Effect of conflict in findings.

In action to quiet title, where court found that plaintiff commenced action on a certain date and regularly levied an attachment on the interest of one of the defendants, and also that other defendants had no notice of the plaintiff's claim, the case should be reversed if such two findings are conflicting; but if a finding of the recording of the papers on attachment in the recorder's office was a specific finding, and the other finding regarding no notice was a general finding, then the specific finding should control.

2. Fraudulent conveyances § 227, 230—Sale of land under execution held to pass legal title itself; proceeding in equity not necessary.

As against a fraudulent transferee of land, the creditor may seize the property as that of the fraudulent vendor, and may proceed to sell it under execution, and the title transferred by such sale is not a mere equity—not the right to control the legal title and to have the fraudulent transfer vacated by some appropriate proceeding—but is the legal title itself; and the judgment creditor need not ask the aid of equity.

3. Attachment § 183—Mortgages § 151(4)—Lien cannot be destroyed except by dissolution; attachment lien good against subsequent mortgagees.

When an attachment is served on land a lien is created which nothing subsequent can destroy, but the dissolution of the attachment, even though the title stands of record in the name of a third person, and such lien is good as against grantees and mortgagees claiming

under instruments made subsequent to the date of the attachment, under Civ. Code, §§ 2897, 3525, and Code Civ. Proc. § 542, subd. 2.

4. Attachment § 178—Attaching creditor not purchaser for value.

An attaching creditor under Code Civ. Proc. § 542, subd. 2, is not a purchaser of land for value, and he cannot, therefore, claim protection under Civ. Code, §§ 1213–1218, and an attaching creditor cannot secure any greater estate in property than the debtor possesses at the date of the levy.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Bank of South San Francisco against Edna Laura Pike and others. From a judgment for defendants Henry S. and Carrie E. Bridge, plaintiff appeals. Reversed.

John D. Willard, of San Francisco, and John W. Coleberd, of South San Francisco, for appellant.

Stanley Jackson, of San Francisco, for respondents.

STURTEVANT, J. Plaintiff commenced an action against the defendants to quiet its title to a tract of land in San Francisco. The trial court gave judgment, among other things, in favor of the defendants Henry S. and Carrie E. Bridge, and from that portion of the judgment the plaintiff has appealed, bringing up the judgment roll without any bill of exceptions.

The facts material to a consideration of the case are as follows:

On April 1, 1910, the American Steel Casting Company, a corporation, and Boaz D. Pike and Georgie S. Pike, executed to plaintiff a one-day note; on April 11, 1911, the plaintiff commenced an action on the note against the makers; each and all of the defendants in that action defaulted, and judgment was entered on the 23d day of May, 1912. On the same date that the action was commenced on the promissory note an attachment was taken out, served, recorded, and returned, under and by virtue of which plaintiff attached the real estate in San Francisco standing of record in the name of Boaz D. Pike, Georgie S. Pike, or Edna Laura Pike. On the 22d day of April, 1914, execution issued on said judgment, and such proceedings were had that thereafter the sheriff duly and regularly delivered to the plaintiff on the 29th day of December, 1915, a sheriff's deed to the property in dispute. On the 7th day of June, 1910, Boaz D. Pike and Georgie S. Pike executed to Edna Laura Pike, their daughter, a deed of gift purporting to transfer said property. On February 10, 1913, Edna Laura Pike executed to the defendant Carrie E. Bridge her promissory note in the sum of

\$1,500, and to secure the same she executed to Henry S. Bridge and Fred W. Bridge a trust deed covering the property in dispute.

Besides the foregoing facts the trial court found that Boaz D. and Georgie S. Pike executed the deed to their daughter, Edna Laura Pike, voluntarily, without any valuable consideration, at a time when they were insolvent, and that they did so with the intent to hinder and delay and to defraud their existing creditors and this plaintiff of its judgment against them. The trial court also found that Fred W. Bridge died after the execution of the deed of trust, and that Henry S. Bridge and Carrie E. Bridge had no notice prior to the commencement of this suit of any claim by plaintiff of the invalidity of the title of the said defendant Edna Laura Pike to the said real estate.

[1] The plaintiff claims that the deed from Boaz D. and Georgie S. Pike to their daughter, Edna Laura Pike, was void, and that it was void as to the defendants Henry S. and Carrie E. Bridge, because they had notice of plaintiff's claim. The defendants Henry S. and Carrie E. Bridge reply that they had no notice. The trial court found that, at the time plaintiff commenced its action on the promissory note, April 11, 1911, it regularly levied an attachment on the interest of Edna Laura Pike. It also found that Henry S. and Carrie E. Bridge had no notice of the plaintiff's claim. If it be said that these two findings are conflicting, the case should be reversed. *McElligott v. Krogh*, 151 Cal. 126, 90 Pac. 823. If it be said that the finding on the recording of the papers on attachment in the recorder's office was a specific finding, and that the other finding regarding no notice was a general finding, then the specific finding should control (*McCormick v. National Surety Co.*, 134 Cal. 510, 66 Pac. 741), and, for the reasons which we shall presently develop, the judgment should have been for the plaintiff, and against the defendants.

[2, 3] The claim of the defendants is that they had no notice of the attachment, and, as the title to the property stood of record in the name of Edna Laura Pike, that the defendants were entitled to deal with her as the owner. They also claim that, as the plaintiff had not filed an action in the nature of a creditor's bill against Edna Laura Pike on February 10, 1913, the defendants were not in any way bound by any contention of this plaintiff regarding the frailty of the title of Edna Laura Pike. In both of these contentions of the defendants we think that they are in error. In section 136 of *Freeman on Executions* it is said:

"As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity—not the right to control the legal title,

and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all. The creditor having a judgment may, if he thinks it advisable, ask the aid of equity, but he cannot be compelled to do so."

In those words the author has digested a long line of cases in California, including, among others, *First National Bank of L. A. v. Maxwell*, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286. In proceeding to perfect its rights under the particular remedy which it had selected, the plaintiff caused to be issued and duly levied an attachment on the lands in controversy. Code Civ. Proc. § 542, subd. 2. When the attachment was served the effect thereof was, as stated in section 224, *Drake on Attachments*:

"When an attachment is served, a lien on the property attached is created, which nothing subsequent can destroy but the dissolution of the attachment. It is said to be beyond the power of the state Legislature to pass an act annulling it. And as to the defendant, though, as we have just seen, his power of alienation, subject to the attachment, is not impaired, yet no subsequent act of that description on his part can defeat the attachment."

It is not, and it could not well be, contended that such an attachment would not be controlling as to the debtors and his subsequent acts. *First Nat. Bank of L. A. v. Maxwell*, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64. The question is, has the statute been duly complied with? and, if it has been, then the lien has been created. And it has been held uniformly that, when the writ of attachment has been duly levied on real property, or an interest therein belonging to the judgment debtor, although the title stands of record in the name of another, the levy has the same binding force and effect. In *Porter v. Pico*, 55 Cal. 165, at page 174, the court says:

"The property is sold under the final process issued on the judgment, but the deed made to the purchaser at the sale, as the last of the series of acts, takes effect from the date of the levy of the attachment, as the first of the series of acts, and perfects the title to the property from the day when it was taken by the officer for the satisfaction of the judgment."

As to the grantees and mortgagees of the debtors, claiming under instruments made subsequent to the date of the attachment, the rule in *Porter v. Pico* has been uniformly followed. *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Reilly v. Wright*, 117 Cal. 77, 48 Pac. 970; *Woodward v. Brown*, 119 Cal. 283, 306, 51 Pac. 2, 542, 63 Am. St. Rep. 108;

Martinovich v. Marsicano, 150 Cal. 597, 89 Pac. 333. This rule is but applying section 2897 of the Civil Code, which provides: "Other things being equal, different liens upon the same property have priority according to the time of their creation; * * *" and section 3525, which provides: "Between rights otherwise equal, the earliest is preferred." If one attached person cannot defeat the attachment, how can another? They are all attached under the same statutes. The authorities hold the rule is the same. *Thompson v. Baker*, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889; *King v. Wilson*, 54 N. J. Eq. 247, 34 Atl. 394; *Westervelt v. Hagge*, 61 Neb. 647, 85 N. W. 852, 856, 54 L. R. A. 333; *Coit v. Sistare*, 85 Conn. 573, 84 Atl. 119, 121, Ann. Cas. 1913C, 248; *Brackett's Adm'r v. Boreing's Adm'r*, 131 Ky. 751, 110 S. W. 276, 280, 115 S. W. 766; *Merchants' & Farmers' Bank v. Harris*, 113 Ark. 100, 167 S. W. 706, 709; *Pease v. Frank*, 263 Ill. 500, 105 N. E. 299, 302. In the *Thompson Case*, supra, 141 U. S. at page 655, 12 Sup. Ct. 91, 35 L. Ed. 889, Mr. Justice Harlan, writing the opinion, says:

"So, in *Hancock v. Henderson*, 45 Tex. 479, 484, where the contest was between the holder of an attachment lien upon land, and a person who purchased from the grantees of the defendant in the attachment, who, it was alleged, had conveyed the land to such grantees with the fraudulent intent to hinder his creditors, such purchaser having no actual notice of the issuing of the attachment or of the levy, the court said: 'That a valid levy created a lien on the land attached, and, when properly returned on the writ into the court from which it issued, is notice to third parties, are propositions which it is not deemed necessary to discuss. * * * It follows that Mrs. Louisa Hancock, the purchaser after the levy of the attachment, having bought the land under these circumstances, took it subject to the plaintiff's attachment lien.'"

[4] The respondent cites *Morrow v. Graves*, 77 Cal. 218, 19 Pac. 489, and *Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264. The cases are not helpful. They were cases involving unrecorded deeds. Assuming an unrecorded deed was made in good faith, it passed the title upon its delivery. After its delivery the lands were not "lands belonging to the defendant." Such lands, therefore, were not subject to attachment. Code Civ. Proc. § 542, subd. 2. Furthermore, it will not be contended that an attaching creditor is a purchaser for value, and he cannot, therefore, claim protection under the Civil Code, §§ 1213-1218; *Hoag v. Howard*, 55 Cal. 564. And, again, it will not be contended that an attaching creditor can ever secure any greater estate in property than the debtor possessed at the date of the levy.

The briefs devoted some space to the issue as to whether the respondents had notice, actual or constructive. The respondents cite

some language contained in *Casey v. Leggett*, supra, and *Morrow v. Graves*, supra, and in reply the appellant cites some language contained in *Ritter v. Scannell*, 11 Cal. 238, 249, 70 Am. Dec. 775. The respondents might also have cited *Aigeltinger v. Einstein*, 143 Cal. 609, 616, 77 Pac. 669, 101 Am. St. Rep. 131. The matter of notice or no notice, we believe, is a false issue under the facts of this case. The real issue is lien or no lien. If the appellant gave all the notice that the statute required in taking out its attachment, and otherwise fully complied with the statute, it acquired a valid lien. If it acquired a valid lien, we have shown that such lien could not be diminished after its creation except by a dissolution of the attachment.

It follows that the appellant should have been given a judgment on the findings as made; that this judgment should be reversed, and the trial court should be directed to enter judgment for the appellant on the findings, in accordance with what has been said above; and it is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

53 Cal. App. 530

**BANK OF SOUTH SAN FRANCISCO v.
PIKE et al. (Civ. 3811.)**

(District Court of Appeal, First District, Division 2, California. July 15, 1921. Hearing Denied by Supreme Court Sept. 12, 1921.)

1. Pleading ☞121(4)—Denial of information or belief not sufficient as to matters of public record.

Denial of information or belief is not sufficient as to matters of record, which defendant is presumed to know.

2. Appeal and error ☞916(3) — To support judgment it will be presumed that insufficient denial was not treated as sufficient.

Where there is no bill of exceptions, and it cannot be known from the record that plaintiff, who obtained a judgment, treated an insufficient denial in the answer as a sufficient denial, it must be assumed in support of the judgment that the plaintiff did not do so.

3. Appeal and error ☞910—Where judgment depends on validity of prior judgment, proper service assumed in support of prior judgment.

Where, on an issue involving validity of prior judgment, there was a finding that in such prior action summons was returned as filed June 20, 1911, and a finding that an affidavit showing service of summons on an unserved defendant on the 20th day of March, 1912, was filed May 22, 1912, in the absence of a bill of exceptions, it must be assumed in support of a judgment for plaintiff that plaintiff obtained permission to withdraw the summons, and thereupon did withdraw the same and make due and legal service thereof.

4. Appeal and error — 910—Where judgment depends on validity of prior judgment entered by clerk, presumptions are in favor of such prior judgment.

On appeal from judgment, where cause should be reversed if default judgment as entered by the clerk was not properly obtained in a prior case, appellants claiming that the former judgment did not have the same verity as a judgment of a court of general jurisdiction, because entered by the clerk, it must be assumed that at the time the clerk entered the judgment there was a minute entry purporting to authorize the withdrawal of the summons for the purpose of serving it on unserved defendants, and, in support of the judgment on appeal, that such minute was shown to the trial court rendering the second judgment, that the said minute order had been obtained, and was before the clerk before he entered the first judgment; the clerk being called upon, when plaintiff applied to have a default entered, to perform his statutory duty in a statutory manner.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Bank of South San Francisco against Edna Laura Pike and others. From the judgment, certain defendants appeal. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

Joseph E. Bien and Abram M. Marks, both of San Francisco, for appellants.

John D. Willard, of San Francisco, and John W. Coleberd, of South San Francisco, for respondent.

STURTEVANT, J. This is an appeal by Boaz D. Pike, Georgie S. Pike, and Edna Laura Pike from the judgment rendered in the case of Bank of South San Francisco, a Corporation, Plaintiff and Appellant, v. Edna Laura Pike et al., Defendants, Henry S. Bridge and Carrie E. Bridge, Defendants and Respondents (Civ. 3810) 199 Pac. 752, this day filed. By stipulation of the parties the appeal is supported by, and rests on, the same record as in the Bridge Case. The defendants Pike appeared and answered the plaintiff's complaint; a trial on the merits was had, and the trial court rendered judgment in favor of the plaintiff and against these defendants, and they have appealed from the judgment, and which judgment will hereinafter be termed the second judgment.

The plaintiff alleged, and the trial court found, that on the 23d day of May, 1912, this plaintiff, the Bank of South San Francisco, obtained judgment against certain defendants, including the defendants B. D. Pike and Georgie S. Pike, for the sum of \$5,714.31, and which judgment will hereinafter be termed the first judgment. The appellants make the claim that the first judgment was void because the summons was never served on

the defendant Georgie S. Pike. If this claim can be sustained the judgment should be reversed; otherwise it should be affirmed. We think that the claim of the appellants is without merit for several different reasons, which we shall proceed to state.

[1, 2] (a) The plaintiff alleged:

"III. That said American Steel Casting Company, B. D. Pike, and Georgie S. Pike, and each of them, made default in the payment of said promissory note, and that thereafter said plaintiff brought suit upon said promissory note in said superior court, and on the 23d day of May, 1912, plaintiff herein obtained judgment against said American Steel Casting Company, B. D. Pike, and Georgie S. Pike for the sum of \$5,714.31, which judgment is recorded in judgment book No. 29 of said superior court at page 382."

In each of the answers each of these defendants attempted to deny the above allegation by alleging:

"Defendant has no information or belief sufficient to enable her to answer the allegation contained in paragraphs * * * 3 * * * of the second amended complaint, and basing her denial upon said lack of information or belief, defendant denies each and every, all and singular, the allegations in said paragraphs, and each of them contained."

There is no question but what certain facts can be denied by this form of a denial. *Etchas v. Orena*, 121 Cal. 270, 271, 53 Pac. 798. However, that rule does not extend to authorizing or permitting a defendant in that manner to deny matters of record which he is presumed to know, and the contents of public records are, among others, such facts. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Jensen v. Dorr*, 159 Cal. 742, 747, 116 Pac. 553. As there is no bill of exceptions before us, and as we do not know from the record that the plaintiff treated the denial as a sufficient denial, we must assume in support of the judgment that the plaintiff did not do so, and that the trial of the action in which the second judgment was rendered was conducted on the theory that there was no denial. In other words, in the form of the record before us, we cannot assume that such proceedings were had in the trial court as will authorize the appellants to claim any rights as by estoppel, and as portrayed in *Schroeder v. Mauzy*, 16 Cal. App. 443, 447, 118 Pac. 459.

[3] (b) There is a finding that the summons in the first action was returned as filed June 20, 1911, and there is a finding that an affidavit showing service of summons on Georgie S. Pike on the 20th day of March, 1912, was filed May 22, 1912. However, there is no finding, and there is no bill of exceptions showing, that after application therefor, duly made, the plaintiff did not obtain permission in the first action to withdraw the summons, and thereupon did withdraw

the same and make due and legal service thereof on Georgie S. Pike. *Rue v. Quinn*, 137 Cal. 651, 657, 66 Pac. 216, 70 Pac. 732; *Hibernia Sav. & Loan Soc. v. Cochran*, 141 Cal. 653, 658, 75 Pac. 315. When the record on appeal is in this form we are bound to presume in support of the judgment of the trial court that the summons was so withdrawn, and was legally served. The appellants contend that "the summons, having been returned, was functus officio." *Fanning v. Foley*, 99 Cal. 336, 339, 33 Pac. 1098. It is true that Mr. Commissioner Temple in that case used that language, but he was addressing that language to a summons that was 11 years old, and which was returned and filed during the tenth year of its age, 7 years after it could be used for any purpose. Code Civ. Proc. § 581, as amended, St. 1889, § 398. The amendment to that section resulted in the legislative annihilation of the life in a summons not returned until 10 years after it was issued. That statute was so construed by the same learned jurist after he had become a justice of the Supreme Court. *Vrooman v. Li Po Tai*, 113 Cal. 302, 304, 45 Pac. 470.

[4] (c) Assuming, as appellants contend, that the judgment in the first action was a judgment entered by the clerk as distinguished from a judgment ordered by the court, and that therefore the instrument does not have the same verity as the judgment of a court of general jurisdiction, still the appellants have not sustained their appeal. When the plaintiff applied to have the default of the appellants entered, the clerk was thereupon called upon to perform a statutory duty in a statutory manner. *Glidden v. Packard*, 28 Cal. 649. The appellants have shown that certain papers and files were at that time before the clerk. The appellants have not shown that there was not at that time before the clerk a minute entry which purported to authorize the withdrawal of the summons for the purpose of serving it on certain of the defendants. The trial court in this case has made a finding that the judgment in the first case was regular. Again, in support of the second judgment, we must presume that it was shown to the trial court, rendering the second judgment, that the said minute order had been obtained, and was before the clerk when he entered the first judgment.

The record shows no error, and the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

We base our denial of the petition solely

upon the fact that the trial court expressly found as one of the facts of the case that the judgment in the former action on the note "was duly given and made," and that there is nothing in the judgment roll in this action, upon which alone this appeal is based, necessarily in conflict with this clear and explicit finding of fact.

53 Cal. App. 701

McBRIDE et al. v. McCARTNEY.
(Civ. 3327.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1921.)

1. Appeal and error §1011(1)—Finding on conflicting evidence final.

The trial court's determination of facts on conflicting evidence is final.

2. Frauds, statute of §116(10)—Oral authorization, though void under statute of frauds, may be ratified by owner.

Oral authorization of broker to sell land, though void under statute of frauds, may be ratified by owner, in which case the acts of the broker become as effectual and binding as though his authority had been expressed by the writing.

3. Principal and agent §75—Agent, though imperfectly authorized, liable to principal for money received for principal in performance of acts ratified by principal.

Wherever an agent, imperfectly authorized in the first place, performs acts in execution of the agency which are ratified by the principal, the principal is entitled to enforce his demands against the agent for anything which the agent has received on his account.

4. Brokers §28—Broker could not retain portion of price of land sold on theory that he bought and resold at advance.

Real estate broker who paid owner only a portion of the price received from purchaser could not repudiate the agency and retain the money on the theory that he was acting as a principal, and had purchased the land from owner, and had resold it to purchaser, but was liable to owner for full amount received from purchaser.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by A. N. McBride and another against Grant McCartney. Judgment for plaintiffs, and defendant appeals. Affirmed.

Dudley W. Robinson, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondents.

JAMES, J. Appeal by the defendant from a judgment awarding to the plaintiffs the sum of \$500 and costs. In their complaint plaintiffs allege that within two years prior

to the commencement of the action defendant became indebted to them on account of money had and received for their benefit. All of the material allegations of the complaint were denied in the answer.

Plaintiffs were the owners of a house and lot in the city of Los Angeles. They desired to sell the same. Defendant was engaged in the business of buying and selling real estate as an agent. Plaintiffs orally listed with the defendant, through one of the latter's employees, their property for sale, the price fixed being the sum of \$3,500, out of which they expected to pay the customary commission, which the evidence shows would have been 5 per cent., or the sum of \$175. Defendant found a purchaser for the property, but informed this proposed purchaser that the price was \$3,750. Defendant accepted checks from the purchaser for the full amount, and then communicated with plaintiff A. N. McBride. Without informing the plaintiff that he had secured a purchaser, he stated to McBride that he had not seen the property, but that it was in a good location, and asked McBride what the lowest price was that would be accepted by the latter. After some talk McBride agreed to take \$3,250 net cash. Appellant then gave McBride his check for \$25, and an escrow was made with a title company covering the transaction; a deed was passed, and the \$3,250 paid over to respondents.

It was some time after this that the McBrides learned from the purchasers of the property that they had in fact paid \$3,750 to McCartney, and this action was thereupon brought. There was a dispute made between plaintiffs and defendant at the trial as to whether the property ever had been listed with the defendant as an agent, the latter denying that any agency had been so created, and claiming that he purchased the property outright, and hence violated no trust relationship in retaining the full amount which he received from his clients, to whom the property was in fact transferred. However, we have stated the facts, as we must, in the light of evidence most favorable to the plaintiff's case.

[1-3] The evidence being conflicting, the trial court's determination of the facts is final. Appellant concedes, by not advancing a contrary contention, that, if the evidence was sufficient to establish that the relationship of principal and agent existed between him and respondents at the time he effected a sale of the property to third persons, the judgment of the court is right. However, it is insisted that there could be no recovery, even under the facts as they have been herein stated, because no written authorization had been given appellant by respondents empowering him to negotiate a sale of the property; that under the statute of frauds the oral authorization is void, and of no

effect. This position of appellant is not good in law. His principal here elected to ratify all of the acts of the agent. Under such circumstances the acts of the agent become as effectual and binding as though his authority had been expressed by a writing. Wherever an agent, imperfectly authorized in the first place, performs acts in execution of the agency which are ratified by the principal, the principal is entitled to enforce his demands against the agent for anything which the agent has received on his account.

[4] As applicable to that kind of a situation Mr. Mechem, in his work on Agency (2d Ed.) vol. 1, par. 501, states the rule to be this:

"The principal is therefore entitled to the benefits and the profits of the transaction and to all of the advantages which would flow from an authorized performance, and can compel an accounting therefor from the agent. He may recover from the agent property or money received from the other party by virtue of the transaction ratified; and after ratification the agent may not return to the other party money or property so received; if he does so, he is liable for it to the principal."

See, also, *Bogart v. Crosby & Van Haren*, 80 Cal. 195, 22 Pac. 84.

Manifestly, a person, after having assumed to act as an agent for a party, and after receiving into his hands moneys on behalf of his principal, cannot repudiate the agency and retain the money without committing fraud against the principal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 646

ARAKELIAN et al. v. SEARS et al.
(Civ. 2273.)

(District Court of Appeal, Third District, California. July 25, 1921. Hearing Denied by Supreme Court Sept. 22, 1921.)

1. **Fraudulent conveyances** — §182(5) — **Purchaser under trust deed, with purpose of defrauding attachment creditor, held surplus after sale to third person subject to creditor's claim.**

If a bank, pursuant to an agreement with owners of property to defraud attaching creditor, purchased and foreclosed a trust deed, and through its officer purchased the land at foreclosure sale and subsequently sold land to third person at a big increase in price, an action would lie against the bank and officer to establish a trust in the surplus fund, and make it subject to attachment creditor's claim, in view of Civ. Code, § 2224.

2. **Fraudulent conveyances** — §302 — **Evidence insufficient to prove purchaser a party to fraudulent transaction.**

In action to quiet title against attaching creditor of former owner by third person, who

had purchased land from bank which had purchased and foreclosed trust deed and had purchased the land at the foreclosure proceedings, evidence held insufficient to prove that plaintiff had purchased property with knowledge that bank had participated in the transaction to defraud creditor.

3. Evidence ⚡60, 69—Persons presumed not to have been guilty of wrong.

Under Code Civ. Proc. § 1963, it will be presumed that a person is innocent of crime or wrong, that private transactions have been fair and regular, and that the ordinary course of business has been followed.

4. Fraudulent conveyances ⚡271(4) — Presumptions against fraud must be overcome by one who alleges fraud.

Presumptions against fraud in a debtor's conveyance must be overcome by him who alleges it by proof of fraud, and not by proof raising a mere suspicion thereof.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Harry Arakelian and others against Martha A. Sears, etc., William M. Curtner, and others, in which defendant Curtner filed a cross-complaint. Judgment for defendant Curtner on his cross-complaint, and plaintiffs appeal. Reversed.

Andrew Johnston and R. R. Fowler, both of Turlock, for appellants.

Francis O. Hoover, Joseph M. Cross, and Cross & Hoover, all of Modesto, for respondent.

BURNETT, J. On April 6, 1915, Charles Murray and W. A. Jones and their wives were the owners of the lands in controversy situated in the county of Merced. On said date they executed and delivered to the Commercial and Savings Bank of Stockton a deed of trust covering said lands, together with another small tract, to secure a loan of \$10,000. This deed of trust was recorded in said county on April 14, 1915. On February 17, 1916, this deed of trust was assigned by said bank to the First National Bank of Modesto. On May 12, 1916, the indebtedness secured by this deed of trust being due and unpaid, the lands which are the subject of this action were sold to W. N. Steele, then president of the last-named bank, for the sum of \$10,600, the amount of the indebtedness. The proceedings under which this sale took place were found by the trial court to be entirely regular, and there is no dispute that they complied strictly with the requirements of the law. A trustees' deed was duly made to said Steele on said May 12th. One week later, on May 19th, Steele and wife conveyed said lands to plaintiff Harry Arakelian. The consideration paid therefor by said Arakelian was the sum of \$21,000. On January 3,

1916, respondent, William M. Curtner, began an action in the superior court of Stanislaus county against Murray and Jones and their wives to recover the sum of \$15,000 and interest. On said date a writ of attachment was issued by said court and thereupon levied upon said lands by the sheriff of said county. This attachment was recorded in the county recorder's office on the following day. In that action Curtner recovered judgment against the defendants therein for \$5,800, and a copy of this judgment was duly recorded on June 19, 1917. The present action to quiet title was brought July 10, 1916, against Curtner and others, and its specific purpose was to secure an elimination of a reservation of five acres of land for road purposes, being a part of said land purchased as aforesaid by said Harry Arakelian. The rights of the other defendants have been foreclosed, and they are not parties to this appeal, and we may add that Harry Arakelian seems to be the only one of the plaintiffs that has any interest in the controversy, and we shall hereafter refer to him as plaintiff and appellant. Defendant Curtner appeared in the action, and on November 22, 1916, filed an answer, in which he set up his writ of attachment and prayed that it be adjudged superior to the title of plaintiff. The trial of the case was begun on April 5, 1917, and at the close of the taking of the testimony respondent Curtner asked leave of court to file an amended and supplemental answer and cross-complaint. Such leave was granted, and said pleading was filed on the 9th day of October, 1917. An answer to said cross-complaint was filed on November 12th following, and further evidence was taken on January 21, 1918. Thereafter findings were filed, and the judgment entered in favor of cross-complainant Curtner, from which plaintiff has brought the appeal. In respect to the sale under the deed of trust and the transfer to plaintiff, the amended answer and cross-complaint charged that:

"Said W. N. Steele, said Charles Murray and W. A. Jones, and the said Harry Arakelian conspired and contrived together by means of the transaction hereinabove set forth * * * to defeat the lien of the said attachment of defendant, William M. Curtner, upon the said land, and to defraud and cheat the said defendant thereby, and that they did, with the fraudulent intention of cheating and defrauding the said defendant, by means of the purchase of said indebtedness and deed of trust by the First National Bank of Modesto, and the sale of the said land thereunder to W. N. Steele, attempt to effectuate and accomplish a transfer of the title in and to the said land to the plaintiff, Harry Arakelian, freed from the said lien of plaintiff's attachment, and did thereby effect a fraudulent conveyance of the said land from the said Charles Murray and W. A. Jones to the said Harry Arakelian for the purpose of attempting to deprive defendant, William

M. Curtner, of his lien upon and interest in said land."

The court found that Curtner had not been informed that the land was about to be sold under the trust deed; that the price for which the said land was sold to said W. N. Steele under said deed of trust was not a fair and reasonable price for the land, but was an inadequate price therefor; that the said land was within one week thereafter sold to plaintiff, Harry Arakelian, for more than \$10,000 in excess of the amount paid by Steele; that the said excess was not kept by Steele as his private property, but a portion thereof was used by him in the payment of notes of the said W. A. Jones and Charles Murray, held by the First National Bank of Modesto, and that the benefit thereof was thereby given to the said Jones and Murray, and that a portion thereof was paid in cash by said Steele to said Murray and Jones, and that said deed of trust and the indebtedness secured thereby was not purchased by said bank as an investment, but for the purpose of foreclosing the same and of selling the land as aforesaid and for the purpose of defrauding Curtner; that the transfer to plaintiff was fraudulent; and that he had knowledge of and was a party to the fraud, and therefore took the land subject to the lien of Curtner's judgment.

The case naturally divides itself into two parts; the first relating to the question whether the sale to Steele under the trust deed was fraudulent, and the second, whether plaintiff, if fraud existed, participated in it, or as a purchaser was charged with such knowledge as to make the property in his hands burdened with the lien of Curtner's judgment.

As to the general principle that such conveyance may be avoided or subjected to the lien of a creditor's claim, where the purpose exists to defraud a creditor, there is no controversy, and hence that feature of the case may be dismissed without comment.

Respondent claims that certain "badges of fraud" characterized the transaction resulting in the sale to Steele sufficient to warrant the finding of the court as to the invalidity of said purchase.

[1] The various circumstances, which, in their aggregate probative effect, are deemed by respondent sufficient for this purpose, are argued with great force and learning by counsel on both sides, but as we have reached the conclusion that their is insufficient support for the finding that appellant participated in or was charged with notice of any fraud, we may omit consideration of the finding that Steele's purchase for the said bank was fraudulent. We may say, however, that if such fraud was perpetrated there can be no doubt that an action would lie against Steele and the said bank to establish a trust in said surplus fund and make it subject to respondent's

claim. This would follow from the established principles of equity practice and is directly within the contemplation of section 2224 of the Civil Code.

[2] There is no evidence in the record that plaintiff actually committed fraud, or that he had actual knowledge that any fraud had been committed in reference to the conveyance of this property. Indeed, respondent concedes:

"Unless Arakelian had sufficient notice of the fraud to bind him we have no standing in this court at any rate."

It is further admitted that he had "no notice of the fraud until after the trustees' sale was complete." Thus is the inquiry limited to what occurred subsequently. The record shows that a few days prior to May 19, 1916, when he purchased the property, plaintiff brought to the office of his attorney, Mr. Johnston, the abstract of title for examination; Mr. Johnston examined it, and gave his opinion to the effect that said trust deed took precedence over the attachment, and that the title was in said Steele. There is no doubt that the abstract justified said opinion. Nothing appeared upon the face of it to indicate any irregularity in the sale to Steele or to excite suspicion that the transaction was tainted in any degree with fraud. That plaintiff was justified in relying upon the advice of his attorney goes without question. There is only one possible circumstance that might militate against this view, and that relates to the consideration for the sale to Steele. It is claimed that said price was inadequate. It was not the full value of the property, but there is no evidence that Mr. Johnston, upon whose advice plaintiff relied, was familiar with the market value of the land, or knew the price that was to be paid by plaintiff. Therefore his client could not be charged with constructive notice that the price paid by Steele was inadequate. Moreover, such inadequacy of price would not be sufficient to justify a conclusion that said sale was fraudulent, nor would it impose upon an intending purchaser the duty of making inquiry concerning it. *Morrow v. Graves*, 77 Cal. 218, 19 Pac. 489. It may be added that said bank had the unquestioned right to direct the trustees to sell the property, and it was the duty of the latter to sell to the highest bidder (*Stockwell v. Barnum*, 7 Cal. App. 419, 94 Pac. 400), and it may be stated as a matter of common knowledge that under such sales the property is rarely sold for more than sufficient to satisfy the indebtedness. Thus far nothing in plaintiff's conduct is open to suspicion or to just criticism. If an attorney may not safely rely upon such record it is obvious how difficult, if not impossible, it would be for him to advise a client as to the integrity of a title to land. Nor do we think there was any reason for suspicion because of the presence of Murray and Jones in the of-

fice of Hawkins & Hawkins at the time of the execution of the deed from Steele. There is nothing to show that they were there for any improper purpose, or that their business had anything to do with this transaction. There is no evidence that plaintiff had ever met them before, or had any reason to believe that they were concerned in any manner with the sale to him. Indeed he had the right to assume that they were moved by an honest purpose, and that an inquiry upon his part suggesting anything to the contrary would be justly and emphatically resented.

We may go further and say that if he had made such inquiries as respondent suggests, he would probably have received such answers as to indicate the absence of fraud. We have in the record evidence of what Steele would have stated, namely that the motive of the bank in buying the trust deed was to protect their unsecured notes, and said creditor deemed it entirely proper to do so. Neither Jones nor Murray was called as a witness, but we cannot assume that either would have testified to anything derogatory to his own integrity or good faith in the transaction, or would have made such admission if interrogated by Arakelian.

Moreover, since fraud cannot be presumed, in the absence of evidence to the contrary, it may be taken for granted, if necessary to acquit him of culpability, that appellant did question these parties and ascertain nothing inconsistent with upright conduct.

Nor can we discover in what occurred thereafter any circumstances that would reflect in the slightest degree upon the good faith of appellant. He withheld for about six months the payment of \$10,000 of the consideration for the deed, and if in the meantime he had acquired knowledge of any fraud or been put upon inquiry, he might be charged with responsibility for making such payment. A diligent search through the record, however, has failed to disclose any such condition. Manifestly the incidents of this suit do not furnish any evidence that appellant's property should be subject to the claim of respondent. The action was brought before appellant had made said final payment, but the purpose was, as before indicated, to settle the question of a right of way. In the answer to this complaint filed November 22, 1916, there was no suggestion whatever of any fraud in said sale under the trust deed or in the conveyance to plaintiff. Therein Curtner relied upon the lien of his attachment in conjunction with the allegation—

"that any right, title, estate, claim, or interest which the plaintiffs herein, or either of them, may have in or to the said real property, or any part thereof, is subsequent and subservient to the said interest and lien of the said William M. Curtner under and by virtue of the said attachment."

Whatever may have been the reason for the omission of respondent to set up fraud in

this pleading, it is quite plain that nothing contained therein could justly weaken plaintiff's faith in the integrity of his own title to this land. The supplemental answer and cross-complaint in which fraud and conspiracy were alleged were filed on the 9th day of October, 1917, and until a copy thereof was served on appellant's attorney, it is fair to say that neither he nor Arakelian had any knowledge whatever of respondent's theory of fraud, or was apprised of any fact which could legally require hesitation or forbearance in the purchase of said property. The full consideration for the sale of the land had been paid long before the claim of respondent was thus exhibited, and, of course, the validity of appellant's title could not be impeached in this manner. It is true that plaintiff knew that Curtner was a creditor of Murray and Jones, but he had the knowledge also that the First National Bank of Modesto was a creditor, holding a prior lien, and that the usual course was pursued to secure the payment of its claim.

While respondent has thus limited the inquiry to what occurred after the said trustees' sale, we have searched the record to determine whether anything was brought to the knowledge of appellant prior to that time that would legitimately point to fraud, and the investigation has disclosed nothing of the kind. We may add that it is quite apparent, indeed, that he knew nothing whatever of said sale until after it took place. If he had been informed of it he certainly would have been a bidder with a fair prospect of obtaining the property for much less than he afterward paid for it.

In confirmation of the views herein expressed we may set forth the material portion of the testimony of plaintiff and his attorney. The former said:

"I submitted the abstract to Mr. Johnston for examination, and he rendered an opinion, and then I went and got my deed. * * * I bought the land at \$70 an acre, the market value of the land, and I did not know that Mr. Curtner claimed any interest in the land when I bought it. In the beginning I did not know anything about it. I found out after we had paid him. * * * Mr. Johnston told me, he said, 'It is foreclosed, the trust deed; Mr. Curtner hasn't got a chance to collect that money any more.' * * * He told me that, 'When the deed of trust is foreclosed, it knocked everything, his claim against the property.'"

In reply to the question, "Well, you did not, before the bank foreclosed the deed of trust, or before the bank bought that deed of trust from the Stockton Bank, you did not have an understanding, did you, with Murray and Jones, or Mr. Steele, that you were going to afterwards buy the land?" he said:

"No, sir; I knew nothing of those things. I did not know I was going to buy the land, or anything about it, until Mr. Phelps took me out there. Then I came back from Fresno, and

Mr. Phelps told me I had to see the bank. Then I went to see Mr. Steele. Mr. Phelps never mentioned who owned the land. Murray and Jones were not present when the deal was made, but at the time we closed the deal we met them over at Mr. Hawkins' office. * * * When I paid this \$10,000 note I did not know that Mr. Curtner was contesting my title. * * * I did not ask Mr. Johnston to explain what kind of claim this was of Curtner's. I did not ask him nothing, because I did not know anything about the law."

Mr. A. Johnston testified:

"I examined the abstract for Mr. Arakelian. The abstract showed a record of the proceedings, and I gave it as my opinion that the trust would take precedence over the attachment. * * * I knew as early as September, 1916, when the demurrer was filed and when it was served on the 15th, that Cross and Hoover were appearing in the action and contesting Mr. Arakelian's suit, but I did not know for what purpose or under what theory they were going to proceed. The trustees' deed had been made in conformity to the deed of trust, and was the deed of trust in which Mr. Steele and subsequently Mr. Arakelian acquired title, and that is the opinion I held at that time."

[3, 4] There is no dispute as to the fundamental principles of law and of equity that should be invoked in a case like this. They are stated in the Code and decisions as follows: The law presumes that a person is innocent of crime or wrong; that private transactions have been fair and regular; that the ordinary course of business has been followed (section 1963, Code Civ. Proc.); an inference of good faith rather than fraud should be indulged, and the presumptions against fraud must be overcome by him who alleges improper conduct (*Levy v. Scott*, 115 Cal. 39, 46 Pac. 892), or as stated in *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46, "The evidence of the facts and circumstances, taken together, must amount to proof of fraud, and not to a mere suspicion thereof."

Even if the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly predominates for the latter, will strike the balance in favor of honesty and innocence. *Hatch v. Bayley*, 12 Cush. (Mass.) 27; *Price v. Gover*, 40 Md. 102.

We are aware that this latter apothegm is particularly for the guidance of the trial court, and we are not forgetful of the rule that leaves to that tribunal the determination of questions of evidence, but we are persuaded that herein is to be found no substantial support for the position that appellant is chargeable with fraud or indirection.

When fairly considered, the evidence reveals only one circumstance that excites the least suspicion as to the purchase by Arakelian, and that is his knowledge of the attachment, but we think it has never been sup-

posed by the profession or held by the courts that "knowledge by a grantee in a deed of real estate that at the time of the conveyance there existed a claim which might at some time be reduced to judgment, and if so reduced enforced against the real estate of the grantor" would justify setting aside the deed as fraudulent at the suit of the creditor.

It is worthy of note that, if any one is to blame for the defeat of respondent's lien, the censure must be laid at his door. He should have notified Arakelian of the claim of fraud before the latter made his final payment. It was 18 months after the purchase, and nearly a year after the entire consideration was paid, before the defense of fraud was even set up in court. And there is no evidence that at any time he gave personal notice to Arakelian that there was any infirmity in the trustees' deed. His silence under such circumstances would naturally incline a court of equity to regard his claim with suspicion and distrust. Of course, neither plaintiff nor Johnston could know simply from the attachment that his suit was meritorious, or that he would recover judgment in the action upon the ground of fraud affecting the sale to Steele or upon any other ground. Assuredly they were not chargeable with knowledge that respondent was being defrauded because they knew he had a claim against a former owner of the premises and sought to enforce it against the property. If respondent's theory be correct, then it would follow, as suggested by appellant, that the rule of caveat emptor would apply whenever an abstract of title shows that an attachment has ever been filed against the land it covers.

We deem it unnecessary to notice specifically the various other decisions cited by the parties herein. It can hardly be doubted that they declare the law as applicable to the particular facts involved. Indeed, there is scarcely room for dispute as to the principles germane to the present controversy, but, as we view it, the trial court has made an erroneous deduction from the facts. As we read the record, Arakelian was an innocent purchaser, having paid the full value for the land, with an honest purpose, and with no knowledge of any fraud in the transaction, and it would be unjust to burden his property with the claim of respondent.

We may say in conclusion that the comments of the Supreme Court of Kansas in *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252, may be read with profit in this connection. Therein it was claimed that the fact of the hurried manner of the purchase, and the consideration paid by Armstrong, were sufficient to put Johnson upon notice of the former's fraudulent intent, but the court said:

"If these things are badges of fraud, and of such a character as to set aside this transaction, we think it would unsettle the real es

tate transactions, or many of them, in Kansas."

The court refers to the fact that Johnson's attention was called to the land by a neighbor, that he went and found the agent and owner, visited the land, examined the records to see that the title was good, made an offer for the property, which was accepted, paid part of the consideration down on the same day, and completed the transaction the following day. The court concluded that there was no evidence of fraud on his part. No doubt other similar decisions could be found.

We think the judgment should be reversed and it is so ordered.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 725

VURPILLAT v. VURPILLAT. (Civ. 3335.)

(District Court of Appeal, Second District, Division 1, California. July 30, 1921.)

Appeal and error $\S$ 345(1)—**Motion for new trial does not suspend limitations unless filed within 60 days.**

Under Code Civ. Proc. $\S$ 939, requiring that appeal from a judgment shall be taken within 60 days from the entry thereof, and that if proceedings for new trial are pending, the time for appeal does not expire until 30 days after the entry in the trial court of the ruling on such motion, a motion for new trial to extend the time for appeal must be instituted within 60 days from date of entry of judgment.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Suit by William P. Vurpillat against Geneva Stowe Vurpillat for divorce. From a judgment for defendant, plaintiff appeals. Dismissed.

J. H. Ryckman, of Los Angeles, for appellant.

JAMES, J. In this action brought by the plaintiff to secure a decree of divorce, defendant defaulted, and a hearing was had and testimony taken. The trial judge took the case under advisement, and some two weeks later entered a decree, denying the relief prayed for. The judgment was entered on April 29, 1919. On February 6, 1920, plaintiff filed in the trial court his notice of intention to move for a new trial, which motion was later heard by the court and denied. An appeal was then taken by the plaintiff from the judgment. It is urged in the brief of appellant that the decision of the court is not sustained by the evidence, in that the plaintiff established fully the allegations of his complaint by the testimony

which he produced. We think that appellant is right in that contention, for it does appear by the testimony of both parties to the action that defendant deserted plaintiff without just cause, and there was independent evidence which furnished ample corroboration of the facts. Notwithstanding such a state of the case, we are unable here to afford appellant any relief, because his appeal was taken long after the expiration of the time fixed by section 939, Code of Civil Procedure. That section requires that an appeal from a judgment shall be taken within 60 days from the entry thereof. It is provided, however, that if proceedings for a new trial are pending, the time for appeal from the judgment does not expire until 30 days after the entry in the trial court of the ruling on such motion. This provision has been construed by the Supreme Court, and it has been held that proceedings on motion for a new trial, in order that they shall extend the time for appeal, must be instituted within 60 days from the date of the entry of the judgment. *Ransome-Crummey Co. v. William M. Begs et al.*, 196 Pac. 487. See, also, *Pac. Light, etc., Co. v. Kauffman*, 39 Cal. App. 499, 179 Pac. 452. The notice of intention to move for a new trial was filed more than eight months after the date of the entry of the judgment in this case. Before that time the judgment had become final, hence was beyond the reach of an appeal.

The appeal is dismissed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 620

SHANK v. BLACKBURN et al. (Civ. 3503.)

(District Court of Appeal, Second District, Division 1, California. July 21, 1921. Rehearing Denied Aug. 11, 1921. Hearing Denied by Supreme Court Sept. 19, 1921.)

1. Chattel mortgages $\S$ 277—**Complaint must allege demand for possession at a time when defendants had possession.**

In action to foreclose chattel mortgage, providing that in case of nonpayment of mortgage debt mortgagee might take possession of the property, the complaint must allege demand by plaintiff for the property at a time when the defendants held possession.

2. Pleading $\S$ 403(5) — **Complaint's omission to allege material fact held cured by allegations of answer.**

In action to foreclose chattel mortgage entitling mortgagee to possession of mortgaged property in case of nonpayment of mortgage debt, failure of complaint to allege demand for possession by plaintiff at a time when the defendants held possession of property held cured by allegations of answer.

3. Appeal and error — 1042(5)—Refusal to require allegations to be stricken from complaint held harmless in view of judgment.

In action to foreclose chattel mortgage, refusal to require certain allegations of complaint as to rental value of property and as to plaintiff's claim for attorney's fees to be stricken held harmless where the judgment made no allowance to plaintiff based on either of such elements.

4. Trial — 397(2)—Findings held to support judgment notwithstanding absence of findings as to affirmative defense.

In action to foreclose chattel mortgage by purchaser of mortgage, in which the defendant, who had purchased property from mortgagor, set up the affirmative defense that such plaintiff on behalf of mortgagor procured extensions of time for payment of mortgage debt from mortgagee with knowledge of mortgagor's agreement with such defendant to satisfy the mortgage within a particular period, thereby releasing defendant, whose status was that of a surety, and that plaintiff's payment of mortgage indebtedness to mortgagee was the payment of the mortgage debt, and not merely the purchase of the mortgage, findings necessarily implying that such allegations were not true held to support judgment for plaintiff, notwithstanding failure to specifically find as to facts so alleged.

5. Appeal and error — 931(3)—Findings construed so as to uphold, rather than to defeat, judgment.

The findings of the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon, and whenever from the facts found by it other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment the appellate court will not draw from those facts any inference contrary to that which may have been drawn by the trial court for the purpose of rendering such a judgment.

6. Appeal and error — 1011(1) — Conflicting evidence not weighed.

The court on appeal, in reviewing findings of court, will not attempt to weigh or balance conflicting evidence.

7. Principal and surety — 104(1)—Surety held released by extension of time.

Though mere delay on the part of a creditor to proceed against the principal or to enforce any other remedy does not exonerate a guarantor under Civ. Code, § 2823, the creditor, by granting to the debtor an extension of time within which to pay, without surety's consent, under such circumstances as to impair or suspend his right to proceed against the debtor in accord with the terms of the original obligation, alters the original obligations, and thereby releases the surety.

8. Chattel mortgages — 212 — Assignee held entitled to no greater rights as against purchaser of mortgaged goods than those possessed by assignor.

Assignee of mortgage had no greater rights as against purchaser of mortgaged property,

who claimed to have been released by assignor's extension of time for payment by original mortgagor of mortgage debt, without such purchaser's consent, than those possessed by the assignor.

9. Chattel mortgages — 278—Evidence held to show that postponements of foreclosure proceedings were not extensions of mortgage debt.

In action by assignee of mortgage against purchaser from mortgagor of mortgaged property to foreclose the mortgage, in which such defendant claimed to have been released by extensions of time granted mortgagor for payment of mortgage debt by plaintiff's assignor, evidence as to two postponements of proceedings in the prosecution of foreclosure action by such assignor held insufficient to warrant finding that such postponements were extensions of time for payment of the debt under such circumstances as to impair or suspend the right of such assignor to proceed against the debtor in accord with the terms of the original obligation, being mere extensions without consideration which could have been repudiated at any moment.

10. Chattel mortgages — 283—Amount awarded in lieu of delivery of possession should not exceed indebtedness.

Alternative judgment for plaintiff in action to foreclose chattel mortgage, awarding plaintiff specified amount of money in the event that a delivery of the mortgaged property to plaintiff could not be had, should not award an amount in excess of the amount of the indebtedness unpaid.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by William Shank against P. C. Blackburn and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Elmer I. Moody and Porter C. Blackburn, both of Los Angeles, for appellants.

Frank C. Hill and George S. Hupp, both of Los Angeles, for respondent.

CONREY, P. J. On June 10, 1918, Minnie Justis, to secure the payment of a debt of \$1,100 with interest, etc., executed to Jacob Swallow a chattel mortgage on certain furniture and other personal property in the city of Los Angeles. On September 13, 1918, this mortgage was transferred to Lola E. Kilfoil, who remained the owner thereof until March 5, 1919. On August 7, 1918, Mrs. Justis transferred the mortgaged property to the defendant P. C. Blackburn. The note given by Justis, which the mortgage was to secure, was payable on or before December 10, 1918. Concurrently with the transfer to Blackburn, Mrs. Justis executed to him an agreement promising to pay off, and satisfy the mortgage within 90 days from that date, August 7, 1918.

On the 5th day of March, 1919, there was pending an action by Kilfoil, as plaintiff,

against Justis, as defendant, for the foreclosure of the chattel mortgage, in which action the default of Justis had been entered. On said March 5, 1919, William Shank paid over to Mrs. Kilfoil the amount of the mortgage indebtedness, and received from her an assignment in due form of said mortgage. Thereupon the foreclosure action was dismissed, and the assignment was recorded.

On the 8th day of September, 1919, both principal and interest of the mortgage debt being wholly unpaid, Shank commenced this action. The case was tried upon the amended complaint filed December 8, 1919, and the answer thereto. The complaint shows the interest of Shank in the property by reason of said chattel mortgage, including the agreement contained in the mortgage, providing that in case of nonpayment, the mortgagee might take possession of the property in order to sell the same, and from the proceeds pay the debt. Aside from issues raised by denial, the principal defense pleaded is to the effect that the plaintiff did not in fact purchase the mortgage, but that on the contrary the plaintiff, with full knowledge of the contract obligation of Justis to Blackburn first procured extensions of time from Kilfoil on behalf of Justis, and then actually paid the mortgage debt under and pursuant to an arrangement alleged to have been made between the plaintiff and Justis whereby the plaintiff agreed to furnish to her financial assistance in the matter of payment of said mortgage debt. Judgment having been entered in favor of the plaintiff, the defendants appeal therefrom.

[1, 2] Taking up appellants' points in our own order, the first is that the court erred in overruling the demurrer of defendants to the amended complaint. It is contended that the complaint did not state a cause of action in that there is no allegation therein that demand for possession was made by the plaintiff upon the defendants while and during the time they held possession of the property. The rule is that such demand must be alleged to have been made at a time when the defendants held possession of the demanded property. *Home Payment Jewelry Co. v. Smith*, 24 Cal. App. 486, 141 Pac. 933. The complaint is defective in the particular mentioned, but that defect was cured by the answer. The complaint alleged that—

"On the ——— day of September, 1919, plaintiff demanded of the defendants possession of said goods," etc.

In their answer the defendants supplemented their denial of this allegation by the statement:

"But defendants admit that they now retain possession, and on the ——— day of September, 1919, defendants had possession of certain goods and chattels located at the place hereinbefore described."

Further on in the answer, in connection with their pleading of the agreement made by Mrs. Justis with Blackburn, the defendants allege that "on the said 7th day of August, 1918, the said Minnie Justis, in order to deliver said personal property to defendant, P. C. Blackburn, free and clear of all incumbrances," etc., executed the stated agreement. We think that these contents of the answer amount to an admission that at the time when demand was made defendants had possession of the demanded property. This fact being admitted, there is no merit in the claim that the judgment should be reversed on account of the omission to plead the fact in the complaint, or on account of the omission of the court to make a finding of the fact so admitted.

[3] It is claimed that the court erred in denying defendants' motion to strike from the complaint certain allegations referring to the rental value of the mortgaged property and relating to plaintiff's claim for attorney fees in this action. The motion should have been granted. The error, however, is without injury to appellants, since the judgment made no allowance to plaintiff based on either of those elements of the case.

Appellants claim that the transaction and the circumstances as proved clearly indicate that the advancement of the money by respondent was, in legal effect, payment of the mortgage debt to Kilfoil, and that in consequence thereof the debt was discharged. The findings affirm that no part of said mortgage debt has been paid. They further state that the plaintiff did not agree, for or on behalf of Mrs. Justis, to pay off, liquidate, or extinguish said promissory note or chattel mortgage, or said mortgage indebtedness, or any part thereof; that the plaintiff did not pay, satisfy, or discharge the said indebtedness, or any part thereof; that, at the time of the making of said assignment of said chattel mortgage to plaintiff by Mrs. Kilfoil, the plaintiff owned or had a grant deed to the property and premises wherein said personal property was located, and that he purchased the said note and chattel mortgage and took the assignment thereof for the purpose of protecting his interest, and for his own interests alone, and not otherwise.

[4, 5] It is suggested by appellants that these findings are insufficient to support the judgment because they omit to determine the facts alleged in their affirmative defense wherein the transactions between Justis and Blackburn, between Justis and Shank, and between Shank and Kilfoil, were set forth in aid of the assertion of defendants that, notwithstanding the formal execution of the instrument of assignment from Kilfoil to plaintiff, the transaction was in reality one of payment of the debt and satisfaction of the mortgage. But the facts as found by the court necessarily imply that the above-men-

tioned allegations of the answer were not true. This being so, the judgment will not be reversed on account of the absence of findings thus omitted.

"The findings of the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment." *Breeze v. Brooks*, 97 Cal. 72, 77, 31 Pac. 742, 744 (22 L. R. A. 257); *Tower v. Wilson*, 188 Pac. 87, 91.

[6] Concerning the contention that the findings were not justified by the evidence, it is sufficient to reply that the testimony of the plaintiff definitely contradicts the essential evidentiary facts introduced on behalf of the defendants relating to the transactions in question, and definitely affirms his purchase of the mortgage in his own behalf and for his own benefit. This, therefore, is the usual instance of conflicting evidence which the court on appeal will not attempt to weigh or balance.

[7, 8] Appellant Blackburn presents the proposition that, when he accepted the mortgaged property subject to the lien thereon, without assuming or agreeing to pay the same, he became a surety for the payment of the mortgage debt; that as such surety he has been released from the mortgage on account of certain stated acts of the parties, and especially that extensions of time for payment of the mortgage debt were made and obtained without Blackburn's consent. In considering this contention, let it be assumed that the evidence fully establishes Blackburn's purchase of the property from Mrs. Justis in the manner stated in his answer, and the execution by Mrs. Justis of her agreement with Blackburn that she would pay and satisfy said mortgage; and that the court should have found these facts whereby it would have been established that defendant Blackburn, as owner of the property, stood in the position of a surety of a debtor with relation to the property assigned to him, although he was not personally bound to pay the debt. And let it be conceded that he would then be entitled to be exonerated—

"except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Civ. Code, § 2819.

"While mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor (Civ. Code, § 2823), it is well settled that if he grants the debtor an extension of time within which to pay, under such circumstances

as to impair or suspend his right to proceed against the debtor in accord with the terms of the original obligation, we have such an alteration of the original obligation as will release the surety, if the same is without his consent." *Bridge v. Conn. Mut. Life Ins. Co.*, 167 Cal. 774, 782, 141 Pac. 375, 379.

The question, then, is whether or not the evidence relied upon by appellant, assuming that the court had found in accordance therewith, established an extension of time of the debtor, Mrs. Justis, to pay the mortgage debt, under such circumstances as to impair or suspend the right of Kilfoil to proceed to judgment in the foreclosure action. If this be answered in the affirmative, Shank in taking the assignment, did not place himself in any better situation than that of Kilfoil.

It appears from this evidence that Mrs. Justis had been injured in an accident of some kind, and was in a hospital. It does not appear that Shank had obligated himself to pay this debt for Mrs. Justis, but, according to testimony introduced by the defendant, Shank told the defendant that he had arranged to manage her affairs during her incapacity, and that she had made him her agent. Blackburn testified that on December 26 Shank told him that he would pay the debt rather than see Mrs. Justis suffer the mental strain of having a suit pending against her, and that he was going to Kilfoil to get an extension, if possible, of this mortgage, and get them to stay further proceedings in the case until he had an opportunity to pay the mortgage. Blackburn had endeavored to obtain an extension from Kilfoil (husband of Mrs. Kilfoil), and failed. Kilfoil testified that he asked Shank if he wanted to take up the mortgage, to which Shank replied that it would not be necessary, because things were going to be adjusted in a few days. Thereupon Kilfoil said he would let it ride a while. He said that Shank said that he was representing Mrs. Justis. Later, at the request of Shank, Kilfoil promised to continue the matter until February 10th. The debt being not paid at that time, Kilfoil caused the default of Mrs. Justis to be entered in the foreclosure action.

According to the testimony of Kilfoil, when that promise was made Shank said, "I will see that you do not lose this if I take it up myself;" to which Kilfoil replied, "I don't care who takes it up; I am going to get the money out of this mortgage." After the default had been entered, arrangements were made with Shank to grant an extension to March 5th. Kilfoil testified that Shank said he would take the thing up himself. The extension was allowed on account of delay required in getting certificates of title on some property which Shank was to turn over to Kilfoil as security on a note that Shank was to give in lieu of cash as consideration for the Justis note and mortgage.

On March 5th, Kilfoil received, in some form acceptable to him, the amount of the debt due, and executed an assignment of the note and mortgage to Shank. As we have seen, the court found that this was by way of purchase, and not as a payment of the mortgage.

[9] The facts above stated, although they show two postponements of proceedings in the prosecution of the foreclosure action, were not sufficient to have warranted the court in finding that there were extensions of time of maturity of the debt, or any extensions of time for payment, under such circumstances as to impair or suspend the right of Mrs. Kilfoil "to proceed against the debtor in accord with the terms of the original obligation." They were extensions without consideration, and could have been repudiated at any moment. Moreover, it appears quite plainly from the evidence of Blackburn that he was kept posted upon the progress of these negotiations, and it may fairly be inferred that he desired that such extensions be granted. And as we have seen, the court found that it was untrue that the plaintiff agreed, for or on behalf of Mrs. Justis, to pay off, liquidate, or extinguish said note or mortgage. As to that particular issue this finding meets and covers the question of fact as pleaded by the defendant.

[10] Finally it is contended that the court erred in entering judgment for the possession of the property, with an alternative judgment in the sum of \$1,499, in the event that a delivery of said personal property to the plaintiff could not be had. This point is well taken, since the amount awarded is in excess of the amount of the mortgage debt at the time of entry of judgment. The rule is as stated in *Keiser v. Levering*, 29 Cal. App. 41, 154 Pac. 281:

"Since in the present case the plaintiff's right to have possession of the described property is only claimed for the purpose of satisfying his claims for an indebtedness unpaid to him, and since no special damages are either alleged or proved, it is clear that the value of the property to him cannot exceed the amount of the indebtedness unpaid."

But the court found as a fact that no part of the principal or interest of the mortgage debt has been paid. This amount is ascertainable by calculation. We have made a computation, and find that the amount of principal and interest of the note, compounding the interest semiannually as provided in the note, was \$1,250.57 on the date of entry of the judgment. The judgment is hereby modified as of the date of entry thereof by striking out the words "fourteen hundred ninety-nine (\$1,499) dollars," and substituting therefor the words "twelve hundred fifty and 57-100ths dollars (\$1,250.57)."

As thus amended, the judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 754

PEOPLE v. O'BRIEN. (Cr.952.)

(District Court of Appeal, First District, Division 2, California. Aug. 5, 1921.)

1. Criminal law — 519(9)—Confession not excluded merely because prisoner was urged to speak the truth.

A confession is admissible even if officers urged accused to tell the truth, and told him that he might as well make a clean breast of it, if they made no threats or promises of reward.

2. Criminal law — 1172(1)—Instruction as to burglary in first degree held harmless, regardless of error in defining nighttime.

Where evidence was undisputed that the crime was committed in the nighttime, an instruction that, if defendant was guilty of burglary at all, it was burglary in the first degree, having been committed in the nighttime, "that is, between sundown and sunrise on the 2d day of June," instead of saying between sundown on the 1st day of June and sunrise on the 2d, the error was not prejudicial.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

John O'Brien was convicted of burglary in the first degree, and appeals. Affirmed.

Ralph C. McComish and Harry Houser, both of San Jose, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant appeals from a judgment following a verdict of guilty of burglary in the first degree. The crime was committed by the breaking into a store in Palo Alto and taking therefrom a large quantity of silks. Two men were seen lurking around the rear of the store empty-handed at about 1 a. m. on the night of the crime, and some time later were seen coming out of the store with three suit cases and a grip. They were then seen near the railway depot about 2:30 a. m. by a police officer. On the approach of the officer both men fled, dropping the suit cases, which were filled with the articles stolen from the store. Defendant's companion was immediately captured by the officer, while defendant was taken into custody between Palo Alto and Redwood City about 5 a. m. of the same day. After examination by the police officers he admitted his guilt, and this confession was used against him on the trial. There is no suggestion in the record negating the guilt of defendant, but certain technical objections are made to the course of the trial.

[1] First it is said that the confession was not admissible because it was not voluntarily made. The evidence relied on to show that it was involuntary shows that the officers urged appellant to tell the truth and

that he "might as well make a clean breast of it." It does not present a case where the confession was obtained by either threats or promises of reward. *People v. Haney*, 189 Pac. 338, 340. Though he was urged to tell the truth, he was not led to believe that he would gain any advantage by making a confession of the crime. A confession will not be excluded merely because the prisoner was exhorted or urged to speak the truth. 16 Corpus Juris, § 1476; *People v. Heivner*, 13 Cal. App. 768, 114 Pac. 411.

[2] The court instructed the jury that, if appellant was guilty of burglary at all, it was burglary in the first degree, because the evidence was undisputed that the crime was committed in the nighttime—"that is, between sundown and sunrise on the 2d day of June." Of course, what the court meant to say was between sundown on the 1st day of June and sunrise on the 2d. The jury was properly instructed as to the degree of the crime, and no harm resulted from the error in the definition of "nighttime."

There is no prejudicial error in the record. Judgment and order denying a new trial are affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 756

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON et al. (Civ. 2345.)

(District Court of Appeal, Third District, California. Aug. 5, 1921.)

Appeal and error ⇨776—Appeal dismissed on appellant's motion, though respondent confesses error.

Where on defendant's appeal plaintiff confesses error and consents to a reversal, and defendant moves to dismiss the appeal, dismissal thereof, and not a reversal thereon, for which plaintiff moved, will be granted, and this though plaintiff also appealed, as plaintiff must rely on its own assignments of error.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevinson, a corporation, and others. From the judgment, both the named parties appeal. Heard on defendant's motion to dismiss its appeal, and on plaintiff's motion for reversal on said appeal. Appeal dismissed.

See, also, 164 Cal. 221, 128 Pac. 924; 26 Cal. App. 274, 147 Pac. 254, 258; 179 Cal. 533, 178 Pac. 292.

James F. Peck and McWilliams & Hatfield, all of San Francisco, for appellant.

Edward F. Treadwell, of San Francisco, and J. J. Griffin, of Merced (Forrest A. Cobb, of San Francisco, of counsel), for respondent.

FINCH, P. J. This is an action in eminent domain. From the judgment rendered, both the plaintiff and the defendant James J. Stevinson, Incorporated, appealed. On June 8, 1921, the plaintiff served on the said defendant, and on the 11th of the same month filed herein, its confession of error as follows:

"Now comes respondent on the appeal of James J. Stevinson (a corporation), and confesses error in said cause, and consents to a reversal of the judgment therein on the appeal of the said James J. Stevinson (a corporation)."

On June 22, 1921, the defendant filed herein its motion for dismissal of its appeal, and on the 25th of that month it filed the following:

"Comes now, James J. Stevinson, a corporation, defendant in the above-entitled action, and dismisses the appeal heretofore taken by it. And the clerk of the above-entitled court is hereby requested and instructed to enter this dismissal of record."

The plaintiff contends that the judgment should be reversed; the defendant, that the appeal should be dismissed. No cause is shown why the defendant's motion should be denied, other than the right claimed by plaintiff to a reversal of the judgment on the defendant's appeal. The only question, then, is whether the judgment should be reversed on the plaintiff's confession of error.

The confession is not of any particular error, but only that there was "error in said cause." In the defendant's appeal, no record has been brought up, so that it cannot be ascertained upon what errors reliance for reversal was placed. In the cases cited by the plaintiff, where reversals were had upon confessions of error by the respondents therein, there appear to have been no objections made by the appellants to such reversals except in the case of *Newman v. Newman Clock Co.*, 195 Ill. App. 373. In that case it was held that "a confession of error does not preclude the consideration of errors not confessed." The rule there announced is in harmony with the holding in *Sun Insurance Co. v. White*, 118 Cal. 468, 50 Pac. 546. In *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701, it is said:

"Respondent confesses error in striking out the defense, and consents that the case be reversed on that ground. He says the point made by defendant on the demurrer is radical and important, and will be argued when the case is again here, in such form as to require its determination. The question as to the correctness of this ruling is properly presented on this appeal from the judgment, and the con-

sent of respondent to a reversal on some other ground, which does not dispose of the demurrer, cannot deprive appellant of his right to have it determined."

The appealing party may be willing to waive the errors on which his appeal is based and, by a dismissal, to permit the judgment to stand as rendered, but if the judgment is to be reversed, he is entitled to have the errors assigned by him decided for the guidance of the court in the retrial of the case. The fact that the plaintiff, also, has appealed from the judgment herein is foreign to the question under consideration. If an appellant sees fit to dismiss his appeal, and be bound by the judgment from which the appeal is taken, the respondent should not be permitted to prolong the litigation by securing a reversal upon the appellant's assignment of errors of which the respondent has not complained. Where a respondent has not appealed, he is not entitled to a reversal of the judgment, entailing, as it does, a new trial of the action. Where he also has appealed, he must rely upon his own assignment of errors.

The plaintiff's motion for a reversal of the judgment is denied, and the defendant's motion to dismiss its appeal is granted, and the said appeal is dismissed.

We concur: HART, J.; BURNETT, J.

53 Cal. App. 732

KAZMAN v. LIGHT. (Civ. 3527.)

(District Court of Appeal, Second District, Division 1, California. Aug. 2, 1921. Hearing Denied by Supreme Court Sept. 29, 1921.)

1. Appeal and error ⚡907(3)—Findings assumed correct on appeal on judgment roll.

On an appeal on the judgment roll the court must assume that the findings of fact are correct.

2. Partnership ⚡93—Copartnership selling personalty without good title liable to purchaser though a partner.

Under Civ. Code, § 1765, providing that one who sells personal property as his own warrants that he has good and unincumbered title thereto, a copartnership, having sold personal property without having obtained good title thereto, is liable to purchaser though purchaser is one of the partners.

3. Partnership ⚡94—Partner's obligation to buyer of diamond from copartnership under warranty of title a good consideration for agreement to pay buyer part of judgment rendered against him by third person as owner.

A partner's agreement to pay copartner to whom the copartnership had sold diamond one-half of any judgment that might be rendered

against him in action by third person who claimed ownership of the diamond *held* based on a good consideration the partner's obligation under warranty title under Civ. Code, § 1765, to copartner as buyer of goods from seller with defective title being sufficient.

4. Partnership ⚡304—Partner who discharges partnership obligation after dissolution entitled to contribution.

A partner who has discharged a partnership obligation after dissolution of the copartnership is entitled to contribution from copartner.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Alexander Kazman against Max Light. Judgment for plaintiff, and defendant appeals. Affirmed.

Warren L. Williams and Seymour S. Silvertown, both of Los Angeles, for appellant.

E. V. Rosenkranz, of Los Angeles, for respondent.

JAMES, J. This appeal, taken by the defendant, is presented on the judgment roll, and involves the question as to whether the complaint of the plaintiff states facts sufficient to constitute a cause of action, and whether the findings of the court are sufficient to sustain the judgment.

[1] The controversy arose as the result of a transaction in which plaintiff and defendant were engaged as copartners. It is determined by the findings of fact, which, under this record, we must assume are correct that plaintiff and defendant associated themselves together in the purchase of two diamonds. For one of the diamonds they paid the sum of \$635, and for the second \$950, together with some small charges by way of commissions, etc. In this venture they agreed to share profits and losses. The diamond first referred to was sold and an accounting made to the copartnership. The defendant reported to the plaintiff that he had received an offer of \$1,092 for the second diamond, whereupon plaintiff agreed to purchase the diamond himself, and paid the copartnership the sum last mentioned. All of the partnership business having been concluded, the accounts were adjusted and settled. Later, one Taylor brought an action of claim and delivery against plaintiff, wherein she asserted title to the diamond so purchased by the plaintiff from the copartnership, and in that action she obtained judgment for \$1,000, together with costs, which judgment was paid by respondent.

This action was then brought to recover of the defendant one-half of the money expended by the plaintiff in satisfying the judgment of Taylor. The plaintiff in his complaint herein first set forth account for money had and received. In the second and third al-

leged causes of action the facts in detail, the substance of which we have narrated, were stated, and in addition thereto it was alleged that, upon the bringing of the action by Taylor against this plaintiff, defendant was informed thereof, and agreed that if plaintiff would defend that action that he, this defendant, would pay one-half of any judgment that might be rendered against Kazman.

[2, 3] It was alleged that defendant had paid the sum of \$36, and no more, and that he refused to pay any further sum. Leaving aside other questions, it seems not to be disputed that the agreement of appellant to pay one-half of any judgment that might be rendered against respondent in the suit by Taylor is good and enforceable, provided it is founded upon a valid consideration. It was alleged and found that respondent herein purchased the diamond referred to from the copartnership. By the provisions of section 1765, Civil Code, one who sells personal property as his own "thereby warrants that he has a good and unincumbered title thereto." The point is made that a copartner purchasing merchandise from his firm is not entitled to the protection of this section. Counsel for appellant makes the point, but admits that he can find no authorities to sustain it. Under the facts of this case where it appears that the copartnership never obtained title to the diamond which respondent purchased of it, and as to which lack of title respondent had no knowledge, we think the Code warranty should be made to apply with as much force as though the diamond purchased by respondent had been sold to some one outside of the partnership association. If this position is correctly taken, then it at once follows that there was an obligation resting upon appellant to respond when the defect of title became established. This obligation would furnish a good consideration for his promise to respondent to pay one-half of the amount of the judgment in the case of *Taylor v. Kazman*.

[4] The facts showing the liability of appellant were sufficiently stated in the complaint, and the findings of the court fully covered all of the issues made. And, irrespective of the express agreement of appellant to pay one-half of the Taylor judgment, the duty to contribute toward an obligation of a copartnership, where such obligation has been discharged by one partner, continues. It has been held that after a partnership has been dissolved and the accounts fully settled, one partner who has paid partnership debts may maintain an action against the other for contribution. *Sears et al. v. Starbird*, 78 Cal. 225, 20 Pac. 547.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 656

MAZURAN v. FINN, Sheriff. (Civ. 3900.)

(District Court of Appeal, First District, Division 1, California. July 25, 1921.)

1. Execution ⇐185—Third parties may file bond after filing of indemnity bond by judgment creditor.

When property has been levied on under execution, and third parties have advanced their claims to the property, and a judgment creditor has given an undertaking indemnifying the sheriff, the claimants may nevertheless afterwards prevent a sale by themselves filing a bond and securing a release of the property from the levy of the execution, under Code Civ. Proc. §§ 689, 710-713½.

2. Bonds ⇐32—Bond valid though improper obligee named.

It has been held that a bond may be valid though the obligee named be not the one designated by statute, and in such a case one may show by the record of the suit in which the bond was given and by extraneous facts that he was the person intended as the obligee.

3. Execution ⇐185—Statutes relating to bond to release property to be liberally construed.

A bond filed by third parties to obtain release of property levied on under execution under Code Civ. Proc. §§ 710-713½, is sufficient if a substantial compliance with such statutes, being remedial in their nature and to be construed liberally so as to ascertain the remedy, and the naming of others in the alternative, with the judgment creditor as obligee, may be designated as surplusage.

4. Execution ⇐185—Second bond may be filed by claimant if first is insufficient.

A claimant of property levied on under execution may file a second bond if the first is insufficient by reason of some infirmity not anticipated by the framer of the act, in response to an objection other than those permitted by the statute, under Code Civ. Proc. §§ 710-713½.

Application by M. J. Mazuran for writ of mandate prayed to be directed to Thomas F. Finn, as Sheriff of the City and County of San Francisco. Denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

John T. Williams, of San Francisco, and Herman Weinberger, of San Francisco, amici curiæ, for respondent.

WASTE, P. J. This is an application for a writ of mandate directing respondent, as sheriff, to sell certain personal property levied upon by him under execution. The petitioner, as plaintiff in an action against Frank F. Akacich and George Dimmich, was awarded judgment in the superior court of the city and county of San Francisco in the sum of \$5,000, with interest and costs, no part of which having been paid, the respondent, under instructions, levied a writ of execution upon a linotype machine, and its

accessories, alleged to belong to the judgment debtor, Akacich. John H. Leighton and E. E. Carreras served on the sheriff a written claim, verified by oath, setting out their right to the possession of the property. The petitioner thereupon indemnified respondent against the third party claim by an undertaking, executed as provided in section 689 of the Code of Civil Procedure. The sheriff accepted and approved the bond and proceeded to advertise the property for sale.

[1] Before any sale could be had Leighton and Carreras, assuming to act under the provisions of sections 710 to 713½, inclusive, of the Code of Civil Procedure, executed to the sheriff a bond in double the value of the property claimed by them, and demanded its return. The respondent thereupon refused to proceed with the sale, on the ground that the property was released from the lien and levy of the execution by reason of the undertaking last given. The petitioner has applied to this court for a writ of mandate to compel the sheriff to sell the property, claiming that the refusal to do so is unwarranted for several reasons. His principal contention is that, when third parties have advanced their claims, and the judgment creditor has given an undertaking indemnifying the sheriff, the claimants may not afterward prevent a sale by themselves filing a bond, and securing a release of the property from the levy of the execution.

So far as we are aware, this is the first time sections 710 to 713½, inclusive, of the Code of Civil Procedure have engaged the attention of any appellate court, although section 689 has been under consideration a number of times. By its terms the latter section provides that, if property levied upon is claimed by a third person by a written claim verified by oath, setting out his rights to possession, served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies him against such claim by an undertaking, with at least two good and sufficient sureties, in a sum equal to double the value of the property levied upon. This section, based on the old practice act of California (St. 1851, p. 85, § 218), was enacted as a part of the Code of Civil Procedure in 1872. It then provided that if the property levied upon was claimed by a third person the validity of the claim should be tried by a sheriff's jury of six persons. The section was amended in 1891 to read substantially as it does at the present time. St. 1891, p. 20.

In 1903 sections 710 to 713½, inclusive, relating to the release of property levied upon on execution, were added to the Code. Section 710 provides that, where property levied upon to satisfy a judgment for the payment of money is claimed by a person

other than the judgment debtor, such claimant may give an undertaking as provided in the succeeding sections, which bond shall release the property from the lien and levy of the execution. The statute by which the sections were enacted provides that all acts, and parts of acts, in conflict with its provisions shall be repealed. St. 1903, p. 101.

We deem it unnecessary for us to consider the suggestion of the respondent, made on the argument, that the act of 1903 had the effect of repealing section 689. Even if we were to hold that the two acts relate to the same subject, that situation does not present itself. In 1907 section 689 was re-enacted in its present form. St. 1907, pp. 682, 683. It is therefore the last utterance of the Legislature upon the question with which it deals. The statute by which it was re-enacted does not attempt to repeal any act, or parts of acts, in conflict with its provisions. Consequently we may safely conclude that both section 689 and section 710 are to be given effect, if that be possible. Two sections, both numbered 710, were added to the Code of Civil Procedure in 1903, but in this consideration we are dealing only with the section, second in point of position in the Code, which provides that a third party claimant may give an undertaking and secure the release of property levied upon under execution.

Section 689, it has been repeatedly held, was enacted solely for the protection of the officer making the levy. *Paden v. Goldbaum*, 4 Cal. Unrep. Cas. 767, 37 Pac. 759; *Dubois v. Spinks*, 114 Cal. 289, 295, 46 Pac. 95; *Kellogg v. Burr*, 126 Cal. 38, 42, 58 Pac. 306. The undertaking given under its provisions runs to such officer, is delivered to, and indemnifies him against the third party claim. It is quite apparent from a reading of section 710, and the succeeding provisions of the act, made a part of the Code in 1903, that those sections are intended for the benefit of the judgment creditor, and also to provide a method by which a third party, claiming property levied upon under execution, may prevent a summary sale to his loss and detriment. They, in a sense, absolve the sheriff from liability for releasing the property, but that does not appear to have been the primary object. The undertaking there provided for must be filed in the action in which the execution issued, and a copy served upon the judgment creditor, or his attorney. The judgment creditor may except to the sureties, and may also object to the statement in the bond as to the estimated value of the property sought to be released. These matters must be passed upon by the court, and if allowed a new undertaking must be filed. The amount of the bond must be double the estimated value of the property claimed by the third party, and the condition of the bond shall be that, if the property claimed is finally adjudged to

be the property of the judgment debtor, the third party claimant giving the undertaking "will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in the undertaking, of said property claimed." Release of the property held by the sheriff is effected 10 days after a proper undertaking is filed. This summary of the provisions of said sections 710 et seq. makes clear, we think, the purpose for which they were enacted.

[2, 3] This brings us to a consideration of the specific objection urged by the petitioner to the procedure followed in this case. The Code does not specifically designate the person to whom the bond, given under section 710, shall be executed. The third party claimants below first filed an undertaking in which the respondent here, as sheriff of the city and county of San Francisco, was named the obligee, although the condition of the obligation was to pay to the petitioner, the judgment creditor, as required by the statute. On objection of the petitioner the claimants filed a new undertaking which recites that the surety company executing the bond is bound either to Thomas F. Finn, sheriff of the city and county of San Francisco, state of California, or M. J. Mazuran, plaintiff in the action and judgment creditor of the judgment in the undertaking therein before referred to, "whichever of them is, or may be finally adjudged to be the proper obligee of the undertaking (but not to both of them jointly), and, if neither be so adjudged, then unto the state of California," in the sum of \$4,700, or twice the value of the property levied upon, which is stated to be \$2,350.

It has been held that a bond may be valid, though the obligee named be not the one designated by statute. In such a case one may show by the record of the suit in which the bond was given, and by extraneous facts, that he was the person intended as the obligee. *Morgan v. Thrift*, 2 Cal. 562; *Board of Education v. Grant*, 107 Mich. 151, 64 N. W. 1050. But, even if under such liberal rule the first undertaking should be held insufficient, the second was a substantial compliance with the Code sections, which are remedial in their nature, and should be construed liberally, and so as to extend the remedy. *Cullerton v. Mead*, 22 Cal. 95, 98. The naming of others in the alternative with the judgment creditor as obligee, when read in connection with the recital of the obligation of the bond, which literally follows the Code, may be designated as surplusage.

[4] We do not think it matters that the second undertaking was filed in response to an objection other than those permitted by the Code sections. There is nothing in the statute, either by implication or express pro-

visions, forbidding the filing of a second bond if the first is insufficient by reason of some infirmity not anticipated by the framers of the act.

The petition for a writ of mandate is denied.

We concur: KERRIGAN, J.; RICHARDS, J.

53 Cal. App. 688

DAVENPORT v. ALEXANDER et al.
(Civ. 3470.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1921.)

1. Fraudulent conveyances § 132(1)—Sale of automobile held ineffectual as to seller's creditor.

Where owner executed a bill of sale of an automobile, but continued to use the automobile in his business and thereafter kept the automobile sometimes in his garage and sometimes in buyer's garage, the transfer was void as against seller's creditor, who had advanced purchase price of automobile and was entitled to a lien thereon under agreement with seller for amount so advanced, the transfer of the automobile not having been accompanied by an immediate delivery and followed by an actual and continued change of possession, as required by Civ. Code, § 3440.

2. Replevin § 11(1) — Demand a prerequisite to action.

Demand is an essential prerequisite to claim and delivery action.

3. Replevin § 11(4)—Demand for automobile on keeper of garage held insufficient.

In an action of claim and delivery for automobile in defendant's possession, a demand for possession of the automobile, made on the keeper of a garage in which the automobile had been temporarily placed by defendant, held insufficient.

4. Replevin § 93—Findings held insufficient for failure to find plaintiff's right to possession at time of demand.

In claim and delivery action for automobile in defendant's possession, findings held insufficient to support judgment for plaintiff, in that it had not been found that plaintiff, at the time of the demand for possession, had the right to possession.

5. Replevin § 71(1) — Defendant claiming amount advanced by him to seller of automobile could show what such amount included.

In claim and delivery action by automobile buyer against third person who claimed an amount advanced for purchase of the automobile by seller, under agreement with seller specifying the amount that had been advanced to seller prior to execution of agreement, third person was entitled to show that such amount included advances made toward the purchase of an old machine by seller, which had been turned in toward the payment on the purchase of the automobile involved in the action.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. Dryden Davenport against W. E. Alexander and others. Judgment for plaintiff, and named defendant appeals. Reversed.

H. G. Ames, of Anaheim, for appellant.

Mark L. Herron, of Lankershim, and Channing Follette, of Los Angeles, for respondent.

JAMES, J. This action was one of claim and delivery. The plaintiff was awarded judgment, from which defendant W. E. Alexander appeals.

The property involved was a certain automobile which at the time the action was instituted was in the possession of appellant. The machine had been purchased and used by one Barkow who, at the time of the making of the purchase, was employed as a salesman by the corporation of which appellant was the president. In April, 1919, he desired to purchase an automobile different from the one which he was then using, and made an arrangement with the appellant to advance necessary money with which to complete the desired purchase. A written agreement was executed by appellant and Barkow, wherein it was set forth that appellant had advanced the sum of \$720 on account of the purchase of the automobile, and that, there being a balance of \$800 due to the vendor of the machine, payable in monthly installments, appellant should advance the amount of such installments. In the agreement it was set forth that Barkow, as soon as the automobile had been fully paid for with appellant's money, would execute a chattel mortgage in favor of the appellant to secure the latter for the repayment of money advanced, or would deliver the automobile to the appellant to be held by him until the money was so repaid. The agreement, among other things, recited:

"It being understood and agreed between the parties hereto that said first party is to have a lien on said automobile for the sums so advanced by him, until the same has been repaid to him by said second party, and that the same is to be evidenced either by a chattel mortgage, or by a delivery of said automobile by said second party."

[1] It was further set forth that Barkow agreed that in the event he should leave his employment with the appellant, or should be discharged from such employment, appellant should be entitled to have the automobile delivered to him to be held until the money advanced on account of its purchase had been repaid, or at the option of appellant appellant should have the privilege of paying whatever balance there might be due to the vendor of the machine, and then accept a note and chattel mortgage as security for the debt. Upon making the purchase of the machine in question Barkow turned in for cred-

it the old machine which he had been using at an allowed sum of \$400. Appellant advanced in the first instance \$322.30, and further advanced various installments of \$50 as they became due for the months commencing with May, 1919, up to the time when this controversy arose, which was at the end of that year. In November, 1919, Barkow, acting, as the evidence plainly shows, in bad faith toward appellant, attempted to transfer his interest in the machine to the plaintiff. It appears that he owed the plaintiff \$900. He at first thought of giving plaintiff a chattel mortgage, but having learned that by the conditional sale contract under which the automobile was being purchased the title remained in the vendor, and that he could not legally mortgage the same, he executed a bill of sale in favor of plaintiff, and attempted to deliver possession of the automobile thereunder. We may here call attention to the fact, assuming that Barkow had such an interest in the automobile as might be transferred by bill of sale, the attempted transfer was not accompanied by such a change of possession as is required under the provisions of section 3440 of the Civil Code. Under that law a transfer of personal property is ineffectual and void against creditors where it is not "accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred." There is not the smallest dispute made by the evidence but that Barkow, after the attempted transfer, continued to have the use of the automobile. He testified that he had the agreement with the plaintiff that he might use it as he needed it, whenever it was necessary in his work as a salesman, that he had used the car subsequent to the alleged transfer, and that sometimes it was in plaintiff's garage and sometimes in his. Following close upon this alleged transaction with the plaintiff, and early in January, 1920, Barkow notified appellant that he would leave his employment with the latter. He had not informed appellant of his transaction with the plaintiff regarding the automobile, and did not inform him of it when the question of the adjustment of that debt was taken up. At the time of what was apparently the last discussion on this subject, Barkow drove the automobile in question to appellant's place of business. Appellant there insisted upon Barkow's complying with the terms of the contract. Appellant took possession of the machine, claiming that right under the express terms of the agreement hereinbefore referred to, and continued to keep it until this action was brought by this plaintiff. The court found that appellant had "forcibly" taken possession of the machine. The only testimony that in any wise gives color to that finding is found in the statement of Barkow that appellant walked out to the machine and took hold of the spark lever and broke or

damaged it, saying "I guess you won't drive it away now." Whether Barkow was in fact prevented from taking the machine away does not appear; he did not testify that the machine was injured so that it could not be driven away, or that appellant interfered in any other way to prevent him having the automobile removed. For aught that appears, Barkow, after the words last quoted were used, went away and left the machine in the possession of appellant.

[2-5] Under the specific terms of the agreement made between appellant and Barkow appellant had the right to the possession of the machine immediately upon Barkow's voluntarily ceasing his employment with appellant, or upon his discharge by the latter. Appellant proceeded promptly to offer to the vendor the balance of the purchase price, which amounted to less than \$200. The vendor refused to receive it. By his answer filed in the case appellant made the offer to satisfy any claims on the part of the vendor. However, the vendor, after refusing to permit appellant to discharge the purchase price debt, accepted the money from the plaintiff and gave receipt therefor. Appellant performed every act essential to make effectual his lien upon the property after obtaining possession of it, and we think that the judgment should have been in his favor. We have already called attention to the fact that no such transfer of possession of the property was made as is contemplated by section 3440, Civil Code. Appellant was the creditor of Barkow at the time of the alleged transfer to plaintiff, and was one of the persons entitled to claim the benefit of the provisions of the section mentioned. Other reasons exist why the judgment appealed from cannot be sustained. The demand for possession, which is an essential prerequisite to the commencement of a claim and delivery action, was made upon the keeper of a garage in which the automobile had been temporarily placed by appellant, and no demand was shown to have been made upon appellant. Furthermore, it was alleged in the complaint that demand was made on the 2d of January, 1920. The court determined, in the face of a denial as to any demand having been made, that prior to the commencement of the action plaintiff was entitled to the possession of the automobile, and that "prior to the commencement of the action" defendant took possession of the same, and that "before the commencement of the action" plaintiff demanded of the defendants possession of the property. These findings are insufficient to support the judgment because it is not found that at the time the demand was made plaintiff had the right to possession of the automobile. It was stipulated that the sum of \$670 was the correct amount of money which appellant had advanced, and which had been used in making

payments on the automobile. In addition to this it appeared that the appellant had advanced money for the purchase of the old machine which Barkow had used in making the trade for the second one. Barkow admitted this to be the fact, but testified that he couldn't say how much money had been advanced by appellant on that account. It has been noted that the agreement between Barkow and appellant stated that the sum already advanced by appellant on account of the purchase of the second machine was \$720. If this amount included advances made toward the purchase of the old machine, appellant was entitled to show that fact.

We have not been aided in a consideration of this appeal by either printed brief or oral argument from respondent. Appellant, however, has made full presentation of points adverted to.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

186 Cal. 698

COSBY v. CLINE. (L. A. 6208.)

(Supreme Court of California. Aug. 24, 1921.
Rehearing Denied Sept. 23, 1921.)

1. Appeal and error ☞907(1)—Facts appearing by reasonable inference assumed to be true, in so far as they support the findings.

On appeal the court assumes as true all facts which appear by reasonable inference from the evidence in the record, so far as they support the findings of the trial court.

2. Fraudulent conveyances ☞132(2)—Statute as to transfer of possession held inapplicable.

Where third party transferred an automobile, which the sheriff had taken on an attachment to the plaintiff, Civ. Code, § 3440, providing that, in case of transfer of property by persons in possession, there must be an immediate delivery and change of possession of articles transferred, in order to be valid against the creditors of the transferor, did not apply, since the transferor was not in possession of the automobile at the time of transfer.

3. Fraudulent conveyances ☞132(2) — Seller of automobile held not in possession, within statute as to change of possession.

Where the automobile of a third party was held by the sheriff under an attachment, and plaintiff paid liens and the judgment against it, whereupon it was transferred to plaintiff, who took control of the car, but left it in the same garage, subject to his orders, and afterwards the third party executed bill of sale to plaintiff, the third party was not then in possession of the automobile, within Civ. Code, § 3440, providing that transfer of property by person in possession must be accompanied by immediate delivery and change of control of property, in order to avoid being invalid as against creditors.

4. Appeal and error ☞1061(3)—Judgment not reversed, when essential facts shown after erroneous denial of nonsuit.

A judgment will not be reversed for error in denying a nonsuit, where facts entitling plaintiff to recover were shown by evidence given after the motion was made.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Walter Cosby against John C. Cline. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph K. Hutchinson and Hutchinson, Van Fleet & Christin, all of San Francisco, for appellant.

Dockweiler & Mott, Mott & Cross, and Albert M. Cross, all of Los Angeles, for respondent.

SHAW, J. The defendant appeals from a judgment against him for damages from the conversion of an automobile.

One Boyd began an action in the superior

court of the city and county of San Francisco against one A. B. Cosby to recover money due on contract and sued out a writ of attachment therein to the defendant in his official capacity as sheriff of Los Angeles county. The defendant received the writ, and in virtue thereof, on April 29, 1915, levied the same on the automobile in question and took it into his possession. Judgment was thereupon recovered in that action, and a writ of execution thereon was issued to the defendant, by virtue whereof he sold the same to Boyd, the plaintiff in the action, on June 14, 1915. This is the conversion complained of. The defendant, in defense, set up the judgment, levy, and sale in justification. The sole question is whether or not the automobile was subject to attachment and execution as the property of A. B. Cosby at the time of said levy and sale.

The defendant's claim is that the automobile was subject to execution against A. B. Cosby by virtue of the provision of the Civil Code that—

"Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." Section 3440.

At the time the transactions here in question occurred, A. B. Cosby was in business in San Francisco as an automobile dealer and he owned the car in controversy. He had been sued by one Korbel on a claim for \$1,100, in which action an attachment was issued and levied on the car in question on January 16, 1915, and it was then taken by the sheriff into his possession and kept by him in a place known as "Class A Garage" on Post street. It was also encumbered by a chattel mortgage to secure a debt of A. B. Cosby for \$1,050. While thus in possession of the sheriff under attachment, the plaintiff, Walter Cosby, agreed with A. B. Cosby that, in consideration of the sale and transfer of said car to him, he would pay off and discharge said liens. In pursuance of this agreement plaintiff paid off the liens, and A. B. Cosby transferred to him his interest in the car, and thereupon the attorney for Korbel directed the persons in charge of the Class A Garage to deliver the car to the plaintiff. Plaintiff then went to the said garage and took over the car. He left it there, with instructions to the garage people that they should not let the car go out, except upon his order in writing, giving them his signature for identification of such order, and then employed them to wash and polish the car. All this occurred not later than February 25, 1915. On February 26, 1915,

A. B. Cosby executed a formal bill of sale, purporting to sell said car to Walter Cosby, the plaintiff, for the sum of \$2,150.

Quite a while afterwards Walter Cosby gave to A. B. Cosby an order to Class A Garage to deliver the car to A. B. Cosby, and the latter then, at plaintiff's request, got it from the garage, and took it to A. B. Cosby's place of business on Van Ness avenue, and there turned it over to Walter Cosby. For about two weeks thereafter Walter Cosby used the car in going about the city of San Francisco. When not in actual use, he would sometimes put it in the basement of A. B. Cosby's place of business, sometimes in the Denman Garage, on Bush street, or, if it was during the daytime, he would leave it on the street in front of the Cosby place of business. Walter Cosby was the father of A. B. Cosby. After said sale A. B. Cosby did not use or drive said car, but merely, at times when it suited his father's convenience, allowed his father to store the car in the basement aforesaid, or elsewhere on his premises. Plaintiff was desirous of selling the car, and upon learning that one Brant, of Los Angeles, wanted to buy a car of that make, he caused his son, as his agent, to take it to Los Angeles, there to be sold either to Brant or to some other person. It was while the car was in the possession of A. B. Cosby for that purpose that the defendant levied the writ of attachment on the car as aforesaid.

[1] We have taken the above statement of facts from the bill of exceptions. Some of the facts we have related are not there shown by express statements, but they do appear by reasonable inference from the facts directly shown. Inasmuch as the findings are in favor of the plaintiff, it is necessary for the reviewing court to assume as true all facts which appear by reasonable inference from the evidence contained in the record on appeal, so far as they may support the findings for plaintiff. These findings are that at the time of the levy Walter Cosby was the owner of the car, and A. B. Cosby had no interest therein, and that the defendant wrongfully and unlawfully seized the car on the attachment against A. B. Cosby. The facts aforesaid are sufficient to sustain these findings.

[2] Section 3440, on which the defendant relies, describes a certain variety of constructive fraud, whereby a transfer is declared to be fraudulent as a matter of law, regardless of the actual motives or intentions of the parties. Such a provision cannot be extended beyond its plain meaning, nor be made to apply to cases which do not meet the conditions there described. By its own terms it applies only to transfers "made by a person having at the time the possession or control of the property." It is plain from the foregoing evidence that, at the time of this transfer between A. B. Cosby and Wal-

ter Cosby, A. B. Cosby was not in the possession or control of the property transferred. On the contrary, it was in the possession and control of the sheriff and entirely beyond the control of A. B. Cosby. It is well established that in such a case an immediate delivery to the transferee, followed by an actual change of possession, is not necessary in order to make the transfer valid against creditors. The reason is, of course, that all the conditions stated in the section are necessary to make the constructive fraud declared and in such a case one of the conditions is absent, and hence the sale is valid without immediate delivery or continued change of possession. This has been decided in *Williams v. Borgwardt*, 119 Cal. 82, 51 Pac. 15, *Curtner v. Lyndon*, 128 Cal. 37, 60 Pac. 462, and *Williamson v. Monroe*, 174 Cal. 466, 163 Pac. 662. It follows, therefore, that the court below was correct in holding that the levy was unlawful and wrongful and that the property did not belong to A. B. Cosby at that time.

[3, 4] The appellant erroneously assumes in his argument that the transfer from A. B. Cosby to Walter Cosby did not take place until the execution of the bill of sale, and since at that time the property had been released from attachment, he claims that the evidence is such that the court should have found that it was then in the virtual custody of A. B. Cosby. The proposition that A. B. Cosby then had the virtual possession of the car is only deducible by inference from the evidence, if at all. There was positive evidence to the effect that the actual transfer took place prior to the execution of the bill of sale, the time being somewhat uncertain, but at least, under the evidence, two or three days before, and also that at the time the bill of sale was executed the car was in the Class A Garage under the control of Walter Cosby, and not to be taken away except upon his written order. It is therefore clear that at the time of the transfer, even by the bill of sale, A. B. Cosby was not in possession or control of the car. Under these circumstances the provisions of section 3440 have no application. These facts appeared either before the motion for nonsuit was made or were shown by the evidence subsequently given. In such a case we will not reverse a judgment because of error in denying the motion for a nonsuit.

The judgment is affirmed.

We concur: SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.; WILBUR, J.

On Rehearing.

PER CURIAM. The application for a rehearing is denied.

As to the refusal of the trial court to grant the motion for a new trial on the ground of newly discovered evidence we are

of opinion that the proposed evidence could not have substantially affected the result. It would still remain true that the car remained in the garage up to or about the time of the transfer in the name of and apparently subject to the orders of the attorney for the attaching creditor.

All concur, except SHAW, J., absent.

53 Cal. App. 726

AUCHMOODY v. CITY OF MANHATTAN BEACH. (Civ. 3682.)

(District Court of Appeal, Second District, Division 1, California. Aug. 2, 1921.)

1. Waters and water courses ⚡263 — **Complaint held sufficient as against general demurrer.**

A complaint, in an action against a city for damages for failure to furnish water for agricultural purposes, which alleged in one count that the plaintiff demanded the water from the defendant and was ready, able, and willing and offered to pay therefor, and that at the time in question the defendant "was well able to deliver and did deliver to the immediate neighbors of the said plaintiff and to the residents of the said city of M. in general, except the said plaintiff herein, as aforesaid, a sufficient and adequate supply of water," was sufficient as against a general demurrer that the complaint did not in either count thereof state facts sufficient to constitute a cause of action.

2. Waters and water courses ⚡263—**Evidence held to show existence of water supply sufficient to have met plaintiff's requirements.**

In an action against a city for damages for failure to furnish water for agricultural purposes, evidence that water company for four years had furnished the water required for plaintiff's purposes was sufficient prima facie to warrant finding that the city could have continued to furnish to plaintiff the same supply, and that the failure so to do resulted from some fault of the defendant; the latter having taken over the water mains of the water company and having the right to purchase water from the company at wholesale "through the capacity" of mains owned by the company.

3. Waters and water courses ⚡263—**Evidence held sufficient to show negligence in not furnishing water for agricultural purposes.**

In an action against a city for failure to furnish water for agricultural purposes, evidence held sufficient to sustain a finding that the city was negligent in failing to furnish an adequate supply during the period in question.

4. Waters and water courses ⚡263—**Losses from failure to furnish water held not speculative.**

In an action against a city to recover damages for negligent failure to furnish water during a certain period, damages to crops and chickens, consisting in the depreciation or de-

struction of value of property actually in existence, were not speculative, and therefore recovery was properly permitted.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Clara L. Auchmoody against the City of Manhattan Beach. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank L. Perry, of Redondo Beach, for appellant.

Carnahan & Clark, of Los Angeles, for respondent.

CONREY, P. J. From the year 1908, and at all times thereafter to and including the time of the transactions covered by this action, the plaintiff was the owner of a tract of land, containing about 12 acres, within the city of Manhattan Beach, a municipal corporation of the sixth class. During more than four years immediately preceding July, 1914, the Hermosa Beach Water Company, a public utility corporation, was engaged in furnishing water through a distributing system established by it, supplying practically all of the consumers of water within the corporate limits of defendant city, together with consumers situated outside of said city. During all of that time, and until the 1st day of July, 1914, the plaintiff received from the water company an adequate supply of water for domestic, agricultural, and horticultural needs upon said property. Plaintiff had improved her lands by setting out thereon eight acres of various kinds of orchard trees, as well as annual crops of agricultural and garden products. On the 1st day of July, 1914, these trees were in normal growing condition.

Prior to the 1st day of July, 1914, the defendant was authorized to and did construct and install a municipal water system for the purpose of furnishing an adequate supply of water for domestic, agricultural, and horticultural needs to practically all water consumers, including the plaintiff, within the corporate limits of the city, and, with the approval of the railroad commission of the state of California, entered into a contract in writing with the water company whereby the defendant assumed the service of said consumers situated within its corporate limits, including the plaintiff, commencing with the 1st day of July, 1914, at which time it was agreed that the water company should withdraw from the city of Manhattan Beach and discontinue the service of water to any of said consumers. By the terms of that contract the city obtained the right to purchase water from the company at wholesale "through the capacity" of mains then owned by the company delivering water to the city limits, such water to be furnished at a price stated in the contract. The city intended to obtain its primary source of water supply

from a well put down by the city within the corporate limits. The contract right to purchase from the water company was relied upon to furnish a secondary supply to the extent that it should be needed by the city.

In this action the plaintiff seeks to recover damages caused to her property resulting from neglect, failure, and refusal of the defendant to deliver an adequate and sufficient supply of water at the premises described in the complaint. The first cause of action stated in the amended complaint relates to the alleged negligent failure of the defendant to furnish an adequate supply of water to the plaintiff during the first nine days of July, 1914, and the resulting damage to the plaintiff's crops, trees, and to a large number of chickens kept by the plaintiff upon said premises. The second count is for additional damages suffered by reason of the further neglect and failure of the defendant to furnish an adequate supply of water to the plaintiff from the 9th day of July to the 8th day of October, 1914. The findings of the court are in accordance with the facts above stated. The court further found that at all of said times beginning with the 1st day of July, 1914, the defendant, with the exercise of ordinary care, skill, and diligence in the management and operation of said water system, was able to furnish to plaintiff and to all other consumers upon its said water system an adequate supply of water to meet all of their reasonable domestic, agricultural, and horticultural needs; that by reason of the failure of the defendant to furnish such adequate supply to the plaintiff, almost all of plaintiff's chickens died, her cantaloupe vines and pepper plants died, a very large portion of the trees upon her premises died, and a very large portion of the remaining trees thereon were stunted and delayed in their normal maturity from one to three years; that by reason of the injuries so suffered, the plaintiff suffered damages in the sum of \$2,090. The defendant appeals from the judgment.

[1] The defendant presented a general demurrer to each count of the complaint. It is now contended that the court erred in overruling that demurrer. It is first suggested that in the first count the plaintiff did not allege that she offered or tendered in money the established water rates of the city. In said first count it was stated that the plaintiff demanded said water from the defendant, and was ready, able, and willing, and did offer to pay therefor. Next it is suggested that the second count fails to show that the defendant had the ability to furnish the plaintiff with water from July 9, 1914, to October 8, 1914. In the second count we find that it was alleged that during all of said period of time the defendant "was well able to deliver and did deliver to the immediate neighbors of the said plaintiff and to the residents of the said city of Manhattan Beach

in general except the said plaintiff herein, as aforesaid, a sufficient and adequate supply of water." We think that as against a general demurrer, which only suggests that the complaint did not, in either count thereof, state facts sufficient to constitute a cause of action, the complaint was sufficient.

Appellant contends that the damages sustained by plaintiff, as stated in the first count of the complaint, were the result of her own act in that she prevented the city from installing a meter connection in front of her property and making a water connection to that property. We have examined those portions of the evidence to which counsel have referred in support of their position. From this evidence it appears that the plaintiff objected to the attempt made to install a five-eighths-inch meter in front of her property and a five-eighths-inch pipe connection, and claimed that she was entitled to have, as she had theretofore had, a larger meter and larger water connection. That she was so entitled appears to have been conceded by the city. The evidence merely shows objection and protest made by the plaintiff, but not any act, forcible or otherwise, actually preventing the installation as attempted.

[2] The next claim is that the evidence is insufficient to show negligence on the part of the defendant. It is conceded that, in order to recover, the plaintiff must show negligence on the part of the defendant. The evidence did prove the existence of a water supply adequate and sufficient to have met plaintiff's requirements. The fact that the Hermosa Beach Water Company continuously for four years prior to that time had furnished this required amount of water to the plaintiff's premises, taken together with the other facts to which we have referred, was sufficient prima facie to warrant the court in determining that the defendant, in the ordinary course of its business, could have continued to furnish to the plaintiff the same supply which she had theretofore received, and that the failure so to do resulted from some fault of the defendant.

[3] To fully exhibit the situation as shown by the evidence would require a longer description than should be made here of the distributing system of the city and of the physical conditions under which the water was distributed. Suffice it to say that the city contained a section of high ground, which included the lands of the plaintiff, and that there were other lower areas near the ocean; and that the city attempted to supply the higher ground by gravity flow from a high tank to which water was to be pumped from a reservoir situated on lower ground. Some time in July the "booster pump" used to force water to the high tank broke down and there was considerable delay in restoring that means of supply to the high tank. There is evidence tending to prove that the

defendant could have obtained from the Hermosa Beach Water Company, from a high tank of that company, a supply of water which could have been connected with the distributing system of the defendant in such manner that the city could have continued to furnish an adequate supply of water to the plaintiff. The water company was willing to furnish this water, but the representatives of that company and of the city did not come to an agreement covering the expense of making certain necessary additions to the pipe line. We think that the court was warranted in determining that the city did not make any sufficient effort to obtain this substitute water supply, and in finding that defendant's failure to furnish to plaintiff an adequate supply of water during the entire period of time covered by the complaint was negligent and without cause.

Concerning the amount of damages awarded, appellant claims that the evidence shows that the plaintiff received sufficient water for all ordinary needs; that the court erred in allowing the sum of \$500 as damages for destruction of chickens which the plaintiff had on said premises; that the sum of \$690 damages awarded for the destruction of plaintiff's pepper crop was an award of speculative damages not allowed by law. So far as the facts are concerned, there is sufficient evidence to support the court's finding that these losses were incurred, and that they were the proximate result of defendant's failure to furnish the necessary supply of water.

[4] The damages were not speculative in their nature, but they represented actual detriment caused by defendant's breach of its obligation. Appellant relies upon certain decisions which have held that where damages are claimed for refusal to furnish water upon land the true measure of damages must be determined by ascertaining the difference between the rental value of the land with water and its rental value without water. *Crow v. San Joaquin Irr. Co.*, 130 Cal. 309, 62 Pac. 562, 1058; *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805. These were cases in which the plaintiff attempted to prove that he would have raised certain kinds of crops and that he would have obtained certain profits therefrom if he had received the supply of water to which he was entitled. As was said by the court in *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366:

"Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined."

But in the present case the losses incurred consist in the depreciation or destruction of value of property actually in existence. These losses were capable of ascertainment by direct evidence, and were not at all specu-

lative in their nature. Under these circumstances, the loss of chickens which died, and the loss of the growing crops which were destroyed, were of such a nature that recovery can be had therefor. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 599

**LONDON GUARANTEE & ACCIDENT CO.,
Limited, v. SOUTHERN PACIFIC CO.
(Civ. 3819.)**

(District Court of Appeal, First District, Division 2, California. July 21, 1921. Hearing Denied by Supreme Court Sept. 19, 1921.)

1. Railroads ⇨401(9) — Instruction on last clear chance held justified.

In an action for damages arising out of death on track, *held*, under the evidence, that court properly instructed on the doctrine of last clear chance.

2. Trial ⇨295(1) — Instructions read together.

Instructions should all be read together in determining whether or not certain ones were erroneous.

3. Railroads ⇨400(10) — Workman's contributory negligence in failing to flag train held for jury.

Omission of one working on a crane on a railroad track to place red flags several hundred feet distant from the crane, between it and any approaching train, a duty imposed upon him, although a fact which, with other facts, may be considered by the jury as showing contributory negligence, did not constitute contributory negligence as matter of law.

4. Appeal and error ⇨1048(5) — Question to witness not prejudicial in view of answer.

In action against railroad for death of one employed by a gravel company on a crane standing on defendant's track, question to clerk for the gravel company, "Did you ever hear any objection made by any one connected with that train crew to the use of the outer tracks by the gravel company?" could not have prejudiced the defendant where the witness answered "No."

On Hearing in Supreme Court.

5. Railroads ⇨401(9) — Instructions on last clear chance held substantially correct.

In an action against a railroad to recover damages for death on track, instructions as to the doctrine of last clear chance *held* not substantially erroneous.

6. Railroads ⇨401(9) — Knowledge held to warrant instruction on last clear chance doctrine.

Actual knowledge by defendant railroad of a crane upon its track, engaged in loading grav-

el into cars, imputed knowledge to defendant's train crew of the presence of employees in the vicinity of such crane, and court did not err in submitting last clear chance doctrine to jury in action for death of a servant who was not seen by defendant's train crew.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the London Guarantee & Accident Company, Limited, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

A. A. Moore and Stanley Moore, both of San Francisco (Ford & Johnson, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, and E. Nusbaumer, of Oakland, for respondent.

STURTEVANT, J. On the 12th day of April, 1916, one Frank Rodrigues met injuries resulting in his death during the course of his employment by the Niles Sand, Gravel & Rock Company. Plaintiff was the insurance carrier of the employer of the deceased, and under the terms of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), being subrogated to the rights of the heirs at law of Rodrigues, brought this action for damages, alleging that, through the negligent operation of one of its trains, the defendant was responsible for the death of the deceased. A verdict was arrived at in plaintiff's favor, and it is from the resultant judgment that this appeal was taken.

The Niles Sand, Gravel & Rock Company, at the time of the accident in question, maintained a gravel pit in the bed of Niles Creek. In this pit were three railroad tracks, two being commonly known as industrial spur tracks, and one the main track of the defendant. The tracks were so constructed that cars could be switched from one to the other. The main track approached the gravel pit on a descending grade of about 1 per cent. and on a curve of about 9 degrees. All of the tracks were maintained by the defendant. In the course of its operations the gravel company used a crane to load cars in the pit. This crane was operated by a steam engine mounted on something similar to a flat car. It had two trucks under it, and it could be moved by its own power. Its engine house extended approximately 14 feet above the tracks. The top of the crane at ordinary slant was about 30 feet above the track. At the time of the accident the crane, together with one gondola car, were located on the main track. The engine operating the crane had steam up, and the crane had been in position and at work for a few hours. At the time of the accident the deceased was on the ground on the opposite side of the crane from which the defendant's train ap-

proached. At the corner of the platform of the crane, on the same end of the car, was the brake on the crane. That brake was an appliance consisting of a wheel set horizontally, and which could be operated only by using a bar. To operate the same most effectively the operator should stand on the ground astride of one of the rails. The deceased was the brakeman in charge. No witnesses observed the position of the deceased immediately before the impact.

At the time of the accident one of the defendant's trains, consisting of an engine and six loaded gravel cars, proceeded down the track toward the pit. The fireman was handling the throttle while being seated in the engineer's place, and the engineer was seated in the fireman's place. The air brakes of the train were disconnected. There was the testimony of two or more witnesses to the effect that the location of the crane could be seen from a point opposite the water tank about 400 feet up the track.

When the gravel train arrived at the pit the train struck the gondola car attached to the crane, shoving both of them forward 72 feet, and upon examination it was found that the deceased had been run over by the front wheels of the front truck. The appellant does not claim that the defendant was not negligent, but contends: First, that the last clear chance doctrine under the pleadings and under the proof had no place in the record; second, that the instructions that were given on the doctrine of the last clear chance were in themselves erroneous statements of the law; third, that the evidence as a matter of law shows the deceased to have been guilty of contributory negligence; fourth, error in the admission of certain evidence relative to notice from the defendant not to use the main track.

[1] On the appeal the defendant does not even claim that it was not negligent. It contends with much earnestness that the deceased was guilty of contributory negligence. In the face of these two propositions, it is patent that we are very close to the usual contention that the doctrine of last clear chance is involved. And when we consider certain other facts which were developed on the trial, and which are stated below, it becomes manifest that the plaintiff, at least, had the right to have the jury instructed on the doctrine of last clear chance. Some of those reasons will appear as we proceed, but, considering the whole record, we think that it was altogether proper that the court instructed on that doctrine.

[2] The second contention—that the instructions given on the doctrine of last clear chance were in themselves erroneous—is without foundation. It is fundamental law that the instructions should all be read together. As so read, instructions 13, 14, and 15 were correct, and clear expressions of that doctrine. They were as follows:

"Where one has placed himself in a dangerous position, and another has actual knowledge of his dangerous situation, and has a clear opportunity by the exercise of proper care to avoid injuring him, he must do so, notwithstanding the injured person has placed himself in such situation of danger by his own negligence.

"In other words, if you find the decedent, Frank Rodrigues, in working around and about the crane in question, at and immediately prior to the happening of the accident, if you find he was so working around and about said crane, had placed himself in a dangerous position, notwithstanding this fact, if you further find the employees of the defendant, Southern Pacific Company, in charge of the train in question, knew of the existence of said crane upon said track, and knew of such position of deceased in time, by the exercise of proper care, to have brought said train to a stop and avoid said collision, and did not do so, then I charge you the defendant, Southern Pacific Company, is responsible for the death of the decedent, Frank Rodrigues, and your verdict should be in favor of the plaintiff.

"Even though you find that the Niles Sand, Gravel & Rock Company had no right to have its crane upon the track in question, and that by doing so it and its employee, the decedent, Frank Rodrigues, was guilty of negligence in so doing, then I charge you if the defendant, Southern Pacific Company in the operation of its train in question, knew of the existence of the crane upon the track in question in time to have stopped and avoided the collision, and had the last clear opportunity of avoiding the accident, and if by the use of reasonable care, after its employees observed the said crane upon the said track, it could have brought its train to a standstill in time to avoid the collision in question, and did not do so, it is solely responsible for the accident and the consequent death of the decedent, Frank Rodrigues, provided you find that without negligence on his part, at the time of the accident in question, he was at a place where, in the discharge of his duties as brakeman of the Niles Sand, Gravel & Rock Company, he was required to be, and under these facts, if you so find, your verdict should be against the defendant, Southern Pacific Company, and in favor of the plaintiff.

"If the engineer and fireman, or either of them, in charge of the train in question, knew of the existence of the said crane upon said track, and by the use and exercise of proper care could have brought the said train to a stop in time to have avoided colliding with and striking said crane, or the gondola car on the rear thereof, and therefore had a last clear opportunity of avoiding the collision in question, and did not do so, then it matters not whether the said crane was rightfully or wrongfully upon said track, and your verdict should be against the defendant, Southern Pacific Company, and in favor of the plaintiff, provided you find that at the time of the accident Frank Rodrigues was at place where his duties as employee of the Niles Sand, Gravel & Rock Company required him to be, and that solely by reason of the said collision the said decedent, Frank Rodrigues, sustained injuries which resulted in his death."

[3] The appellant's third contention is that the evidence, as a matter of law, shows the deceased had been guilty of contributory negligence. This contention is founded on the fact that the employer of the deceased had furnished the crew of the crane with red flags, and that the duty of placing the flags had been imposed on the decedent. The plan was that a red flag should be placed between the railroad rails several hundred feet distant from the crane, and between it and any approaching train. At the time of the accident the decedent had failed so to place the flags. This fact was a fact which, with other facts, might be considered by the jury as showing contributory negligence, but the omission, of itself, did not constitute contributory negligence as a matter of law.

[4] The witness Duffy had stated that he had worked at the pit as shipping clerk for the gravel company. He stated that during the years he was there the gravel company used all three of the tracks daily. On certain occasions while they were using the tracks the defendant's train came in.

"Q. Did you ever hear any objection made by any one connected with that train crew to the use of the outer tracks by the Niles Sand & Gravel Company?

"Mr. Ford: I object to it as incompetent, irrelevant, and immaterial, not a matter which the train crew could consent to, or give the Niles Sand & Gravel Company any right by its consent or otherwise.

"The Court: The objection is overruled.

"A. No, sir."

Had the witness made a different answer, the answer might have been prejudicial, but the particular answer given by the witness at the most can merely be said to be immaterial. There are probably several thousand people not called who would have given the same answer, but such answers would lead nowhere. The slightest consent or the slightest objection on the part of an officer of the defendant, having authority to speak on the subject, of course, would be otherwise. The superintendent saw the crane using the outer track, and made no objection.

Appellant's brief contains a great deal which goes to the sufficiency of the evidence to sustain the verdict of the jury as based on the doctrine of last clear chance. It will be noted, that the appellant's points, as stated by them, and as quoted above, hardly present that question, however their record on appeal does present the question. The appellant contends with much vigor that the record does not show that the defendant's trainmen actually saw the deceased in a place of danger. That may be true; however, the record does show that the crane was in a place where it could be seen 500 feet up the track, that the steam was issuing from the top of the pipe leading from the engine, and that the fireman who was operating the engine realized that the crane was

in his way when he was at the switch 450 feet from the crane. He testified that he had the straight air on and the emergency air when he was 250 feet away. He also testified that the train was under his control at all times. In view of these facts it cannot be said that there was no evidence to support the case of the plaintiff on the doctrine of last clear chance. Furthermore, during the trial of the case, the questions of counsel for the plaintiff and of counsel for the defendant indicate that they both considered that the doctrine of last clear chance was involved in the case, and both sides tendered instructions on that theory. The court did not err in instructing the jury on that theory.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. [5, 6] The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

In view of the circumstances of this case, as shown by the evidence, we think that there was no substantial error in the instructions on the issue of the last clear chance. In other words, we are of the opinion that, under such circumstances, actual knowledge of the position of the crane imputed knowledge of the presence of such employees as were engaged thereon.

ANGELLOTTI, C. J., and SHURTLEFF, LAWLOR, SLOANE, and LENNON, JJ., concur.

53 Cal. App. 671

PEOPLE v. MARTIN. (Cr. 793.)

(District Court of Appeal, Second District, Division 1, California. July 26, 1921.)

1. Embezzlement — 8—Transfer of property to secure debt does not pass title.

A bill of sale by lessor of an automobile to a bank to secure a debt did not pass title in the automobile to the bank, and in a prosecution of the lessee for embezzlement of the automobile ownership was properly alleged in lessor.

2. Statutes — 118(1)—Title held not insufficient.

Pen. Code, § 504a, as added by St. 1917, p. 273, making one guilty of embezzlement who fraudulently removes, conceals, or disposes of goods, is not void under Const. art. 4, § 24, by reason of insufficiency in its title.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Ed. R. Martin was convicted of embezzlement, his motion for new trial denied and he appeals. Affirmed.

A. A. Howell, and Allan Brant, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

CONREY, P. J. The defendant has appealed from a judgment convicting him of the crime of embezzlement and from an order denying his motion for a new trial.

Section 504a of the Penal Code was added to that Code by an act entitled:

"An act to add a new section to the Penal Code to be numbered five hundred four a, relating to the removal and disposal of leased property."

The section reads as follows:

"Every person who shall fraudulently remove, conceal or dispose of any goods, chattels or effects, leased or let to him by any instrument in writing, or any personal property or effects of another in his possession, under a contract of purchase not yet fulfilled, and any person in possession of such goods, chattels, or effects knowing them to be subject to such lease or contract of purchase who shall so remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof, is guilty of embezzlement." Stats. 1917, p. 273.

As stated in the information, the defendant was charged with a crime of embezzlement in that he did, with intent to defraud W. B. Conniry, remove, conceal, and dispose of a described automobile, the personal property of Conniry, which had been leased to defendant by Conniry. Two grounds of appeal have been presented in argument: (a) Variance between the proof and the charge in the information, in that the evidence proved that the ownership of the automobile was not in Conniry and that the offense, if committed at all by the defendant, was not committed in the county of San Diego; (b) that the above-mentioned section of the Penal Code is unconstitutional because its adoption was in violation of section 24, art. 4, of the state Constitution, which provides that every act shall embrace but one subject, which subject shall be expressed in its title.

[1] The evidence, which was unconflicting on this point, proved that after Conniry had delivered the automobile to defendant on the lease contract, and before the time when defendant is alleged to have committed the crime, Conniry executed and delivered to the First National Bank of San Diego a bill of sale of the automobile. But it further appeared that this bill of sale was given to the bank as security for money advanced as a loan to Conniry by the bank on the contract. If the jury believed this testimony

(and it is undisputed), the only proper conclusion to be drawn was that Conniry remained owner of the automobile. Where a transfer of property is made in form sufficient to convey title, but the instrument was made only to secure a debt, it does not pass title. *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; *Shattuck & Desmond, etc., Co. v. Gillelen*, 154 Cal. 778, 784, 99 Pac. 348.

The defendant testified that at the time when he drove the automobile out of San Diego county he had not any intention to conceal it or take it away from Southern California, and that he did not decide to take the property out of the state, or to sell it, until after he had left San Diego county. But there were abundant circumstances in evidence upon which the jury was authorized to determine that the intent to commit the offense existed at the time when defendant removed the property from San Diego county.

[2] The contention that the statute by which section 504a of the Penal Code was enacted is void by reason of insufficiency in its title is entirely without merit. *Deyoe v. Superior Court*, 140 Cal. 476, 488, 74 Pac. 28, 98 Am. St. Rep. 73.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

53 Cal. App. 695

RAUER v. FERNANDO NELSON & SONS.
(Civ. 3658.)

(District Court of Appeal, First District, Division 1, California. July 29, 1921. Rehearing Denied Sept. 26, 1921. Hearing Denied by Supreme Court Sept. 26, 1921.)

1. Corporations ⚡402—Corporation held liable on president's contract not purporting to be its contract.

A contract to pay owner of excavating equipment a certain rental for use thereof, made by the president of the corporation owning the land being graded, *held* the contract of the corporation, though it was signed by the president without purporting on its face to be the corporation's contract.

2. Corporations ⚡425(4)—Liability on contracts made by officers and agents within apparent authority.

A corporation which suffers appearances to exist and its officers and agents to so act as to give one dealing with it reason to believe that he is dealing with the company is liable on the contract made by such officers and agents.

3. Corporations ⚡426(10)—Liability on contract of president after receiving benefit thereof.

A corporation, having benefited by the contract entered into by its president, not pur-

porting on its face to be the contract of the corporation, was liable thereon.

4. Assignments ⚡31—Land owner finishing contract liable to pay rental for equipment let to contractor.

Where owner of excavating equipment being used by grading contractor under rental agreement threatened, on contractor's default in payment of rental, to take equipment off job unless he was paid for the use thereof, a corporation owning the land being graded, which had assumed control of the contract, and was paying all the bills, and advancing the money for doing the work, was liable on its contract with the owner of such equipment to pay monthly rental for use thereof, entered into in order to prevent the work being stopped, though on completion of the work it was not indebted to the contractor; the doctrine that an owner's acceptance of contractor's assignment in favor of subcontractor binds the owner to pay the assignee only if there is money coming to the assignor not being applicable.

5. Appeal and error ⚡878(6), 1033(8)—Insufficiency of judgment for plaintiff not ground for reversal in absence of appeal by plaintiff.

Judgment giving plaintiff insufficient relief will be affirmed on defendant's appeal therefrom, where plaintiff has not appealed since plaintiff, by failure to appeal, acquiesced therein, and since defendant has no ground for complaint.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by J. J. Rauer against Fernando Nelson & Sons. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodfellow, Eells, Moore & Orrick, of San Francisco (C. J. Goodell, of San Francisco, of counsel), for appellant.

H. M. Anthony, of San Francisco, for respondent.

WASTE, P. J. The defendant, Fernando Nelson & Sons, appeals from a judgment in plaintiff's favor. The action was commenced by the plaintiff to recover the sum of \$5,532.10, alleged to be due from the defendants upon a written contract, dated October 16, 1917, whereby Fernando Nelson & Sons and A. E. Buckman agreed to pay to respondent the sum of \$680 per month as rental for certain sand machines, cars, rails, and wire used by Buckman in excavating and filling certain property under a contract with appellant. The complaint was in the form usual in actions to foreclose a mechanic's lien, and prayed that the amount sued for be adjudged a lien upon the land of the defendant Nelson & Sons upon which the work was done by Buckman. After the testimony was in, plaintiff filed an amended complaint to conform to proof, based upon an implied contract for the reasonable rental value of

the equipment and the defendants Fernando Nelson, individually, and A. E. Buckman, were dropped from the case.

Early in 1917, Buckman, as contractor, started the work of excavating, and filling blocks and streets of a tract of land of about 50 acres at the west portal of the Twin Peaks tunnel in San Francisco under a contract with Fernando Nelson & Sons, the owner. He agreed to do the work for 17 cents per yard, and it was provided in the contract that he should, at his own cost, furnish all the materials and equipment necessary to perform his contract. Monthly payments were to be made as the work progressed. Shortly after engaging in the work Buckman found himself financially embarrassed, and appellant from that time on paid all the bills, with apparent disregard of the stipulation of the contract relating to payments.

The equipment used in the work, consisting of sand machines, cars, wire, rails, and tools belonging to this respondent Rauer. Buckman had possession under an agreement of purchase which permitted him to pay for it as he could. In October Rauer went to Fernando Nelson, the president of appellant, and complained that he was getting no money from Buckman for the outfit. He threatened to take the equipment off the job unless he had some assurance that he would be paid for its use. Nelson insisted that Rauer and Buckman adjust their troubles. Buckman thereupon in writing assigned to Rauer all moneys due, or to become due, him from Fernando Nelson & Sons for work and labor done, materials furnished, and for grading the property. As part of the settlement Nelson signed the following agreement:

"San Francisco, Oct. 16, 1917.

"J. J. Rauer: Your assignment of A. E. Buckman, received. As my conversation—I will agree to hold out for you \$680 per month being the amount use of track, sand machine from Oct. 1, 1917, until such time rail, etc., is taken away. [Signed] Fernando Nelson."

Nelson testified that he signed this paper in his personal capacity, "not wanting to hold the corporation responsible for anything of that sort," and that he would pay it out of his own pocket rather than for the work to stop. On the day following, Buckman and Rauer executed another agreement in which it was stipulated that, in making the assignment, it was understood that it did not cover any money due for labor or material expended on the work, but covered any money due for rent of the plant, or "surplus money coming to said Buckman after all labor and bills are paid," and was to be applied on the purchase of plant as theretofore agreed between Rauer and Buckman. Whether appellant had notice of this document does not appear.

There is a very material conflict in the evidence as to what occurred at the meeting of Nelson, Rauer, and Buckman, and as to what the final understanding of the parties was. The testimony of Rauer and Buckman is to the effect that it was definitely understood, at the time the assignment was accepted by Fernando Nelson for the defendant, Fernando Nelson & Sons, that the agreement was that that defendant should pay the sum of \$680 per month for the rent of the plant as stipulated in the writing, and that Fernando Nelson, during the conversation concerning the matter, expressly agreed to pay that amount. They insist that one payment of \$680, made by the appellant, about one month after the agreement was signed, was actually paid in accordance with the terms of the settlement as fully understood by the parties at the time. The respondent based his complaint and his right to recover on such agreement and understanding. Fernando Nelson is equally positive in his testimony that, in no conversation, or at any time, was the subject of a monthly payment of \$680 mentioned, and that the first intimation he had of the claim of the respondent to that effect was when the contract was read in his office some time later. His position is that his only agreement was to "hold out" \$680 and pay it to Rauer at the end of the job, whether there was anything coming to Buckman or not; that before the work was completed he paid the amount, less a 2 per cent. discount, at Rauer's request to enable Buckman to buy a new chain.

The work of grading and filling was completed on July 20, 1918. 203,967 cubic yards of material were moved, which, at the agreed price of 17 cents per cubic yard, called for a payment of \$34,674.39. As a matter of fact, appellant paid \$63,605.93, or \$28,931.54 in excess of the contract price.

On this evidence the trial court found that appellant and respondent entered into a written contract whereby the appellant agreed to pay respondent \$680 per month as rental for the equipment; that, although the appellant agreed to pay the sum of \$680 per month, under which price there would be due \$6,210, the price was actually agreed upon through mistake; that, irrespective of said written contract, however, plaintiff furnished to Nelson & Sons the equipment at its special instance and request, and that the reasonable worth or value of its use was the sum of \$475 per month. The court refused to accord plaintiff a lien, but entered judgment in his favor against appellant in the sum of \$3,655. From this judgment Fernando Nelson & Sons appeal.

[1-3] We are satisfied that the lower court was correct in holding that the agreement entered into between Fernando Nelson and Rauer was in reality the contract of the

corporation, and that it was properly admitted as part of defendant's case. Because the agreement does not purport on its face to be signed by Fernando Nelson as president of Nelson & Sons, appellant contends that the court erred in admitting it in evidence. Nelson was representing the appellant in all matters connected with the transaction, and the writing falls within the rule that a corporation which suffers appearances to exist, and its officers and agents to so act as to give one dealing with it reason to believe that he is dealing with the company, the corporation is liable. *Ageltinger v. Burke*, 176 Cal. 621, 627, 169 Pac. 373. Furthermore, appellant received the benefit of the contract, in that the work of improving its property was not hindered.

[4] Because the total amount paid out was greatly in excess of the contract price for the work, appellant contends that the case falls within the doctrine that, where an assignment in favor of a subcontractor or other person is drawn by a contractor upon an owner, and accepted by him, it is conditional, and not absolute, and binds the owner to pay the assignee only if, and when, there is money coming to the assignor. But this contract differs from those considered in the cases cited by the appellant, for which reason the authorities are not in point. Here the promise is much more than a mere acceptance of an assignment. It was made directly by the debtor in order to prevent the work being stopped. At the time it was made appellant was advancing all money for doing the work, was paying all bills, and had apparently assumed control of the contract with Buckman. If, under such circumstances, it agreed to pay a monthly rental for the use of the equipment by Buckman, whom it had to all intents released from liability under his contract, rather than have the work impeded, it may not now avoid its agreement simply because there is nothing due Buckman. There is evidence to support the trial court's finding that Rauer threatened to take the equipment off the job unless he knew he would get his money. It does not seem unreasonable that appellant would agree to pay for its use. On the conflicting evidence the court found that, from and after the date of the settlement between the parties, the equipment was furnished by respondent to appellant at its special instance and request. That situation entirely removes the agreement from the theory advanced by appellant.

[5] The appellant contends that the finding that it entered into the agreement to pay \$680 per month for the use of the grading equipment by mistake, is not supported by the evidence. We think this is so, and, further, there is no issue upon which the finding can rest. From our reading of the rec-

ord we are of the view that the respondent was entitled to the sum of \$680 per month for the use of the plant, or nothing. That amount would be the sum of \$6,210. The trial court by virtue of its finding as to the mistake of the parties, has reduced the judgment to \$3,655. The plaintiff has acquiesced in the judgment by not appealing, and the defendant has no ground for complaint therefor. *Larkin v. Mullen*, 128 Cal. 449-455, 60 Pac. 1091; *Blood v. Munn*, 155 Cal. 228-236, 100 Pac. 694. It may be that some of the findings of the court on other matters are not correct, but they are immaterial. The judgment rests upon sufficient facts, amply supported.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

53 Cal. App. 701

LOS ANGELES GAS & ELECTRIC CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 3455.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1921. Hearing Denied by Supreme Court Sept. 26, 1921.)

1. Dismissal and nonsuit ⇐2—Statute encourages voluntary dismissals.

Code Civ. Proc. § 581, is grounded upon the policy of encouraging voluntary dismissals, and covers all plaintiffs not coming within the exception stated there, unless there exists in some other statute something explicit removing the operation of such section.

2. Action ⇐59—Consolidation held not to prevent dismissal by plaintiff in one.

Where servant of gas company, injured through alleged negligence of street railway, obtained an award of compensation as against the gas company, and then sued the street railway for damages, and the gas company also sued the railway, seeking damages because of the payment of the award, that the two causes were consolidated, as required by Workmen's Compensation, Insurance, and Safety Act, § 26, as amended by St. 1919, p. 920, did not prevent the gas company from voluntarily dismissing its cause under Code Civ. Proc. § 581, subd. 1, in absence of counterclaim or prayer for affirmative relief.

3. Prohibition ⇐10(2)—Lies to restrain proceedings by court in a consolidated cause sought to be dismissed.

Where employee of gas company injured through negligence of street railway obtained an award of compensation against the gas company and sued the street railway for damages, and the gas company also sued the street railway for damages because of the payment of the amount of the award, and the causes were consolidated under Workmen's Compensation, Insurance, and Safety Act, § 26, as amended by St. 1919, p. 920, and court re-

fused at gas company's request to dismiss its cause under Code Civ. Proc. § 581, subd. 1, further proceedings in the gas company's action could be prevented by prohibition, as against an objection that the effort of either to withdraw from the case would leave the court with the same "jurisdiction" over the case, not only as to the party still prosecuting, but also as to the party seeking to dismiss, in that the court would have the entire subject-matter and all the parties before it; and the question was not affected by a defense of contributory negligence set up in the answer to the complaint in the gas company's action.

Application by the Los Angeles Gas & Electric Corporation for a writ of prohibition prayed to be directed to the Superior Court of Los Angeles and Hon. Charles Monroe, Judge of said Court. Writ granted.

Paul Overton and S. W. Guthrie, both of Los Angeles, Samuel Poorman, Jr., and Herbert J. Goudge, of Los Angeles, for petitioner.

Frank Karr, R. O. Gortner, and W. R. Millar, all of Los Angeles, for respondents.

WORKS, J. One Milosevich, while engaged in laying a gas main for petitioner in a public street, was killed by a car operated by Pacific Electric Railway Company. The widow of Milosevich brought suit against the railway company for damages for his death, alleging that her loss resulted through the negligence of those operating the car. The petitioner paid to the widow a sum of money under an award of the Industrial Accident Commission, in a proceeding instituted before that body on account of the death of the husband. A short time after the widow commenced her action against the railway company petitioner filed suit against that corporation, seeking damages because of the payment of the amount of the award. Under the provisions of section 26 of the Workmen's Compensation, Insurance, and Safety Act (Stats. 1919, p. 920; Deering's Codes and Gen. Laws, Consol. Supp. 1917-19, p. 1410), the full text of which section appears below, the two actions were consolidated. Immediately before the day on which the consolidated causes were to be tried petitioner filed with the clerk of respondent court a request for a dismissal of the action instituted by it, complying in all respects with the terms of subdivision 1 of section 581 of the Code of Civil Procedure, to the effect that an action "may be dismissed: * * * By the plaintiff, * * * by written request to the clerk, filed with the papers in the case, at any time before the trial, * * * provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant." In the action thus attempted to be dismissed no counterclaim was presented, nor was any affirmative relief asked by the defendant. The clerk, upon the filing of the request for

a dismissal, entered a dismissal of the action in his register of actions. Upon the day on which the consolidated actions were to have been tried the railway company moved that the dismissal of petitioner's action be vacated. Respondent court granted the motion and ordered the trial of both actions, whereupon petitioner instituted this proceeding to compel respondent to desist from the exercise of further jurisdiction in the dismissed action, and an alternative writ of prohibition was issued. The matter is now before us on the question whether the writ shall be made peremptory.

[1] Respondents contend that an action may not be dismissed where it has been consolidated with another action pursuant to the terms of section 26 of the Workmen's Compensation, Insurance, and Safety Act. If that claim may be upheld, we are presented with an unusual condition of affairs. A defendant may be kept in court, when once brought in through proper steps taken to acquire jurisdiction over him, and there is manifest justice in the idea that a plaintiff may be placed in the same position by the interposition of a counterclaim against him, or by a prayer of the defendant for affirmative relief. Consequently such a case is excepted from the operation of subdivision 1 of section 581, Code of Civil Procedure. It is the policy of government, however, to discourage, rather than to encourage, litigation, and that policy is subserved by permitting the voluntary departure from court of one who voluntarily comes into court. As section 581 is grounded upon such a policy, and as, by its terms at least, it covers all plaintiffs not coming within the exception above stated, we must find something direct and explicit in section 26 of the Workmen's Compensation Act before we can say that petitioner is removed from the operation of section 581, and that the position of respondents is justified. Section 26 follows:

"The term 'employee,' as used in this section, shall include the person injured and any other person in whom a claim may arise by reason of the injury or death of such injured person. The death of the employee, or of any other person, shall not abate any right of action established by this section. The claim of an employee for compensation shall not affect his right of action for damages arising out of injury or death against any person other than the employer; and any employer having paid, or having become obligated to pay, compensation, may likewise bring an action against such other person to recover said damages. If either such employee, or such employer shall bring such action against such third person, he shall forthwith notify the other in writing, by personal service or registered mail, of such fact, and of the name of the court in which such suit is brought, filing proof thereof in such action, and, if the action be brought by either, the other may, at any time before trial on the facts, join as party plaintiff or must consolidate his action, if brought independently,

If the suit be prosecuted by the employer alone evidence of any expenditures which the employer has paid or become obligated to pay by reason of said injury or death shall be admissible, and such expenditures shall be deemed a part of the damages, including a reasonable attorney's fee to be fixed by the court; and if in such suit the employer shall recover more than the amount he has paid or become obligated to pay as compensation he shall pay the excess to the injured employee or other person entitled. If the employee joins in or prosecutes such suit, evidence of the amount of disability, indemnity or death benefit paid by the employer shall not be admissible, but proof of all other expenditures on account of said injury or death shall be admissible and shall be deemed part of the damages. The court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation. When any injury or death shall have been suffered by an employee, no release or settlement of any claim for damages by reason of such injury or death and no satisfaction of judgment in such proceedings, shall be valid without the written consent of either both employer and employee, or one of them, together with the consent of the commission or the court in which any such action may be pending."

[2] We scan the section in vain for a support for the position of respondents. By its language one situated as was petitioner after the payment of the award may maintain such an action as petitioner commenced against the railway company. If such an action is commenced, the section requires that it must be consolidated with any action commenced by one circumstanced as was the widow of Milosevich. We can perceive no support for respondents' position in the mere fact that a consolidation was required by the statute, or that one resulted under it. If actions are consolidated because of the mandate of a statute, because of the permission of a statute, or because of a stipulation of the parties, it appears to us that the status of the consolidated actions is the same. If the attitude of respondents were correct, then a dismissal of any action which is consolidated with others would be impossible through whatever means the consolidation was brought about. Section 1195 of the Code of Civil Procedure permits the consolidation of mechanics' lien cases, and it is almost the invariable practice to order a consolidation of such actions. Can it be that after a consolidation none of such cases may be dismissed? If one may not, neither may any number less than all. If ten such cases are consolidated—and more than that number are frequently brought together where large jobs are involved—nine may not be dismissed voluntarily by the respective plaintiffs if the tenth plaintiff elects not to dismiss. In resolving this question it must be remembered that the consolidation of actions is usually brought about solely for the purpose of

avoiding repetitions of procedure and evidence, and for the economizing of time. We are at a loss to perceive any other reason behind the requirement for consolidation contained in section 26. We are convinced that petitioner was not prevented from dismissing its action by the fact that it was consolidated with another action. As in some degree supporting our conclusions, we cite the following authority for the general proposition that causes which have been consolidated are, for a variety of purposes, still to be considered as separate actions, the first of the cases being directly in point: *Young v. Grand Trunk Ry. (C. C.)* 9 Fed. 348; *Union Pac. Ry. Co. v. Jones*, 49 Fed. 343, 1 C. C. A. 282; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155; *American Trust & Savs. Bank v. Zeigler Coal Co.*, 165 Fed. 34, 91 C. C. A. 72; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; *Cariaga v. Dryden*, 29 Cal. 307; *Harmon v. San Francisco & S. R. R. Co.*, 86 Cal. 617, 25 Pac. 124; *Realty Construction & M. Co. v. Superior Court*, 165 Cal. 543, 132 Pac. 1048; *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420.

[3] The next contention of respondents is based upon the assertion, made by them that under the statute governing the litigation inaugurated by the consolidated actions respondent court had jurisdiction to try and determine the petitioner's right of action at the suit of the widow alone. After this statement they say, reproducing their italics:

"The effort of either to withdraw from the case would leave the court with the same *jurisdiction* over the case, not only as to the party still prosecuting, but as to the other party who seeks to dismiss. Therefore there can be in such a situation no *exceeding of jurisdiction* by the trial court, for it has the entire subject-matter and all the parties still before it, to dispose of by judgment."

And after a page of argument they say, further:

"Petitioner must therefore admit that the trial court, in spite of the attempted dismissal, has the same jurisdiction it had before the dismissal, and must confess that its dismissal was not intended to deprive the court of jurisdiction to adjudge a recovery in its favor."

This matter is advanced in support of the claim that prohibition does not lie under the circumstances presented, for the reason that the writ issues only to curb an excess of jurisdiction. We are unable to follow this argument. Counsel, in presenting it, fail to distinguish between jurisdiction over a particular question or controversy and jurisdiction over a particular action. To say that respondent court had jurisdiction, in the action commenced by the widow, to pass upon the questions presented by the action insti-

tuted by petitioner, is far from saying that it had jurisdiction, because of that fact, over the latter action itself. If it attempted to retain and exercise jurisdiction over petitioner's action on such a ground, respondent court would exceed its jurisdiction, and such excess could be prevented by prohibition.

A goodly portion of the brief of respondents is devoted to a discussion of the effect upon the present controversy of a defense of contributory negligence which is set up in the answer to the complaint in petitioner's suit. In the midst of the argument of the question respondents say:

"A decision of the question now under discussion is not, we assume, necessary to a determination of the matter now before this honorable court; but we make this argument only in view of the possibility of the point being discussed by the members of the court."

In its reply brief petitioner concurs in the view that the argument in question is inapplicable to the present controversy. As we entertain the same view, we do not undertake a discussion of the point.

A peremptory writ of prohibition will issue as prayed for.

We concur: FINLAYSON, P. J.; CRAIG, J.

53 Cal. App. 559

TORMEY et al. v. ANDERSON-COTTONWOOD IRR. DIST. (Civ. 2316.)

(District Court of Appeal, Third District, California. July 15, 1921. Hearing Denied by Supreme Court Sept. 12, 1921.)

1. Waters and water courses — 263—Finding that certain allegation was untrue held negative pregnant.

A finding "that it is untrue that said defendant ever since the use by it of said canal or ditch for conducting water has negligently or carelessly or without right allowed said water or any water to flow to or upon the said lands or any lands of the plaintiffs," attempting to negative an affirmative allegation of a complaint, is in the nature of a negative pregnant and implies the truth of the allegation.

2. Waters and water courses — 263—Finding that defendant's seepage water did not flood land held contrary to evidence.

In an action to restrain owner of canal from permitting seepage water to flow upon the lands of plaintiff and for damages caused by such water, a finding that there was no seepage of water from defendant's canal held contrary to the evidence.

3. Waters and water courses — 262—Negligence to construct canal through loose gravel.

To knowingly construct a canal through loose sand or gravel incapable of holding water without taking any steps to prevent or control seepage therefrom constitutes negligence.

4. Waters and water courses — 262—Duty of owner of canal as to seepage waters.

If in the actual operation of a canal sudden and unexpected damage results from seepage by reason of some hidden defects which could not reasonably have been foreseen, the owner will not be liable in damages, being chargeable only in case of negligence, but after discovery of the defect and after reasonable opportunity to correct, if he continues the use, his liability for subsequent damages would be the same as if he had known of the defect at the time of construction.

5. Waters and water courses — 262—Landowners not guilty of contributory negligence in failing to increase capacity of drain.

Landowners near a canal were not negligent barring recovery of damages caused by flooding by seepage water by their failure to increase the capacity of a drain sufficient to carry off flooding caused from natural causes so as to carry off additional water seeping from defendant's canal.

6. Waters and water courses — 263 — Failure of injured party to exercise care to prevent damages from seepage from canal considered in mitigation of damage.

That landowners near a canal failed to use ordinary care to prevent injury to their crops after seepage water from the canal began to flow down upon their land may be considered in mitigation of damages, but, if by the exercise of such care they could have avoided the injury to their crops altogether, they would be entitled to recover as damages the reasonable expenditures made necessary by the additional water.

On Hearing in Supreme Court.

7. Eminent domain — 112—Landowner injured by seepage water held entitled to damages regardless of negligence.

Owner of land damaged by water seeping from irrigation canal, constructed for public purposes and to serve the purpose of distribution of water to public use, is entitled to damages whether the irrigation district is negligent or not, in view of Const. art. 1, § 14, providing that private property shall not be damaged for public use, etc.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by William H. Tormey and another against the Anderson-Cottonwood Irrigation District. Judgment for defendant, and plaintiffs appeal. Reversed in District Court of Appeal, and hearing denied in Supreme Court.

R. L. Shinn, of Sacramento, for appellants.
Carr & Kennedy, of Redding, for respondent.

FINCH, P. J. This action was brought to restrain the defendant from permitting seepage water from its canal to flow upon the lands of plaintiffs and for damages caused by such water. Judgment was ren-

dered in favor of the defendant, and the plaintiffs appeal. The plaintiffs allege:

"That said ditch or canal was negligently and carelessly constructed by defendant, and that because of such construction by defendant water has constantly escaped and seeped through the bottom and banks of said canal, and said defendant, ever since the use by it of said canal or ditch for conducting water has negligently, carelessly, and without right allowed said water to flow to and upon the said lands of plaintiffs."

These allegations are denied by the defendant. The defendant alleges, in substance, that it is an irrigation district organized under the laws of the state; that in accordance with the California Irrigation District Act (St. 1897, p. 254, as amended by St. 1917, p. 751, and St. 1919, p. 660) it "caused to be prepared by a competent irrigation engineer a set of plans and specifications for the construction of said canal, which said plans and specifications were duly and regularly approved by the State Engineer of the state of California and by the irrigation district bond commission"; that the construction of said works was authorized by a vote of the people of the district; that the canal was constructed in accordance with said plans and specifications; and that said canal has ever since been used for conveying and distributing water to the lands within said district for public use. These affirmative allegations of the answer are clearly established by stipulation and proof. No negligence in the construction of the canal is shown.

The plaintiffs' lands are adjacent to and northerly from the town of Anderson, and within the defendant district. Within said lands is an irregular shaped body of about 25 acres which, until partially drained, was a natural swamp into which the drainage from the neighboring territory lying to the west thereof collected. Until recent years nothing was produced in the swamp except wild hay which was usually harvested from June to August of each year, depending upon the rainfall of the preceding winter and spring. Many years ago a ditch was constructed in an easterly direction which partially drained the swamp into the Sacramento river. In the year 1917 the defendant constructed the section of its canal to the west of plaintiffs' lands in part along a steep hillside, and at an elevation of about 50 feet above the swamp. This section of the canal, the only one in question here, was well constructed, and, in the language of the defendant's engineer, "thrown so far back in the bank that the cut line on the down stream side came about the water line of the ditch." The ground surface was plowed on the lower side "so that there would be a good bond between the old ground and the fill," and "stumps and large roots" were removed. The evidence shows that the consulting en-

gineer was justified in saying, "I thought it was an excellent piece of construction."

The appeal is taken on a bill of exceptions settled by the court, and the appellants specified various particulars in which it is claimed that the evidence is insufficient to support the findings.

The court found that the portions of the lands which plaintiffs allege were overflowed by seepage water "had never been productive prior to the construction of defendant's canal, and had never been used for the growing or production of crops, except wild hay, for the reason that the same were swampy and unproductive." Witnesses for the plaintiffs testified that five or six acres of the swamp produced cultivated crops during the years 1913 to 1915, inclusive, and all but about an acre and a half thereof produced crops in 1916 and 1917. There is nothing in the record to contradict this testimony, and four of the defendant's witnesses gave testimony in corroboration thereof, stating that William Vlach, who prior to 1916 farmed the lands now owned by the plaintiffs, plowed portions of the swamp. One of these witnesses, James F. Bedford, testified that a small portion was put into alfalfa, and that Mr. Vlach plowed "quite a lot" of it. The finding that the swamp had never been productive has no support in the evidence.

[1, 2] The court finds that—

"It is untrue that said defendant ever since the use by it of said canal or ditch for conducting water has negligently or carelessly or without right allowed said water or any water to flow to or upon the said lands or any lands of the plaintiffs."

This finding, attempting as it does to negative an affirmative allegation of the complaint, is in the nature of a negative pregnant and implies the truth of the allegation. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 619, 30 Pac. 783, 19 L. R. A. 92; *Auerbach v. Healy*, 174 Cal. 5, 161 Pac. 1157; *State ex rel. Russell v. Box*, 34 Tex. Civ. App. 435, 78 S. W. 982. The appellants, however, make no objection to the sufficiency of the finding, but specify only that it is unsupported by and contrary to the evidence. The evidence that seepage water from the defendant's canal flowed down to and upon the swamp is conclusive. The court found that in the "early spring" of the year 1918 the plaintiffs had "fully prepared the ground for planting and planted various valuable crops described in paragraph 8 of the plaintiffs' complaint," alleged in said paragraph to comprise 20 acres of the swamp. The court further found "that in addition to the crops so planted the plaintiffs fully plowed and (prepared?) for planting 3½ acres of said land." It thus appears that after the end of the rainy season all but an acre and a half of the swamp was sufficiently dry to be plowed and planted. The evidence shows without conflict that

within about two weeks after the defendant turned water into its canal in May, 1918, water began to flow into the swamp and continued throughout the irrigating season, covering the swamp and destroying the crops growing thereon. The evidence shows that the crops referred to in the findings were planted the latter part of May. Climatic conditions in the Sacramento valley are such as to make it clear that, if the drainage of the swamp was of such character as to carry off the winter's accumulation of water and render the land tillable by the latter part of May, the natural drainage water from the low foothills would not keep the land flooded during the remainder of the dry season. The evidence shows that the drainage facilities provided by the plaintiffs were sufficient to protect their crops from any natural flow of water into the swamp during the cropping season of 1918.

There was some contention that the flooding of the swamp was caused by a general rise of the water table due to the irrigation of lands in the district, but the evidence shows that the lands the irrigation of which might probably have that effect were not in fact irrigated in the year 1918 until after the swamp was flooded. Witnesses for the plaintiffs testified that the water which caused the damage seeped from the defendant's canal and flowed down in surface streams to the swamp. This testimony is corroborated by that of O. F. Oliphant, a ditch tender for the defendant, and one of its witnesses at the trial, who testified:

That he did not find any water seeping from the bank of the canal during the year 1918. "By 'bank' I mean the immediate levee or upthrow. * * * I noticed seepage water below the bank of the ditch, from the McFarland place down to the high school. * * * I noticed the water in 1917 the same as I noticed it in 1918."

Two gulches referred to in the testimony as gulches F and E merge and drain into the swamp. Mr. Oliphant testified on cross-examination:

"I paid particular attention to those drains that ran out below the canal and merge in that gulch which is marked F on the map; I noticed the branch of that gulch marked E; I noticed all of them; I noticed water coming from below the line of the canal and coming out and running down these drains. * * * There was water coming out of the hillside below the line of the canal in May and June, 1918. It came out near Diamond creek here, out through that plug, out through the cut where the Anderson water pipe went through, but I don't know whether that was seepage from the canal or from the water company. I couldn't say whether the water company's water came through a conduit of any kind, because it was under the ground. I never noticed that point prior to 1918. * * * I crossed that plain several times and found water flowing down from the direction of the canal. * * * I don't know that all that water came

from the canal. * * * I wouldn't say that the quantity of water has not increased in that gulch F since the water was put into the main canal in 1918, as compared to conditions prior to that time. I noticed an increase. * * * I noticed there was more water in these gulches after the water was turned into the canal in May and June, 1918, than there was prior to that time. * * * I don't remember of seeing any of the depressions that are included in the heads of these drains and the east limits of the town site of Anderson in 1918 that were dry. * * * I noticed water percolating from the soil at the McFarland place, along the hill, and flowing off down into the flat, after the water was turned back into the canal. It was a very short distance it made its appearance, and that was some five or six rods below the canal."

Without substantial conflict, the evidence shows that the water which flooded the swamp in 1918 came from the defendant's canal.

[3, 4] Appellants concede, as under the evidence they must, that the defendant was not negligent in the original construction, but they contend that it was negligent in failing to correct a defect which developed in the actual operation of the canal. To knowingly construct a canal through loose sand or gravel incapable of holding water, in a situation such as that disclosed here, without taking any steps to prevent or control seepage therefrom, would constitute negligence. *Turpen v. Turlock Irrigation Dist.*, 141 Cal. 1, 74 Pac. 295; *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349, 47 Pac. 195. If, in the actual operation of a canal, sudden and unexpected damage results by reason of some hidden defect which could not reasonably have been foreseen, the owner would not be liable in damages, because he is not an insurer, but chargeable only in case of negligence. *Sutliff v. Sweetwater Water Co.*, 182 Cal. 34, 186 Pac. 766. After discovery of the defect, however, and after reasonable opportunity to correct it, if the owner continue the use, his liability for subsequent damages would be the same as if he had known of the defect at the time of construction. The officers of the defendant knew that there was a heavy seepage from the Anderson section of the canal during the time it carried water in the year 1917, and throughout the irrigating season of 1918. The only effort to remedy the defect consisted of occasional puddling and shoveling clay into the canal by the ditch tender who had a beat to walk of 17 miles a day. In view of the continuing damage being done through many months, this slight effort to correct the defect is not sufficient to overcome the charge of negligence. That the seepage was preventable is indicated by the testimony of the ditch tender, who stated that the effect of his efforts as above set forth was to stop the seepage altogether at one point and to reduce it 75 per cent. at some others. The seepage was not continuous along the canal, but for short distances

only at different points. There are various common methods of preventing or reducing seepage from canals, some of which are described in the evidence. The canal may be lined with concrete at points where seepage occurs; heavy asphalt oil may be applied; the sides and bottom may be puddled; a flow of water carrying large quantities of sediment and silt during storm periods tends to lessen the seepage. Drain ditches may be constructed below the point where the seepage comes to the surface. In this case the deepening and enlargement of the drain from the swamp to the river would have prevented the damage. One of the engineers testifying for the defendant estimated the cost of such deepening and widening at something over \$200. An engineer for the plaintiffs placed the cost at about \$1,500. In view of all the circumstances, it must be held that the defendant did not use ordinary care to prevent the damage.

[5, 6] The defendant contends that the plaintiffs are guilty of contributory negligence in not maintaining their drain in condition to carry off the surplus water from the swamp. The trial court seems to have been impressed with this contention, for it found "that it is possible by grading said drain and annually cleaning the same to carry off from the lands of plaintiffs all surplus waters collected in said swamp or marsh or pond by the drainage from the neighboring territory and seepage from defendant's canal." As hereinbefore pointed out, the drain was sufficient to prevent the flooding of the swamp during the year 1918 from natural causes. The plaintiffs are not guilty of contributory negligence barring recovery in their failure to increase the capacity of the drain so as to carry off the additional water coming down from the defendant's canal. *McCarty v. Boise City Canal Co.*, 2 Hasb. (Idaho) 10 Pac. 624. Evidence that plaintiffs failed to use ordinary care to prevent the injury after the seepage water began to flow down upon their land may be considered in mitigation of damages, but if by the exercise of such care they could have avoided the injury to their crops altogether, they would be entitled to recover as damages the reasonable expenditures made necessary by the additional water. In 3 *Shearman & Redfield on Damages* (6th Ed.) § 741, the rule is stated as follows:

"The plaintiff cannot recover compensation for any damage which he might have avoided by the use of ordinary care and diligence, after first becoming aware of the injury of which he complains"

—citing *Lloyd v. Lloyd*, 60 Vt. 288, 13 Atl. 638, where it is said:

"The plaintiff suffered damage by the wrongful obstruction of his drain. He might have gone on, and sunk the new drain made by the defendants, as aforesaid, below the outlet of

the covered drain, at an expense not exceeding \$25," says the referee. Without taking this precaution, he was damaged \$100. * * * It is the duty of a person injured by the fault of another to use all reasonable means to protect himself against injuries consequent. If injured in his person, he must attend to his cure. If injured in his estate, he must attend to its preservation. If he fails in this duty, he cannot gather the fruits of his own negligence. The plaintiff could have indemnified himself at an expense of \$25, and this is the legal measure of his damage."

Respondent contends that, since its irrigating system was planned and constructed under legal sanction for a public purpose, any detriment suffered by the plaintiffs is "damnum absque injuria," citing some of the reclamation cases wherein it was held that one owner has the right to levee against flood waters even though the effect be to throw such waters back upon his neighbor. Such decisions are based upon the theory that flood waters are a "common enemy" against which each owner may protect himself even to the damage of other owners. It has further been held in numerous cases that a reclamation district is a governmental agency to carry out a specific purpose, and that it cannot, therefore, be sued without the consent of the state. The law under which defendant district is organized, however, authorizes it to sue and be sued. *Boehmer v. Big Rock Irrigation District*, 117 Cal. 28, 48 Pac. 908. While irrigation adds greatly to the public welfare, districts such as the defendant are organized primarily for the benefit of the landowners therein, who ought not to be permitted to do collectively what they cannot lawfully do individually to the injury of their neighbors. As said in *Howell v. Big Horn Basin Col. Co.*, 14 Wyo. 38, 81 Pac. 791, 1 L. R. A. (N. S.) 596:

"The great benefit to be derived from such enterprises as that of the defendant does not authorize the promulgation of a principle that will permit one tract of land to be reclaimed at the expense of the destruction of another without compensation."

And in the case of *Bradbury v. Vandalia Levee & Drainage District*, 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904, where the law authorized the district to sue and be sued, the district—

"was organized upon the petition of a majority of the owners of lands in the belief that they would be benefited by the organization. To deny to the plaintiffs a recovery of the damages which they have suffered by the effort of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice."

It is not necessary to decide whether an irrigation district is liable for damages caused by seepage from its canal of a continuing nature which cannot be prevented by the exercise of ordinary care, for in this

case it is shown that the defendant failed to exercise such care to prevent the damage.

The judgment appealed from is reversed.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. The petition of the respondent for a rehearing in this court is denied.

[7] In so far as the opinion of the District Court of Appeal appears to indicate that the plaintiffs cannot recover damages for the injury to their land unless it appears that the flooding thereof which caused the injury was the proximate result of the negligence of the defendant in the construction and maintenance of its canal, we disapprove the same. The canal is constructed for public purposes and to serve the purpose of distribution of water to public use. Apparently the damage to the plaintiffs is caused directly by seepage of water carried in said canal through the intervening soil onto the adjoining land of the plaintiffs. In such cases the plaintiff is secured a right to damages by the constitutional provision that private property shall not be damaged for public use. Article I, section 14. In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it. This was expressly decided in *Reardon v. San Francisco*, 66 Cal. 505, 6 Pac. 317, 56 Am. Rep. 109, and *Eachus v. Los Angeles*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149. The proposition apparently was not considered by the District Court, and perhaps was not presented in the briefs or in the court below. Nevertheless, upon a new trial the question should remain open.

All concur.

53 Cal. App. 762

BURNS v. FAGET ENGINEERING CO.
(Civil No. 3895.)

(District Court of Appeal, First District, Division 2, California. Aug. 6, 1921.)

1. Master and servant §80(10)—Judgment disallowing employer's counterclaim for advances held error.

In an action for services in which the employer offered a counterclaim for money advanced, *held* that, every essential and material fact in support of the counterclaim having been proved without conflict, its disallowance by the trial court was error.

2. Appeal and error §1011(1)—When conflict in evidence was merely fanciful, finding of court is not conclusive.

Respondent's contention that a judgment could not be set aside on appeal because the

evidence was in conflict was without merit, where the only conflict was merely fanciful or fictitious.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by J. M. Burns against the Faget Engineering Company. From judgment for plaintiff, defendant appeals. Reversed.

Wilson & Wilson, of San Francisco, for appellant.

Bell, Brookman, Simmons & Creech, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued defendant for the balance due for services rendered. Defendant admitted the performance of the services to the value sued for, but offered a counterclaim for \$250, money advanced to the use of plaintiff. Judgment was given for plaintiff on his complaint and against the counterclaim, and defendant appeals.

[1] The facts are that for some five or six years prior to April 5, 1919, plaintiff was employed by defendant in the capacity of salesman at a salary of \$200 a month. Immediately prior to that date plaintiff learned of an opportunity to install an ice plant in China on property owned by the China Mongolia Export Company. He asked defendant's permission to take the employment and, through the aid of defendant, was employed by F. E. Booth Company, the local agents of the China company, to go to China and install the plant. By the terms of the employment plaintiff was to be paid \$350 a month and expenses by the China company. Before leaving for China plaintiff arranged with defendant to advance \$250 a month to his wife, who remained here, the defendant to be reimbursed by the Booth company for the China concern. Plaintiff was to draw the remainder of his salary and his expenses directly from the China company. This arrangement was carried out in every particular, except that in February, 1920, defendant advanced the \$250 to plaintiff's wife as before, but the Booth company refused to reimburse it because it claimed the employment had terminated. This claim was based upon the fact that plaintiff had completed the installation of the plant prior to February 1, 1920, and had returned to San Francisco on February 17th. The Booth company took the position that it was not liable for salary during the full month of February after completion of the work.

Upon his return to San Francisco plaintiff took a vacation of two or three weeks and then returned to the service of defendant. After repeated demands for an adjustment of the February account, and as many promises on the part of plaintiff that he would adjust it, defendant deducted the amount from plaintiff's salary. The advance of the

sum in dispute has never been denied, the only defense to the counterclaim being that defendant was liable to plaintiff for his salary during the entire month of February.

That he sought the employment at his own instance and accepted the offer of the Booth company to pay his salary for his labor in China, which was a substantial increase from what he had been receiving from defendant, that he knew at all times that the China company and not the defendant was his employer, and that the defendant was not interested in the installation of the plant other than to recommend plaintiff to the Booth company for employment, cannot be denied. Every essential and material fact in support of the counterclaim was proved without conflict.

[2] Respondent's only argument in support of the judgment is that the appellate court cannot set it aside because there is a conflict in the evidence. But the only conflict arises out of the testimony of respondent in his endeavor to establish a relation of master and servant in a case where there was no contract of employment express or implied. His statement that appellant urged him to keep his eyes open for business for the firm, and his endeavors to interest others in the purchase of appellant's wares, are all in harmony with the evidence that, having been a salesman for appellant, he was offered a commission on any sales made on his trip. But having been unsuccessful, nothing was due him from appellant. When the conflict in the evidence is merely fanciful or fictitious, the appellate court is not bound by the judgment.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 512

NOCE et al. v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3792.)

(District Court of Appeal, First District, Division 1, California. July 14, 1921. Rehearing Denied Aug. 12, 1921. Hearing Denied by Supreme Court Sept. 12, 1921.)

1. Street railroads ☞102(1)—Persons concurrently negligent liable.

Where collision between motortruck and street car resulted from concurrent negligence of motorman and driver of the truck, and as a result thereof the street car ran wild and collided with another truck, the street railway was liable in damages for the death of driver of the second truck, unless the driver of the second truck was guilty of contributory negligence.

2. Street railroads ☞117(24)—Contributory negligence of truck driver held for jury.

In an action for death of truck driver struck from the rear by a runaway street

car, contributory negligence of deceased, who was driving on the track without looking back, held for the jury.

3. Street railroads ☞85(3)—No exclusive right to portion of road occupied by tracks.

A street railroad has no exclusive right to that portion of a road occupied by its tracks.

4. Municipal corporations ☞705(1)—Statute as to signals on changing direction inapplicable to mere deviations.

A practical and reasonable construction of Motor Vehicle Act, § 20, as amended by St. 1919, p. 216, providing for signals on changing direction, does not require the driver of a motor vehicle upon every deviation from a direct course ahead to look back to ascertain the condition of traffic behind him; such situations being covered by duty to use ordinary care.

5. Trial ☞296(4, 5)—Instructions concerning contributory negligence held reversible error notwithstanding rest of charge.

Instruction that, if the jury found the deceased to have been negligent in a given particular, it could only find for the defendant in the event that the latter was free from negligence, held, in the state of the evidence, practically equivalent to directing a verdict for the plaintiff and to require a reversal, notwithstanding that in another part of the charge the court instructed the jury as to the effect of negligence on part of deceased.

6. Appeal and error ☞1064(1)—Contradictory instructions require reversal.

Where two instructions are contradictory in essential parts, judgment must be reversed.

Lawlor, J., dissenting.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Clorinda Noce and others against the United Railroads of San Francisco. Judgment for plaintiffs, and defendant appeals. Reversed and remanded in District Court of Appeal, and hearing denied in the Supreme Court.

Wm. M. Abbott and K. W. Cannon, both of San Francisco, and Hall C. Ross, of San Mateo, for appellant.

Percy V. Long, Louis Ferrari, and Walter Drobisch, both of San Francisco (A. P. Black, of San Francisco, of counsel), for respondents.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs, the widow and minor children of one David Noce, in an action for damages arising from the latter's death, alleged to have been caused by the negligence of defendant.

The case was tried by a jury, which rendered a verdict in the plaintiff's favor for \$50,000, but upon motion for a new trial the court made an order granting the motion

unless the plaintiffs would consent to a reduction of the verdict and judgment to \$25,000. The plaintiffs consented, and the judgment now appealed from is for the sum of \$25,000.

On the 22d day of July, 1919, a south-bound electric car of the defendant left Daly City on schedule time at 1:50 p. m. and had proceeded but a short distance when it collided with a motortruck belonging to one A. G. Witt. This truck was on the right-hand car track and running at the rate of about 20 miles an hour. The car at the time of said collision was running down grade at the rate of about 40 miles an hour. According to the evidence of a number of witnesses called by the plaintiffs, the motorman gave no warning of his approach, and his car crashed into the rear of the motortruck, hurling it into an adjoining field, the vestibule of the car being smashed, and the motorman thrown to the floor unconscious. The air brake equipment and the entire front control were destroyed. In this condition, and with the motorman unconscious, the car continued on its course at a high and dangerous rate of speed, the track at this point being down grade; and while so proceeding uncontrolled it collided with a truck operated by David Noce, causing his death. This truck was also, according to plaintiffs' evidence, on the right-hand car track proceeding in a southerly direction. Of course, no gong or bell was sounded as the car approached the second truck; and, while it is conceded that the electric car at this time was running at the rate of at least 60 miles an hour, witnesses for the plaintiff stated that it made no unusual noise. It is also conceded that the Witt truck was being operated in violation of a provision of the Motor Vehicle Act of 1919 (St. 1919, p. 191), in that it was so loaded as to obstruct a view to the rear and was not equipped with a mirror by which such a view could have been had by its driver.

[1] From the evidence in the case we think it fairly appears that the first collision was the result of the negligence of the motorman driving the defendant's electric car, or of the concurrent negligence of both such motorman and the driver of the Witt truck. Consequently in either event the defendant would be liable for the death of Noce provided Noce himself was free from negligence proximately contributing to the collision which caused it.

The defendant claims that the judgment in favor of the plaintiffs cannot stand for the reason that the evidence shows that the deceased was in fact guilty of such contributory negligence: (1) In operating and driving his motortruck when the same was so loaded as to obscure his view of the highway to the rear without equipping his truck with a mirror so as to reflect a view of the highway; (2) in driving upon the track in front of this

runaway car without looking or listening to ascertain whether a car was approaching or taking the slightest precaution for his own safety.

As to the first of these contentions it is true that a provision of the Motor Vehicle Act which went into effect the day before this accident occurred requires that a person operating a vehicle so covered, loaded, or constructed as to obscure the driver's rear view should have such vehicle equipped with a mirror so as to reflect a view of the highway for at least 200 feet to the rear; and it is the defendant's contention in this behalf that the omission of the deceased at the time of the collision to comply with this provision of the law rendered him guilty of contributory negligence. This contention it appears is not sustained by the evidence, which fails to reveal that the Noce truck was so loaded or constructed as to obscure the rearward view of the highway.

[2, 3] As to the other of these contentions, it is true that, according to the evidence introduced by the defendant, the deceased was driving his truck on the right-hand side of the car track, and that in order to pass two motortrucks which were standing within about four feet of said track the deceased, without looking back to learn the conditions rearward, turned upon the track just in time, unfortunately, to be struck by the runaway car. On the other hand, according to the evidence introduced by the plaintiff, the deceased did not drive suddenly upon said track, but had been upon it for some time when the collision occurred. Under these circumstances, we cannot say as a matter of law that the deceased was guilty of contributory negligence. The question, it is clear, was one for the consideration of the jury. The defendant had no exclusive right to that portion of the road occupied by its tracks, and in fact it makes no such contention. Nor can it be held that one driving on or near the track of a street car on a public highway shows a lack of ordinary care or is guilty of negligence per se in failing to keep a constant watch behind for an approaching car. *O'Connor v. U. Ry.*, 168 Cal. 43, 49, 141 Pac. 809.

The court in effect instructed the jury in part as follows:

"If Noce violated the Motor Vehicle Act in driving a truck so constructed or loaded as to obstruct his rear view, without mirror equipment, he was guilty of negligence, and if such negligence proximately contributed to his injury and death, *and the defendant was without negligence*, your verdict must be for the defendant.

"The court instructs you that it is the law of this state that 'the person in charge of any vehicle in or upon any public highway, before turning, stopping or changing the course of such vehicle, and before turning such vehicle when starting the same, shall see first that there is sufficient space for such movement to be made

in safety,' and therefore, if you find from the evidence in this case that David Noce was operating a motor vehicle and truck along the westerly or right hand side of the highway and clear of the tracks of the defendant, and did thereafter turn or change the course of such truck so as to go upon the track of the defendant, and failed before turning such truck to see first whether there was sufficient space for such movement to be made in safety, then I instruct you that said David Noce was guilty of negligence in so operating and turning said truck, and that, if such negligence proximately contributed to his injury and death, your verdict should be for the defendant United Railroads, *unless you find the injury could have been avoided by ordinary care of the defendant.*

"If you find that Noce failed to exercise ordinary care, and in consequence thereof received injuries resulting in his death, he was guilty of contributory negligence, and your verdict must be in favor of the defendant, *unless you find the injury could have been avoided by ordinary care of the defendant.*"

These instructions, without the italicized portions thereof, were requested by the defendant, and the defendant contends that in giving them as thus modified the court committed prejudicial error. It is true that the court elsewhere in its charge correctly instructed the jury on the subject of contributory negligence.

It may be doubted whether the defendant was entitled to the first two of these instructions as proposed. As to the first of them, as before stated, there is no evidence in the record that the truck of the deceased was so constructed or loaded as to obscure the driver's rearward view. As to the second of them, its offer by the defendant was based upon the theory that the deceased, when he, upon arriving in the vicinity of the standing trucks, deflected his course a little to the left so as to bring his vehicle upon the car track, thus changed his course within the meaning of subdivision "n" of section 20 of the Motor Vehicle Act (Stats. 1919, p. 216), reading as follows:

"The person in charge of any vehicle in or upon any public highway, before turning, stopping, or changing the course of such vehicle * * * shall see first that there is sufficient space for such movement to be made in safety, and if the movement or operation of other vehicles may reasonably be affected by such turning, stopping or changing of course, shall give plainly visible signal to the persons operating, driving or in charge of such vehicles of his intention so to turn, stop, or change his course, either by the use of his hand or arm, * * * or by the use of an approved mechanical or electrical device. * * *"

[4, 5] We think a practical and reasonable construction of this provision would not require the driver of a vehicle upon every deviation from a direct course ahead to look back to ascertain the condition of traffic behind him. This particular situation would be covered by his duty to use ordinary care,

and whether or not he did so would be for the jury to decide upon the particular circumstances of the case. Had the court contented itself with simply refusing to give these two instructions, we perhaps would find no ground for the reversal of the judgment based upon such refusal; but we think it clear that by giving them with the additions indicated by italics it completely deprived the defendant of its defense of contributory negligence on the part of the deceased. This also is unquestionably the case as to the court's modification of the third of said instructions. The effect of this reiteration of the proposition that, if the jury found the deceased to have been negligent in a given particular, it could only find for the defendant in the event that the latter was free from negligence, was, in the state of the evidence in the case, practically equivalent to directing a verdict for the plaintiff, and certainly deprived the defendant of its defense of contributory negligence on the part of the deceased. If the record contained no evidence of negligence on the part of the deceased which proximately contributed to the collision, the defendant could not be said to have been injured by the modification of its proposed instruction referred to, but such is not the case. There was undoubtedly evidence before the jury from which it could have concluded that the deceased was not free from fault. The fact that in another part of its charge the court instructed the jury as to the effect of negligence on the part of the deceased simply makes the instructions as a whole irreconcilable, leaving the jury to follow one or the other as its sympathies might dictate. This being so, we are of the opinion that the contention of the defendant that these instructions as thus modified were incorrect and seriously prejudicial to its defense must be sustained.

[6] If it be suggested that the modification of the second and third of these instructions was for the purpose of instructing the jury upon the application to the case of the doctrine of last clear chance, the answer is that there was obviously no room for the application of that doctrine, since the undisputed evidence showed that the car which collided with the wagon of the deceased was one over which the defendant had completely lost control prior to the time when the deceased had come into a position of danger. Nor is there anything in the language of the modification which even remotely suggests to a body of laymen that it was meant for that purpose. From the uniformity with which the trial court introduced the modification of these instructions offered by the defendant it seems clear that at the moment of giving them the court had an erroneous view of what constitutes contributory negligence. In any event the conclusion is inescapable that as a result of the instructions the jury must have had a very confused notion on that, to the

defendant, vitally important matter. The instructions are contradictory and confusing, and cannot be reconciled. In the case of *Guthrie v. Carney*, 19 Cal App. 145, 155, 124 Pac. 1045, as here, the charge of the court was contradictory and inconsistent in the application of the law to the vital issues of the case, and it was held that, as it was impossible to determine which of the trial court's views of the law the jury adopted as the basis of their verdict, the error of the court must be deemed to have been prejudicial. Where two instructions are contradictory in essential parts, the judgment must be reversed. *Hayden v. Constantinople Mining & Dredging Co.*, 3 Cal. App. 136, 84 Pac. 422. See, also, *People v. Ross*, 19 Cal. App. 469, 126 Pac. 375.

It follows that the judgment must be reversed, and the cause remanded for a new trial.

It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. Hearing denied.

LAWLOR, J. (dissenting). I dissent from the order denying the application for a hearing in this court. It is plain from the record on appeal that the modifications complained of did not have the effect of taking from the jury the issue of contributory negligence, or of preventing them from passing on the merits of that defense. Instructions on contributory negligence had already been repeatedly given. Among such instructions were these: One that the jury must find that the second collision occurred "without any negligence on the part of said Noce" before a verdict could be rendered for plaintiff and against defendant. The substance of this was repeated in the succeeding instruction. The jury was told in another they must find that the death of Noce was caused by the negligence of the defendant and "without fault" on his part before they could find for plaintiff. In another the charge was given that it was the duty of the motorman to save Noce from injury, and that it was his duty to exercise ordinary care to save himself from injury; that the duty was reciprocal. In another it was declared that—

"Contributory negligence is such an act or omission on the part of David Noce, deceased, amounting to a want of ordinary care as, concurring or co-operating with the alleged negligent act of the defendant, proximately contributed to the injuries resulting in his death. The court instructs you that the basis for the rule of contributory negligence is that the party whose negligence proximately contributed to his injury must bear the harm which he brings on himself and which he might have avoided by reasonable care for his own self-preservation."

In another the jury was charged that—

"The tracks of a street railway company are in themselves a sign of danger, and one who approaches same must exercise his faculties of sight and hearing to wait and listen for cars, and his failure to so act is negligence."

In another the jury was instructed that, if Noce was not exercising ordinary care and prudence for his own safety, and such failure on his part continued up to the moment of the accident and proximately contributed to the injuries resulting in his death, the verdict must be for the defendant, and that, even if they find that the motorman was guilty of negligence, nevertheless, if they find that Noce also was guilty of negligence and such negligence contributed to the injuries which resulted in his death, the verdict must be for the defendant. In another it was stated that, if the jury found Noce could, by the exercise of ordinary care, have seen the car approaching, and have avoided the collision, and his death resulted from a failure to exercise such care, he was guilty of contributory negligence, and the verdict must be for the defendant. And in still another it was declared to be the duty of Noce to make reasonable use of his faculties of sight and hearing to watch and listen for approaching cars, and that it was his duty to use ordinary care for any car that might be approaching from the rear, and, if known to him, to seasonably leave the track in order to permit any such car to pass.

It is to be kept in mind that the modified instructions themselves are addressed to the defense of contributory negligence. In view of the evidence the contentions of the parties, and the elaborate character of the preceding instructions on that subject, the jury could not fail to understand that, if Noce contributed to his own death, the verdict must be for the defendant. I find no warrant for the conclusion that defendant's rights were prejudiced by the modifications. It would be more in harmony with the charge as a whole to conclude that, if the modifications carried any particular meaning to the jury, it was that the court was only repeating to them what it had already declared in varying phrases in a number of instructions—that, if the motorman's negligence was the proximate cause of the injury, and plaintiff did not contribute thereto, defendant would be liable.

The reversal of the judgment rests upon the single proposition that the jury understood, or might have understood, the legal distinction, and thereby became confused, between the instructions first given on the subject, which declared that, if the motorman's negligence was the proximate cause of the accident, and plaintiff was free from contributory negligence, defendant would be liable, and the modifications that plaintiff's contributory negligence would bar his recovery.

ery unless the defendant "was without negligence," or unless "you find the injury could have been avoided by ordinary care of defendant," the latter being repeated in the third instruction. Of course, the distinction is plain to the trained legal mind, but I do not believe that substantial justice can be done on appeal if verdicts are to be set aside upon any such ground. Considered in its entirety, the charge was more than fair to the defendant; indeed, it may with truth be said that it was more favorable to that side of the case. This decision is in the face of section 475, Code of Civil Procedure, and section 4½ of article 6 of the Constitution; for to hold that but for the error in the instructions a different result would have been probable, or that it resulted in a miscarriage of justice, is in effect to declare that, if the judge, in the course of an elaborate charge, inadvertently happens to make a single error, the judgment must be set aside, and the case tried over again, with the attendant delay and expense. It is against every reasonable probability that the jury noticed the contradictory statements in the charge, and therefore, under the rules of decision on appeal, the error should have been held harmless. It is not enough that the jury might have been misled; the appellate court must be of the opinion after an examination of the entire record that such was the result of the error or the judgment must be affirmed. It is entirely problematical whether the jury detected the contradictions in the instructions, and how then can it be said in the presence of overwhelming proof of negligence on the part of defendant's servants that the misdirection resulted in a miscarriage of justice? Moreover, the failure of the District Court of Appeal to weigh the error under the constitutional rule of decision on appeal alone furnishes sufficient ground for granting the petition.

In the next place, it is far from clear that the evidence would support a finding of contributory negligence, and, if this be so, the giving of instructions on that subject, even if erroneous, would not, of course, be prejudicial. Before the first collision occurred the car was traveling at the rate of over 60 miles an hour, and after that, according to the opinion, it slowed down to 45 miles an hour. There is testimony that Noce had been on the track for some prior to the first collision. Besides, it is extremely doubtful whether the jury accepted defendant's theory that Noce turned sharply to go upon the track, and there is ample ground for an assumption that the jury believed he looked in the direction from which the car came before making the turn. It is plain from the evidence that, once on the track, he had no chance to escape. The required warnings were not given by the employees of defend-

ant; the car continued at break-neck speed even after the first collision; and the impact was so great as to render the motorman unconscious. As indicating the high speed at which the car was traveling, the truck was carried 150 feet after it was struck, and it was impossible to stop the car before it had gone 2,000 feet. In short, the servants of defendant showed so flagrant a want of care in the operation of the car that the jury must have decided from the evidence that it was the proximate cause of the injury and that plaintiff was free from contributory negligence.

This is not a case where the evidence on the issues of defendant's negligence is evenly balanced or open to doubt. The gross negligence of defendant's servants is conceded, and by the decision the negligence of defendant has become the law of the case. Between the evidence of gross negligence, on the one hand, and the doubtful claim of error, on the other, it is our duty to grant the petition.

53 Cal. App. 735

**CITIZENS' TRUST & SAVINGS BANK v.
BRYANT. (Civ. 3139.)**

(District Court of Appeal, Second District, Division 1, California. Aug. 3, 1921. Hearing Denied by Supreme Court Sept. 29, 1921.)

1. Guaranty §16(2)—Contract of guaranty held founded on sufficient consideration.

Where defendant entered contract of guaranty dated November 5th for a note secured by mortgage dated October 16th, and plaintiff lent money in reliance on the guaranty after the contract was made, the guaranty was a part of the original transaction, and was founded on sufficient consideration, under Civ. Code, § 2792, providing that, when a guaranty is entered at the same time with the original obligation, or with the acceptance of the latter by the guaranty, and forms part of the consideration, no other consideration need exist.

2. Guaranty §77(2)—Suit may be maintained on unconditional guaranty without pursuing remedy against debtor.

Where, according to the terms of a contract of guaranty, the liability of the guarantor was not contingent upon the exercise of rights of guaranty under a mortgage which secured the debt guaranteed; the guaranty was unconditional, and the guarantee may enforce the obligation of the guaranty immediately upon default of the principal debtor, and without notice to the guarantor, and without exhausting a mortgage security as a condition to suit.

3. Guaranty §91—Default of debtor and loss thereby warrant judgment.

In a suit on a contract of unconditional guaranty, where the principal debtor was in default, and the sum due from him was in excess of the amount of guaranty, no other conditions need exist to entitle plaintiff to judgment.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Citizens' Trust & Savings Bank against W. J. Bryant. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. Reily, of Los Angeles, for appellant.
Daniel M. Hunsaker and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

JAMES, J. Appeal by the defendant from a judgment entered upon a complaint which asserted a claim for the principal sum of \$2,000, alleged to have accrued on an instrument of guaranty.

[1] In the month of October, 1915, appellant, as the agent for George A. Bryant, negotiated with respondent for a loan of \$10,000. This loan was made and a mortgage was given to the bank on real property owned by George A. Bryant. The note and mortgage bore date October 16, 1915. However, the respondent bank declined to make the loan on the note and security offered by George A. Bryant, but insisted as a condition to the making of the same that appellant guarantee payment of the debt to the extent of \$2,000. Appellant agreed to do this, and executed the guaranty sued upon, which was dated the 5th day of November, 1915. It was after the execution of this contract by appellant that the bank paid over the money agreed to be loaned and accepted the several papers hereinbefore mentioned. One of the points made by appellant is that there was no sufficient consideration for the contract of guaranty, and that the obligation thereof must fail because it was not entered into at the time of the loan transaction. This contention has not the semblance of any real facts upon which to found it, unless the mere difference in the date of the note and mortgage and that of the contract of guaranty affords such ground. Section 2792, Civil Code, provides:

"Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist."

All of the evidence, including the terms of the contract of guaranty itself, shows conclusively that there was but one transaction, and that the note and mortgage of George A. Bryant was not accepted by the bank until the guaranty was furnished.

[2, 3] Appellant urges further that there could be no recovery on the guaranty contract until the mortgage security had been exhausted. The guaranty contract was an unconditional one. If the general terms in which it was first expressed left any doubt upon that question, the closing paragraph

placed its character beyond the reach of debate. In that paragraph it was stated over appellant's signature:

"I hereby agree that my liability hereunder as to the sum of \$2,000 shall become immediately due and payable to the Citizens' Trust and Savings Bank upon the happening of any default in any of the terms of said note, whether said default be made by said George A. Bryant, his heirs, or assigns, and that my liability as to \$2,000 shall in no wise be contingent upon the exercise of rights of the Citizens' Trust and Savings Bank as mortgagee under said mortgage to said liability."

The guaranty being unconditional, and in no wise a mere contract of indemnity, respondent was entitled to enforce the obligation thereof immediately upon the default of the principal debtor, and without notice to the guarantor, and was under no requirement to exhaust the mortgage security as a condition to suit. Section 2807, Civ. Code; *Pierce v. Merrill*, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56; *Adams v. Wallace*, 110 Cal. 67, 51 Pac. 14; *Cooke v. Mesmer*, 164 Cal. 332, 128 Pac. 917.

[3] At the time of the bringing of respondent's action, the principal debtor was in default and the sum due from him was in excess of the amount of the guaranty. No other conditions were required to exist to entitle respondent to the judgment entered in its favor.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

53 Cal. App. 709

SITTIG v. RANEY, County Auditor.
(Civ. 2233.)

(District Court of Appeal, Third District, California. July 29, 1921.)

1. Highways §113(3)—Supervisor of district may contract for work at cost not to exceed \$1,000 without advertising for bids.

Under Pol. Code, § 2645, subd. 1, requiring board of supervisors to comply with certain requirements as to advertisement for bids, etc., before entering into a road contract where estimated cost of work amounts to more than \$1,000, the supervisor of a district, under the rule of *expressio unius*, acting as *ex officio* road commissioner, can make a contract involving expenditure of not more than \$1,000 without compliance with the formalities prescribed by such statute.

2. Highways §113(3)—Evidence held to support finding that supervisor's purchase of rock for less than \$1,000 without bids was a transaction separate from purchase at other times from same claimant.

On the issue of a county's liability, depending on whether a supervisor as road commissioner, had ordered of claimant more than

\$1,000 worth of rock without advertising for bids as required by Pol. Code, § 2643, subd. 11, as amended by St. 1919, p. 168, where estimated cost is more than \$1,000, evidence held to support findings that the purchase of rock for which payment was sought was a transaction separate and distinct from the purchase by the supervisor of other rock at other times for other roads.

3. Appeal and error ☞1011(1)—Finding on conflicting evidence conclusive.

Trial court's determination of question of fact on conflicting evidence is conclusive.

4. Highways ☞113(3) — Contract involving less than \$1,000 may be made without bids, though aggregate of similar contracts with same party exceeds \$1,000.

Supervisor could purchase crushed rock for an amount less than \$1,000 without advertising for bids under Pol. Code, § 2643, subd. 11, as amended by St. 1919, p. 168, requiring board of supervisors to advertise for bids before letting contract involving expenditure of more than \$1,000, though he purchased rock from same party at different times for different roads as separate and distinct transactions in an amount in excess of \$1,000.

5. Mandamus ☞167—Variance between claim and complaint in mandamus for issuance of warrant held not fatal.

Variance between claim as presented to and allowed by board of supervisors for "rock crushed and hauled and spread on" named street, and complaint of claimants in mandamus proceeding to require issuance of warrant in payment of claim, describing claim as for "rock crushed and hauled," held not fatal, where both claimant and supervisor understood that the word "spread," as used in the claim, had reference to the unloading of truck load of rock by opening the bed of the truck while truck continued in motion, so that the rock would be scattered on and over the road.

6. Counties ☞202—Omission of claimant's affidavit and certificate of clerk or auditor cured by board's allowance of claim.

Omission of claimant's affidavit to claim presented to board of supervisors, and the certificate of the clerk of the board or the county auditor as to the correctness of the computation of itemized statement of the claim, required by Pol. Code, § 4076, subd. 3, held cured by action of the board in allowing the claim.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Application of A. R. Sittig for a writ of mandamus against James M. Raney, as County Auditor of Napa County. Writ granted, and defendant appeals. Affirmed.

Clarence N. Riggins, of Napa, for appellant.
Frank L. Coombs, Nathan F. Coombs, and John T. York, all of Napa, for respondent.

HART, J. The plaintiff petitioned the superior court of Napa county for a writ of mandate to compel the defendant, as auditor of said county, to issue to him his warrant

on the treasurer of said county for the sum of \$873.80, for services and materials alleged to have been performed and furnished by him for road repair purposes in said county. Judgment awarding a peremptory writ of mandate as prayed for in the petition was given and entered, and from said judgment the defendant auditor appeals.

The claim which is the foundation of this suit is for the furnishing and delivery, upon the order of the supervisor, as ex officio road commissioner of supervisorial district No. 1, in Napa county, of crushed rock at certain points on a road known and designated as "Orndorff street," in said district and county, for use in repairing said road. "Orndorff street" is a road lying outside and terminating or beginning at one end of the municipal limits of the city of Napa, and, as the witnesses described it, "is a little piece of road lying between the Brown's Valley road and West Linn street," the latter street being within and running up to the "end of the city limits."

The complaint sets out the facts respecting the ordering of the rock by Mark Hein, supervisor of supervisorial district No. 1, the filing of the claim with the defendant, as auditor, etc., the presentation of said claim by said auditor in due legal form to the board of supervisors, the consideration and allowance of said claim by said board, and the ordering of the payment of the same by the drawing of a warrant therefor by said auditor against the county treasurer of said county, payable from road district No. 1 fund, the indorsement on the claim by the clerk of said board of his certificate certifying that the claim had been allowed in the sum of \$873.80 by said board, at a regular meeting thereof, and the approval in due form of said claim by Mark Hein, supervisor of said supervisorial district No. 1, the delivery of said claim and warrant form, "and the said attached papers," with the said certificates indorsed thereon, to the said auditor, and alleges that the auditor has ever since held in his possession said claim, etc., and refuses and has at all times refused to issue and deliver to plaintiff his warrant for the said claim.

The answer, after denying the essential or material averments of the complaint, pleads three separate and distinct special defenses. The special defenses raise the principal question in this case, and present the theory upon which the defendant refused and still refuses to draw his warrant on the treasurer for the amount of the claim. The specific grounds taken in the several special defenses are not the same, but the three practically involve the same ultimate proposition which follows from the theory upon which the question of the validity of the claim was contested at the trial of the action, and is contested upon this

appeal, to wit: That Mark Hein, supervisor of said supervisorial district, and as ex officio road commissioner of the road district embracing said supervisorial district, in violation of subdivision 11, section 2643 of the Political Code, as amended by the Legislature of 1919 (St. 1919, pp. 167, 168), himself undertook to enter into a contract with the plaintiff for the rock, and the delivery and "spreading" thereof over and along the roads in said district, at a sum in excess of the amount which it is legally competent for a county road commissioner to expend in the absence of a contract duly let and entered into for such a purpose by the board of supervisors.

It is further contended that there is a fatal variance between the claim as presented to and allowed by the board of supervisors and the claim as set out and relied upon in the petition for the writ of mandate. Objection is also made to the claim on the ground that it was not presented to the board in the form required by law. Several other like objections are made, all of which will hereinafter receive such notice as it may be conceived is required in disposing of this appeal.

That the principal question propounded here may, in the consideration and solution thereof, be the more clearly understood, it is orderly to present here the statutory provisions which are particularly pertinent thereto. Subdivision 11 of section 2643 of the Political Code, supra, reads as follows:

"Whenever it shall be determined that any grading, graveling, macadamizing, ditching, sprinkling, or other work upon highways is necessary, and is to be done, and where the estimated cost of such work amounts to more than one thousand dollars, the board of supervisors must, by proper order, direct the county surveyor to make definite surveys of the proposed work, and to prepare profiles and cross sections thereof, and to submit the same with the estimate of the amount or amounts of work to be done, and cost thereof, and with specifications thereof. Said report shall be prepared in duplicate, one copy to be filed in the surveyor's office, and the other to be filed with the clerk of the board of supervisors. The board upon receipt of such report must advertise for bids for the performance of the work specified. Such advertisement for bids must be published prior to the day fixed for the opening of bids, for at least once a week for a period of two weeks in a newspaper of general circulation printed and published in the county."

[1] It is manifest that, under the rule of *expressio unius*, etc., the above provision does not apply to any work that is specified therein where the cost thereof is less than or does not exceed the sum of \$1,000. Where the cost of such work is no more than \$1,000 or less than that amount, the same is to be done by the supervisor of each supervisorial district acting as ex officio road commissioner, under and by the authority of section 2645

of the Political Code, without observance of the formalities required by subdivision 11 of section 2643, or without the necessity of requiring any bond for the faithful performance of the work. In other words, where the work to be done does not involve a cost exceeding or which is less than the sum of \$1,000, it is not necessary to let the same by contract, it being within the authority and indeed the duty of the road commissioners of a county, under section 2645, to keep their roads within their respective districts in good and proper repair, and to that end they are authorized to purchase materials and employ all help and provide equipment necessary for the proper execution of their duties in that particular.

Having thus presented the statute law which has direct application to the ultimate question of fact presented here, it is proper that we should now state in substance the evidence from which the court manifestly educed its findings of fact. This evidence may be summarized as follows:

That on the 19th day of April, 1919, the board of supervisors of Napa county adopted and passed a resolution instructing the clerk of said board to advertise for bids for furnishing 2,500 cubic yards of crushed rock at the "Harris quarry, in Carneros district," according to certain specifications; that, in pursuance of the direction so made, the clerk published a notice in a local newspaper calling for such bids, and stating that the rock was to be "screened in two sizes, as directed by Supervisor Mark Hein," one-third of said rock to be ready for delivery "immediately after June 1, 1919, and up to July 1, 1919, and the remaining two-thirds of said rock to be delivered before September 1, 1919." The notice further stated that "Napa county will furnish the rock crusher and power line leading from the county road to the quarry and transformers," the successful bidder or bidders to supply the necessary electric power and quarry equipment. Two several bids or tenders were duly filed in response to said notice, viz.: One by J. H. Hein (a brother of Supervisor Hein), for \$1.25 per cubic yard, or an aggregate of \$3,125 for the entire contract, and one by Simon Lenz, for \$1.10 per cubic yard, or for the entire contract a total of \$2,750. These bids were opened and considered by the board on the 14th day of May, 1919, and, upon motion of Supervisor Hein, the same were rejected.

Supervisor Hein, when testifying, explained the reasons for the rejection of both bids as follows:

"Prior to the opening of the bids, between the time of the advertising and the opening of the bids, we had given a Mr. Errington permission to use the quarry on the Harris ranch, and there was not room in the quarry for two operators; that is one of the reasons, and the other

reason was, when I got far enough along, that is to open the bids, I found I could not comply with the specifications, as I had not the funds in district No. 1 to comply with our end of the specifications there."

It appears that the several different roads in Hein's district were in need of repairing, and that, subsequent to the rejection of the bids above spoken of, Hein, in order to put the said roads in proper condition, purchased and ordered from the plaintiff the quantity of crushed rock to be delivered and distributed at certain points on the different roads referred to. Hein testified that the ordering and purchasing of the rock for the roads was made at different times in the months of June and July. In other words, the order for the so-called "Fly District road" was given on June 25, 1919; and for the "Brown's Valley road" June 28th; for a cross road from Brown's valley to Carneros, 120 yards, July 3d; for the "Struve road," 90 yards, July 7th; for the "Mt. Veeder road," 80 yards, July 9th; for the "Jensen road," 10 yards, "Kilburn Street road," 10 yards, the "Steve Henry road," 60 yards, and the "Old Sonoma road," 75 yards, July 11th; for the "Raven Place road," 60 yards, July 16th; * * * for the "Orndorff Street road," 350 yards (the basis of the claim involved herein), July 26th. Hein testified that each of these orders was given separately, and separate delivery of the material made by the plaintiff. He also testified that the full scope of his arrangement with plaintiff was that the latter should furnish and deliver the rock at points on the road designated by him; that Sittig, himself, used his own equipment for transporting the rock from the quarry to the road, and hired and paid the men employed by him (plaintiff) to assist in such transportation. On the latter point Hein was corroborated by plaintiff. The said witness testified that the rock for the Orndorff street road was delivered between the 25th day of July and the 1st day of August, 1919.

Said Hein further testified that the work of scarifying the road preparatory to macadamizing it with the rock so furnished, and the work of macadamizing or spreading the material over and on those portions of the road which required repairing, were done by himself, personally (without expense to the county so far as his own labor was concerned), and one Franco, whom he had employed to assist him.

Franco testified that he worked 16½ days on several roads in road district No. 1, the Orndorff road being one, and for his services for all the work so done he was paid at the rate of \$6 per day; that he presented two claims to the board for his services, one of them being for \$84, for services performed on the Brown's Valley road. Franco said that he worked on the roads under the immediate

direction of Supervisor Hein and that he so worked only as a laborer, and had no control of other laborers doing like work.

The plaintiff testified that he procured the crushed rock furnished by him for Supervisor Hein from the latter's brother, J. H. Hein, who was the same J. H. Hein who submitted one of the rejected bids for supplying road district No. 1 with that material. He further stated that he hauled and delivered the rock for use on Orndorff street at the points on said road designated by Supervisor Hein at some time after the 22d day of July (the date on which the statute of 1919 went into effect), and the 1st day of August, 1919, on which latter date, it should here be stated, the record shows that the county engineer, previously appointed by the board of supervisors, entered upon the discharge of his duties as such in pursuance of the terms of his appointment, and to whom, from said date on, the duties of the supervisors of Napa county, as ex officio road commissioners, were transferred and committed under the law.

The record of the proceedings of the board of supervisors showing the presentation and the allowance of the claim in dispute, on the 12th day of November, 1919, was introduced in evidence, as were likewise the certificate of plaintiff to the effect that the claim, as presented was correct, the certificate of Mark Hein, as supervisor of district No. 1, certifying to the necessity for the materials and services specified in the claim, and that he ordered the same, and that the rock was delivered, and the services performed as set forth by claimant in the claim, the warrant, with the indorsement of said Hein approving and ordering the same, paid, an unsigned blank certificate of the auditor, and a brief statement by the district attorney to the effect that the claim as presented was illegal.

The auditor testified that, upon the presentation of the claim to him, he filed the same, and then presented it to the board of supervisors, after which it was allowed by said board and returned to him by the clerk of the board, indorsed as above indicated. The claim was not itemized but was for the lump sum of \$873.80 for "340 yards of rock crushed and hauled and spread on Orndorff street."

The evidence showed that some 11 other claims than the one for the rock furnished by plaintiff for Orndorff street were presented at the same time to the board of supervisors for rock furnished by said plaintiff to be used on other roads in the same district. The plaintiff testified that these claims were presented separately, because they were for purchases of rock ordered at different times, delivered at different times and used or to be used in the repair of different roads in said district.

From the evidence, of which the foregoing

statement embraces a brief digest, the court found, in substance, as follows:

That between the 22d day of July, 1919, and the 31st day of July, 1919, the said Mark Hein, as road commissioner of road district No. 1, Napa county, purchased for said county from the petitioner, for the repair of the roads and highways in said road district, and the petitioner furnished, sold, and delivered to said county for said purpose of repair, 340 cubic yards of crushed rock, said rock having been delivered within the time above mentioned, and which was used for repair on a county road known as "Orndorff street," for the price of \$873.80; that said Hein did not, as such road commissioner, nor otherwise, ever employ or engage petitioner to spread said rock upon said road, and that said petitioner did not spread said rock thereon, and that the said sum of \$873.80 was the price of said 340 cubic yards of crushed rock, and did not include or comprise any sum whatsoever for any work, labor, or services appertaining to the spreading of said rock upon said road; that said Hein, at other times and on other occasions, also purchased crushed rock from petitioner for the repair of the roads in his supervisorial district other than the Orndorff Street road, and the same were delivered at different places and different times and in different quantities along and adjacent to such other roads in said district according as repair of said roads necessitated, the same to be so delivered and as might from time to time be determined by said road commissioner, "and that none of the said purchases included the spreading of rock upon said roads, or any thereof, and each and all of said purchases and deliveries of said crushed rock were independent of each other, and each purchase and delivery was complete in and of itself, and each comprised a separate and distinct transaction;" that the board of supervisors did not pursue or act upon the procedure set forth in subdivision 11 of section 2643 of the Political Code in the purchase and delivery of said rock for Orndorff street or any other roads for which such rock was purchased by the road commissioner of said district, "but, in each and all of said instances, including said Orndorff street, said rock was purchased by the said road commissioner for the repair of the roads in said road district as the conditions of said roads necessitating such repairs might from time to time arise or require of him or his successor, in performance of their official duties."

The court further found:

"That it is true that 11 other claims against said county of Napa were presented by petitioner to said board of supervisors, but each one of said claims related to transactions independent of, and not embraced within, nor in any manner dependent upon or forming a part of the transaction for the purchase of said rock for said Orndorff street, upon which these proceedings are based, and that each of said eleven claims so presented were separately considered, acted upon, and allowed by the said board of supervisors, and separate warrants were issued by said auditor of said county of Napa for the payment of each thereof, and each and all of said warrants were delivered to said petitioner by said auditor, and paid by the county

treasurer of said county, prior to the commencement of these proceedings."

[2-4] That the foregoing findings derive sufficient support from the evidence is plainly apparent from the above-epitomized statement of the facts. It is readily to be conceded, though, that the record discloses some evidence which tends in a measure to support the theory of the defendant that the manner in which the several orders for crushed rock were made by Supervisor Hein was adopted by that officer for no other reason than to enable him to evade the law requiring the board of supervisors to let all contracts for certain specified work on the roads of the county involving an expenditure of more than \$1,000 only after proposals for doing such work have been duly advertised for and accepted; but this is only to say that there exists in the evidence addressed to that vital question a conflict which must be required to abide where its determination by the trial court has left it. It must therefore be accepted as settled propositions of fact in this case that the purchase of the crushed rock for the Orndorff street road by the road commissioner of road district No. 1, and upon which the claim in controversy arose and is founded, constituted a transaction separate from, independent of, and in no way connected with any other transaction occurring about the same time, and affecting said district, and that, the amount of the cost incident to said purchase being less than the sum of \$1,000 in the purchase of said rock or the delivery thereof for said Orndorff street, the board of supervisors of Napa county did not "follow, pursue, or act upon the procedure set forth in subdivision 11 of section 2643 of the Political Code." And from these facts it follows as a matter of law, as the court below adjudged, that the claim was and is a legal one against the county of Napa and upon the fund of road district No. 1.

If the foregoing considerations embraced all that there was to this appeal, it is manifest that they would alone be decisive of this appeal, but, as seen, the counsel for the appellant presents and presses upon us certain objections to the validity of the claim founded in an alleged failure of the claimant and the board of supervisors to follow the form prescribed for the presentation and allowance of claims against the treasury of a county. It is further urged, as we have already stated, that there is a fatal variance between the claim as presented to and allowed by the board of supervisors and the claim as pleaded under an amendment of the complaint allowed by the court in the course of the trial on the application of counsel for the plaintiff. These objections we will now consider, and the last stated will first receive attention.

The claim, as presented to and allowed by

the board, as will be noted, was for "340 yards rock crushed and hauled and spread on Orndorff street." The effect of the amendment of the complaint was merely to strike therefrom the words "and spread," as they appeared in said complaint in its original draft, and which, following the exact phraseology of the claim in suit, were used as descriptive of said claim. Thus, so it is argued, a variance arose between the claim as presented to and allowed by the board and the claim as pleaded.

The objection is extremely technical, and, if upon its face it does not appear to be without merit, the testimony of both Sittig and Supervisor Hein does show such to be the case. These witnesses testified that the arrangement between them for the supplying of the rock was that it should be delivered to the Orndorff street road and dumped at such places on or along said road as the supervisor should designate. Sittig said that when any of his trucks reached the road with a load of rock the bed of the truck would be opened, so that, as the truck continued in motion, the rock would be dumped or scattered on and over the road. This process was frequently referred to by the plaintiff while testifying as the act of "spreading" the rock on the road, but he explained that in thus describing the delivery of the rock he meant dumping or scattering it, as above indicated. Supervisor Hein also testified that it was not the understanding that plaintiff should do more than deliver the macadam as above described, or that the latter should spread the rock on and over the road as in repair thereof.

[5] Thus it appears quite clear that both plaintiff and said Hein, as ex officio road commissioner, so understood the signification of the word "spread" as it was used in the claim as presented and allowed. And, since such was the understanding of said Hein, a member of the board, it may be assumed that the board itself, in considering and passing upon the claim, had a like understanding of it, and was therefore not misled by the improper use of the word "spread" therein.

What is said above applies with equal force to the objection that the court found that the county was indebted to plaintiff on a liability different from that for which he presented his claim to the board of supervisors. The alleged "different liability" found by the court arises out of the amendment of the complaint above referred to, the finding as to the liability following the proof addressed to the nature of the claim as it was described by the complaint as amended.

The objections to the form in which the claim was prepared, presented to, and allowed by the board of supervisors are these: First, that the said claim was not presented and the payment thereof ordered in the form or

according to the procedure adopted by the board of supervisors of the county of Napa, with the approval of the state board of control, in pursuance of section 4076 of the Political Code, in that the claimant, in the place of attaching to the claim an affidavit stating that the claim and items as therein set out are true and correct, and that no part thereof has been paid, merely annexed his certificate thereto, certifying to the correctness of the claim; second, that there was not annexed to the claim a certificate either by the county clerk or the county auditor, "as to the correctness of the computations" of the itemized statement of the claim, as required by subdivision 3 of said section 4076.

[6] It is true, as the record shows, that the claim in dispute was not supported by the affidavit of the plaintiff, nor was there annexed thereto the certificate of the clerk of the board or the auditor which is required by the third subdivision of section 4076. Of course, it cannot be doubted for a moment that these omissions constituted irregularities in the matter of the presentation to and the allowance of the claim by the board of supervisors.

We are of the opinion, however, that these irregularities, since they merely go to the form or the procedure by which the claim was presented and allowed, were cured by the action of the board in allowing the claim. In other words, inasmuch as it is, under the law as we have pointed it out above, within the general powers of the members of the board of supervisors as such, acting in their ex officio capacities as road commissioners, to order materials for and cause work to be done in the repairing of the roads within their respective road districts, where the cost thereof in no case exceeds the sum of \$1,000, or is less than that amount, the allowance of a claim therefor by the board of supervisors, although said claim be irregular in form, amounted to a recognition of the correctness of the claim, and therefore a ratification of the act of the road commissioner resulting in the creation of the liability upon which the claim is founded. As is said in the case of *Power v. May*, 114 Cal. 207, 46 Pac. 6, quoting from the syllabi:

"The board of supervisors may, under certain circumstances, allow a claim against the county, although the formalities necessary to bind it were not originally employed. Thus, in respect to a matter concerning which the board had original power, it may, provided the service has been rendered, or the money expended for the benefit of the county in a manner authorized by law, cure informalities or irregularities in procedure by a subsequent ratification and recognition of its liability."

The doctrine of recognition by ratification of a liability against a county, arising upon an agreement or understanding which it is with-

in the general powers of the county to make for the benefit of the county, is considered and approved by a large array of authorities, many of which may be found cited in the footnotes of 15 Corpus Juris, p. 544, § 250. The rule is stated in the text as follows:

"Not only may the unauthorized contracts of a county be given validity by curative statutes, but contracts made on behalf of the county, and within the general powers of the county to make, but made in an irregular manner or by agents without the requisite authority, may be ratified by such county through the agents who would have been authorized in the first place to make such contract, and this ratification may be either express or implied, provided some official action by the proper authorities is taken in reference to the particular matter in question. The ratification must be made by the proper authorities in the same capacity in which they were required to act in making the contract in the first instance, and with full knowledge of the existence and nature of the contract in question. The unauthorized agent who made the contract cannot ratify it. It is also essential that the contract be of such a nature that the body assuming to ratify it would have had the power to make it in the first instance. A contract wholly unauthorized and void cannot be ratified."

See, also, *S. F., etc., v. Dunn*, 62 Cal. 580 et seq.; *Irwin v. County of Yuba*, 119 Cal. 686, 690, 52 Pac. 35; *Smeltzer v. Miller*, 125 Cal. 41, 57 Pac. 668; *Power v. May*, 123 Cal. 147, 55 Pac. 796; *Buck v. City of Eureka*, 124 Cal. 61, 56 Pac. 612; *Spence v. Clay County*, 122 Ark. 157, 182 S. W. 573; *Appel v. State*, 9 Wyo. 187, 61 Pac. 1015.

It may further be added that, as to the proposition that the claim, as presented to the board, was fatally defective in that there was not annexed thereto a certificate of the auditor authenticating the "correctness of the computations" of the claim, another reply thereto is that the claim was put in for a lump sum for the total amount of the rock furnished and delivered by the plaintiff, without stating in itemized form the number of cubic yards of rock so furnished and delivered, and there was, therefore, no "computation" to be made by the auditor as to said claim. We are, of course, not to be understood as holding that the claim as presented and allowed was in due legal form. To the contrary, it is obvious that it was not; for clearly the proper way to have prepared and presented it was to state therein the number of cubic yards supplied and delivered for use on Orndorff street. What we do say, though, is that the failure to present the claim in that form amounted only to an informality or irregularity, or in other words, did not involve the omission to observe a jurisdiction prerequisite to the due consideration of the claim by the board.

The cases cited by defendant as supporting his position that the mode prescribed by the

statute for the presentation of claims against a county must, to legally authorize the board of supervisors to allow such claims, be strictly followed, are not in point here. No useful purpose would be subserved by a review herein of all the cases so cited. It is enough to say, in referring to the doctrine of those cases, that it has never been questioned that, as to certain matters coming within the legal cognizance of the governing board and other officers of a county, the mode prescribed by the statute is the measure of the power of such officers, and that in such cases "the method of initiating the proceeding must be followed in order to make a valid exercise of the power there conferred." *Larsen v. City & County of San Francisco*, 182 Cal. 1, 6, 186 Pac. 757, 760. But we think it will be found to be generally true that in those instances where the mode prescribed for the doing of certain official acts is the measure of the power for doing them, the acts so required to be done are essentially jurisdictional—that is, they constitute jurisdictional prerequisites to a valid exercise of the power conferred and sought to be exercised. For, instance, let us take the case of *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260, one among the more recently decided cases cited by defendant. In that case a writ of mandate was sought to compel the superintendent of schools of Imperial county to approve and allow a warrant in the sum of \$531 drawn in favor of the appellant by the board of trustees of the central union high school district of Imperial county. The claim upon which the warrant was allowed by said board of trustees was for doing certain plastering work on the school building in said school district, the same not having been done according to the method prescribed by subdivision 22 of section 1617 of the Political Code, as that section and subdivision read prior to the amendment thereof by the Legislature of 1913. The said subdivision of said section provided that before making any contract for the expenditure of more than \$200 it was necessary for the board of trustees of a school district—

"to publish a notice calling for bids, stating the work to be done or materials or supplies to be furnished, and the time when and place where bids will be opened, at least once a week for two weeks in some daily or weekly newspaper published in the county," etc.

This course was not pursued. It was held that the claim was illegal and a writ of mandate was refused. The court said:

"Where the statute prescribes the only mode by which the power to contract shall be exercised the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases"—citing a number of cases.

The distinction between that case (Reams v. Cooley) and the instant case is obvious. In the former, there were certain steps required to be taken before the board of trustees could legally authorize the work to be done. In the present case, it was, under the law, within the discretion of the road commissioner and his duty to keep the roads in his district in repair, and, without resorting to any formalities for that purpose, purchase such materials and employ such labor as might be necessary to enable him to discharge that duty. When he has done this, and the cost has not exceeded the sum of \$1,000, a legal liability thereupon has arisen against the county for the materials and labor so furnished.

Manifestly no such liability could arise under subdivision 11 of section 2643, unless the terms upon which such liability may be created as prescribed by said subdivision are followed with substantial strictness; and this is precisely the situation that is presented in the case of Reams v. Cooley. The procedure prescribed for the presentation to and consideration by the board of supervisors of a claim based upon a liability created under section 2645 of the Political Code, vesting supervisors, as road commissioners, with the power, discretion, and duty of keeping the roads in their respective districts in good repair, is, as we have before declared, merely formal, and in no sense jurisdictional.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

53 Cal. App. 744

PEOPLE v. KRUVOSKY. (Cr. 962.)

(District Court of Appeal, First District, Division 2, California. Aug. 5, 1921.)

1. Criminal law §74(1), 742(1) — Weight of evidence and credibility of witnesses for jury.

The weight of the evidence and the credibility of the witnesses are, in the first instance, peculiarly within the province of the jury.

2. Criminal law §1160—Trial court's conclusion as to evidence supporting verdict not disturbed unless evidence inherently improbable.

After the verdict has been rendered, the weight of the evidence and the credibility of the witnesses are for the trial judge on motion for new trial, and his conclusion as to the sufficiency of the evidence to support the verdict will not be disturbed by the appellate court unless it is obvious that the testimony upon which the conviction was had is so inherently improbable as to be impossible of belief.

3. Criminal law §1170½(5)—Admission of testimony harmless where defendant himself testified as to same facts.

The action of the court in permitting cross-examination claimed to be improper, if error, was harmless, where the defendant himself testified as to the facts elicited on such cross-examination.

4. Witnesses §379(11)—Statement of witness held properly admitted for impeachment where no evidence of duress.

A signed statement previously made by a witness was properly admitted for purpose of impeachment over the objection that it was secured by duress, where there was no evidence of such duress.

5. Criminal law §369(2), 372(1)—Evidence of other crimes stated admissible where crimes are intermixed or details of criminal scheme.

Generally, evidence of an offense other than the one for which the defendant is being tried is not admissible, but if several crimes are intermixed or connected, so that they form an indivisible criminal transaction, and full proof of any one of them cannot be given without showing the others, evidence of one or all is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme.

6. Criminal law §369(8)—Evidence as to assault on prosecutrix's companion at same place and time admissible.

In a prosecution for rape, evidence as to an assault with intent to commit rape upon a companion of the prosecutrix, by the defendant and others, at the same place where the attack was made upon the prosecutrix, and at about the same time, *held* admissible, the crimes being so connected as to form an indivisible criminal transaction.

7. Criminal law §372(1)—Testimony as to other crime held admissible in view of conspiracy.

In a prosecution for rape, testimony as to an assault with intent to rape made upon a companion of the prosecutrix by defendant and others associated with him, at the same place that the rape was committed, and at about the same time, *held* admissible, in view of evidence establishing a conspiracy between defendant and others to commit the crime charged, and showing that both crimes were committed as a part of the same plan and design.

8. Criminal law §374—Conspiracy may be proved by circumstantial evidence.

In proving a conspiracy, so as to warrant admission of evidence of other offenses committed as a part of the same plan it is not necessary to prove that the parties met and actually agreed to undertake performance of the unlawful act, but conspiracy may be shown by proof of circumstances sufficient to satisfy the jury of its existence, leaving the weight and sufficiency of the evidence to the triers of questions of fact.

9. Rape ⚡40(1) — **Witnesses** ⚡340(3) — **Testimony as to moral delinquency of prosecutrix admissible to show consent in rape case, but not admissible as affecting her credibility.**

In rape prosecution, evidence as to the unchastity of the prosecutrix is admissible on the question of consent, but evidence of her moral delinquency is not admissible as affecting her general credibility as a witness.

10. Criminal law ⚡940—**Denial of new trial for newly discovered evidence held not error where materiality not shown.**

In prosecution for rape, in which the prosecutrix stated the different residences at which she had lived, denial of new trial on the ground of newly discovered evidence that she had resided at a place not enumerated by her during such testimony *held* not error, in the absence of a showing as to the materiality of such testimony.

11. Witnesses ⚡344(2)—**Prosecutrix cannot be impeached by evidence of sexual relations with men other than defendant.**

In a prosecution for rape, prosecutrix could not be impeached by testimony as to sexual relations with men other than the defendant, under Code Civ. Proc. § 2051, providing that a witness cannot be impeached "by evidence of particular wrongful acts."

12. Rape ⚡51(1)—**Evidence held to sustain conviction.**

Evidence *held* to sustain conviction for rape as against contention that it was so improbable as to be unworthy of belief.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Edward Kruvosky was convicted of rape, and from the judgment and an order denying defendant a new trial, he appeals. Affirmed.

Edmond H. Lomasney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Matthew Brady, Asst. Dist. Atty., and Stanislaus A. Riley, Deputy Dist. Atty., both of San Francisco, for the People.

LANGDON, P. J. This is an appeal from a judgment of conviction of the crime of rape. The first objection of the appellant that the verdict of the jury is contrary to the evidence may be disposed of briefly. The verdict is supported by the testimony of Jessie Montgomery, the prosecutrix, and by the testimony of Jean Stanley, who was her companion on the night of the crime. The jury believed this testimony, which was corroborated in part by the physical condition of the two women, who were bruised and beaten when found by the police within a short time after the assaults upon them, and by other evidence. Counsel for appellant argued to the jury, and now argues to this

court that the testimony of the two girls should not be believed. It is urged that the testimony of the prosecutrix in the present case differs from her testimony in the trial of a similar case against another defendant for a crime committed at the same place on the same evening. The testimony in the other case was introduced in evidence in the present case. Any apparent contradiction between it and the testimony in the present case was explained by the witness herself upon the stand. The argument of the appellant as to the improbability of certain testimony given by the prosecutrix concerning the matter of defendant's return to the house where she was lying helpless after his earlier assault, and his subsequent assault upon her, together with his argument as to the improbability of the testimony of the prosecutrix with reference to being forced to drink intoxicating liquor, was made to the jury; but evidently the testimony did not seem so improbable to them as to destroy its weight.

[1, 2] The weight of the evidence and the credibility of the witnesses are in the first instance peculiarly within the province of the jury when deliberating upon the guilt or innocence of a defendant. After their verdict has been rendered, the determination of such questions rests solely with the trial judge in passing upon a motion for a new trial. His conclusion as to the sufficiency of the evidence to support the verdict will not be disturbed by this court save in those rare cases where it obviously appears that the testimony upon which the conviction was had is so inherently improbable as to be impossible of belief. *People v. Von Perhacs*, 20 Cal. App. 48, 127 Pac. 1048. In the present case the jury, in its verdict, and the trial judge, in denying the motion for a new trial passed upon the weight and sufficiency of the testimony against the defendant.

[3] The second objection made by appellant is as to the scope of the cross-examination which was permitted of the witness Allen McDonald. It is not necessary for us to decide whether or not this cross-examination covered too broad a field, for the reason that objection was made to but two questions upon that ground, and the answers thereto permitted, over the objections of defendant, were not in the least prejudicial to the defendant. The prosecutrix had testified that the defendant had assaulted her, and had later left the house; that she was lying on a mattress on the floor, stripped of her clothing, and bruised and exhausted; that after a time the defendant and the witness McDonald returned to the house and again assaulted her, and remained there until they were taken into custody by the police.

The defendant had testified to having been at the house in question during the hours covered by the testimony of the prosecuting

witness, and had admitted leaving the house and returning to it again with McDonald, but had denied the assaults. He stated that he returned to the house to get his overcoat, which he had forgotten. McDonald was put upon the stand by the defendant, and interrogated regarding his meeting with defendant on the street after defendant had left the house, and regarding their return to the house together. He testified as to what occurred from the time they re-entered the house until the arrival of the police.

Upon cross-examination, the district attorney asked: "Q. Was that the first occasion on that evening when you saw Krivosky, when you met him at Ninth and Howard?" Objection was made to this question upon the ground that it was not cross-examination, and did not relate to anything testified to on direct examination. The objection was overruled, and the answer was: "No, sir." No prejudice could possibly have been suffered by the defendant by reason of this answer, because he himself had testified that McDonald had been at the house, and that defendant himself had been there during the hours covered by the testimony of Jessie Montgomery and Jean Stanley. No further objection was made to the cross-examination upon this ground until the following question was asked the witness: "Now what part of the house did this party go into?" This was objected to, on the ground that the witness had not been examined on direct examination about anything regarding the "party." The objection was overruled, and the answer was: "They went into the room as you enter on the left—the front room on the left."

Certainly, the defendant was not prejudiced by this answer. He had himself testified that when he arrived with the others at the house where the crime was alleged to have been committed, the party entered the house and went into the front room "on the left-hand side." There was no dispute about this fact whatever, and this answer by the witness McDonald could in no way have been prejudicial to the defendant. Later in the cross-examination objection was made by the attorney for the defendant to the use by the district attorney of the word "party" in referring to those who were at the house at the time under discussion. The objection was stated as follows: "Now, if your honor please, I object to the 'party,' and ask that the district attorney say who they were. There were several there." The district attorney amended his question so as to refer to "the party comprising Krivosky and his companions," to which counsel objected on the ground that "his companions" was not a sufficiently definite term, and asked that the parties be named.

[4] There was no objection interposed to any of the other questions asked upon cross-examination. The prosecution introduced in

evidence, for the purpose of impeachment, a signed statement previously made by the witness. Counsel for defendant objected to the introduction of this statement, on the ground that it was "secured from the man under duress, that he signed it against his will, that he was beaten and abused by the police before he signed it, and the only reason that he signed it was so that they might cease their brutal treatment." There was no evidence of any kind offered to sustain these charges. The record contains not one word upon these matters except the statement of counsel. Under such circumstances, this objection was properly overruled.

[5, 6] The next objection is to the admission of evidence as to an assault with intent to commit rape made upon Jean Stanley, the companion of the prosecuting witness, by the defendant and others at the same house where the attack upon Jessie Montgomery was made, and at about the same time. While it is the general rule that evidence of an offense other than the one for which the defendant is being tried may not be admitted in evidence against him, there are certain exceptions to this rule. An exception applicable to the present case is well stated in the case of *People v. Ciulla*, 187 Pac. 46, where it is said:

"If several crimes are intermixed or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of one or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme."

In the present case the testimony of Jean Stanley bearing upon the crime with which the defendant was charged could not be given without the recital of offenses against herself. The whole brutal story is so interwoven, and its incidents are so inseparable, that proof of the crime with which defendant is charged here must necessarily involve a reference to other offenses by him, such as assault with intent to commit rape, assault and battery, illegal purchase of intoxicating liquors, etc. But, under the rule laid down in the case of *People v. Ciulla*, supra, this testimony may, nevertheless, be admitted under the circumstances shown here.

[7, 8] Furthermore, the evidence in the record before us is sufficient to establish a conspiracy on the part of the defendant and others to commit the crime with which he is charged. In proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, but a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact.

People v. Schmidt, 33 Cal. App. 426, 444, 165 Pac. 555.

In the present case, the evidence shows that the crime against Jessie Montgomery and the crime against Jean Stanley were both committed as part of a plan and design entered into by the defendant and others. The evidence showed that the defendant and several other men held a whispered conversation in the Stroller's café, after meeting the girls, which conversation was not overheard by the girls. Shortly thereafter the girls and their escorts left the café and entered an automobile. The defendant and several other men also left the café and entered the automobile, which was driven to the house on Howard street where the crime was committed. The men entered, and the girls were later persuaded to enter. The door was opened by a man in charge of the house, and when the party entered the doors were locked after them. The girls later found, upon trying to escape, that all the doors had been locked. Intoxicating drinks were served frequently and regularly, and one of the girls was forced to drink, after she had refused to drink any more willingly. Several of the men assisted in this compulsion. One of the girls was then taken into the kitchen and told to remove her clothing and dance for the men there. Upon her refusal she was knocked down by a blow from the defendant. The other girl, upon coming to her rescue, was struck a severe blow in the face, which loosened her teeth and broke her nose, and otherwise injured her. One girl was then dragged into the bathroom, where she was assaulted by the defendant. The other girl was attacked by several men, and succeeded in escaping through a window, which she broke. The men had, in the meantime, turned their attention to the girl who was lying in the bathroom stunned—Jessie Montgomery—and upon becoming conscious she found herself in another room upon a mattress, where she was again assaulted by the defendant and others, after they had torn off all of her clothing. It appears that one of the men whom she charged with having assaulted her left the house at one time, and stood outside on guard to learn if the noise and cries of the girls could be heard from the outside. It was he who turned out the lights after one of the girls had escaped through the window, and who warned the others to leave, as "the cops" were coming.

Substantially the same facts were considered by division 1 of this court in the case of People v. Murphy, 200 Pac. 484, which was a prosecution of one of the other men who assaulted Jessie Montgomery upon this evening. In that case the court held that the conspiracy was established, and the testimony of Jean Stanley regarding an attempted crime against herself was properly admissible upon that theory.

[9] Appellant objects to an instruction by the trial court "that the moral delinquency of the girl complainant, if there be such moral delinquency, is not to be considered as affecting her credibility." In this state, in cases of this character the rule is that evidence of the unchastity of the prosecutrix is admissible as bearing on the question of consent, but evidence of her moral delinquency is inadmissible as affecting her general credibility as a witness. People v. Murphy, 200 Pac. 484. While we do not lend our approval to the instruction as given in this case, yet, for the reasons given in the case of People v. Murphy, supra, we do not believe that it was prejudicial.

Appellant's next objection is predicated upon the refusal of the trial court to permit the filing of certain affidavits in support of defendant's motion for a new trial. The affidavits were sworn to by Ludwig Achsman and Frieda Achsman, his wife, and were to the effect that on a certain date there had been residing at their home at 67 Crocker street, San Francisco, a young woman who had given her name to them as Jeanette Warden; that from the pictures appearing in the newspapers of the witness Jean Stanley, affiants believe that Jeanette Warden and Jean Stanley are one and the same person; that said Jeanette Warden worked at the Sanitary Laundry at the time she resided at the home of affiants; that while said Jeanette Warden was so residing at the home of affiants, the said Ludwig Achsman discovered a strange man in his kitchen one morning at about 4 o'clock; that this man was in his shirt sleeves, and that the kitchen of said residence was a room next to the room occupied by Miss Warden; that said Ludwig Achsman pursued said strange man into the street, but failed to catch him; that later in the day, when Miss Warden returned from her work, the said Achsman accused her of knowing this man, and of having received him in her room. She replied that the man must have been a burglar, and later said that she would rather go to jail than tell anything she knew. Said Achsman then told Miss Warden to leave his home, which she did.

[10, 11] Appellant contends that these affidavits furnished evidence impeaching the witness Jean Stanley, and that their subject-matter was newly discovered evidence, material to the defense. This argument is predicated upon the fact that, in the cross-examination of Miss Stanley, she had been asked if she had ever worked at the Sanitary Laundry, to which she had replied in the affirmative. Witness was then asked:

"At the time you worked in the Sanitary Laundry where did you reside? A. I lived at the Osirin Apartments, at Sixteenth and Mission."

Appellant contends that, because the affidavits indicate that Miss Stanley lived at

67 Crocker street for at least a part of the time that she worked at the Sanitary Laundry, therefore such affidavits contradict the testimony of the witness above quoted. It is possible, of course, that the witness may have moved to the Osirin Apartments after leaving 67 Crocker street. Appellant contends, however, that at another place in the testimony of this witness she enumerated the places at which she had lived since her arrival in San Francisco, and that 67 Crocker street was not enumerated among them, and that she stated that the places of residence which she so enumerated were the only places where she had lived in San Francisco. Even though this be true, it was not a contradiction in a material matter. The affidavits themselves state that the young woman known as Jeanette Warden lived at 67 Crocker street for only about 10 days, and it does not appear that this matter is of any materiality. Under these circumstances, this portion of the affidavit, taken in connection with the testimony of the witness, was clearly insufficient to cause the court to grant the defendant a new trial, and the remaining portions of the affidavit were clearly inadmissible for any purpose, and it was doubtless because of their inclusion therein that the trial court properly ordered the affidavits stricken from the record.

Jean Stanley was not the prosecutrix. Had she been, evidence of sexual relations with men other than the defendant might have been relevant upon the issue of consent, had that been made a defense. But the defendant not being charged here with having assaulted Jean Stanley, evidence of her sexual relations with another man was quite irrelevant and immaterial. The Code provides the method of impeaching a witness (section 2051 Code Civ. Proc.), namely: By contradictory evidence or by evidence that his (her) general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he (she) had been convicted of a felony. Appellant contends that these affidavits were to lay a foundation for impeachment of the witness, but we think they were not admissible for such purpose. At most, they furnished inconclusive and merely circumstantial evidence of a particular wrongful act on the part of the witness.

[12] The foregoing constitutes the specific assignments of error made by the appellant. In addition, he complains of the condition of the public mind at the time of the trial of the defendant, and of the effect upon the rights of the defendant. No motion was made for a change of venue. Reference is made to the sensational accounts printed daily in the newspapers about matters connected with the orgy at the Howard street

shack. The jury was carefully instructed by the trial judge not to read the newspapers, nor to discuss the case with any one, and there is no evidence in the record that any of them disobeyed these instructions. The record contains so much that is brutal and revolting that it would be strange indeed if there had not been an outburst of indignation from all good citizens. These things are inherent in the crime itself. But, despite the righteous indignation that must be aroused in all decent persons by the sordid testimony contained in the record in this case, there is nothing in the record to suggest that the defendant was not accorded a fair trial in every particular. On the contrary, the record is extraordinarily free from error, and every substantial right of the defendant was therein fully protected and freely accorded. The record overwhelmingly convicts him. There could be but one verdict upon such evidence, and that the jury has correctly rendered.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

53 Cal. App. 712

PEOPLE v. CAREY. (Cr. 969.)

(District Court of Appeal, First District, Division 2, California. Aug. 5, 1921. Rehearing Denied Sept. 3, 1921.)

1. Criminal law §811(5)—Instruction on credibility of one witness singled out from others held improper.

In prosecution for rape, instruction that "the moral delinquency of the girl complainant, if there be any such moral delinquency, is not to be considered as affecting her credibility," held improper, in that it singled out one witness from all of those who had appeared before the jury.

2. Criminal law §1172(2)—Instruction on credibility of witnesses held harmless in view of evidence.

In prosecution for rape, instruction as to credibility of prosecutrix, though improper in that it singled out such witness from others who had testified, was not ground for reversal where a careful review of the entire evidence fails to show that defendant was prejudiced thereby.

3. Criminal law §1172(1)—Instruction held harmless in view of evidence.

In prosecution for rape, instruction that one who aids and abets in a crime is a principal, though jury might have found that defendant might merely have aided others in the commission of the crime, held harmless where evidence of the assaults of all the others was admitted without objection.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

James Carey was convicted of rape, and he appeals. Affirmed.

W. F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Matthew Brady, Asst. Dist. Atty., and Stanislaus A. Riley, Deputy Dist. Atty., both of San Francisco, for the People.

NOURSE, J. Appellant was convicted on an indictment charging forcible rape upon Jessie Montgomery. He appeals from the resultant judgment, and from the order denying his motion for a new trial.

It is first urged that the testimony of the prosecutrix is inherently improbable and insufficient to justify the verdict. This testimony is substantially the same as that reviewed in *People v. Murphy*, 200 Pac. 484, and in *People v. Kruvosky*, 200 Pac. 831, this day decided. It is not necessary to review it here. It is enough to say that it was sufficient, if believed, to justify the verdict, and that it is not so improbable as to warrant this court in setting aside the verdict. The fact that when the prosecutrix was confronted with appellant she merely identified him as one of the party, and did not specifically charge him with rape, is said to be highly significant. But the prosecutrix was merely asked to make the identification.

[1, 2] Criticism is made of the following instruction:

"You are further instructed that the moral delinquency of the girl complainant, if there be any such moral delinquency, is not to be considered as affecting her credibility."

The vice of this instruction is that it singles out one witness from all those who appeared before the jury. The jury is told that the moral delinquency of that one cannot be considered by them, thus giving the impression that the moral delinquency of others might be considered. Though the instruction, as given, cannot be defended, a careful review of the entire record in this particular case fails to show that defendant was prejudiced by it. *People v. Murphy*, supra. The same criticism of the instruction on the flight of defendant which was made in the *Murphy* Case is made here, and the court in that case correctly disposed of that objection.

[3] Appellant was charged in the indictment as a principal. The court instructed the jury that one who aids and abets in the commission of a crime is a principal. This instruction is criticized upon the ground that the jury may have found that appellant merely aided *Kruvosky* or some other mem-

ber of the party in the commission of the crime, whereas the indictment does not designate such person as a principal. But evidence of the assaults of all the others was admitted without objection, and no prejudice resulted from this instruction.

On the hearing of appellant's motion for a new trial, the court made use of the transcript of the proceedings in *People v. MacDonald*, 200 Pac. 491. The record discloses that the discussion between court and counsel on this subject occurred after the court had determined to deny the motion, and that the *MacDonald* record was used by the court to satisfy counsel of the correctness of that ruling, rather than as a basis for it.

The judgment and order denying a new trial are affirmed.

We concur: **LANGDON, P. J.**; **STURTEVANT, J.**

53 Cal. App. 523

Ex parte SPAGNOLI. (Cr. 1005.)

(District Court of Appeal, First District, Division 1, California. July 14, 1921.)

1. Habeas corpus ☞3—Writ held not to be proper remedy for failure to proceed to trial of indictments.

Where defendant, convicted and imprisoned for rape, and indicted for five other felonies growing out of the same offenses, complains that the court refuses without cause to proceed to trial on the other indictments, habeas corpus is not the proper remedy, mandamus being available to petitioner.

2. Mandamus ☞61—Mandamus is the proper remedy for a refusal to try a defendant on an indictment within the statutory period.

Where the superior court, without good cause, has postponed the trial of defendant without his consent beyond 60 days allowed by statute, he is entitled to relief by a proceeding in mandamus, on a proper showing, to compel a dismissal of the indictment.

In the matter of the application of Ernest E. D. Spagnoli for a writ of habeas corpus in behalf of Edmund Murphy. Writ denied.

PER CURIAM. [1] This is an application for a writ of habeas corpus. From the facts alleged in the petition, it appears that Edmund Murphy is confined in the state prison at San Quentin under and by virtue of a certified copy of a judgment of the superior court of the city and county of San Francisco based upon the conviction of said Murphy of the crime of rape. Coincident with the return of the indictment upon which he was convicted, the grand jury returned five other indictments, accusing the defendant with various felonies growing out of the same offenses. Petitioner complains that the

superior court refuses, without cause, to proceed to trial on any of the charges contained in said last-mentioned indictments.

[2] Assuming that to be true, the petitioner is not in a position to avail himself of this proceeding in habeas corpus. Where the superior court, without good cause, has postponed the trial of a defendant, without his consent, beyond the 60 days within which the statute requires he must be tried or the indictment against him dismissed, he is entitled to relief by a proceeding in mandamus on a proper showing, to compel a dismissal of the indictment. In re Ford, 160 Cal. 334, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

The application for the writ is denied.

54 Cal. App. 11

Ex parte SPAGNOLI. (Cr. 1009.)

(District Court of Appeal, First District, Division 1, California. Aug. 12, 1921.)

Criminal law ⇨1218—Statute allowing jury to determine place of imprisonment construed as applying to rape committed without force.

Where in a prosecution under Pen. Code, § 261, subd. 3, for rape by force on a woman over 16 and less than 18 years of age, it was not incumbent on the jury under Pen. Code, § 264, to determine whether defendant should be imprisoned in the county jail or the state penitentiary, since section 264 applies only to subdivision 1 of section 261, relating to rape committed without force.

Application of Ernest B. D. Spagnoli for a writ of habeas corpus on behalf of Edmund Murphy, to be directed to the Warden of San Quentin prison. Writ denied.

Ernest B. D. Spagnoli, of San Francisco, pro se.

PER CURIAM. This is an application for a writ of habeas corpus on behalf of Edmund Murphy, who is imprisoned in the state prison, under conviction and sentence for the crime of rape of Jessie Montgomery, accomplished against her will and consent, and over her resistance. The jury rendered a general verdict of "guilty of the crime of felony, to wit, rape, as charged in the indictment." The court thereupon sentenced the defendant to imprisonment in the state prison at San Quentin.

On this application it is contended that because, during the trial, Jessie Montgomery testified that she was but 17 years of age at the time the rape was accomplished, it became incumbent upon the jury, under section 264 of the Penal Code, to determine whether or not the defendant, if found guilty, should be imprisoned in the county jail or in the

state prison. A complete answer to the contention is that said section is, by its terms, only made applicable in cases in which the prosecution is for offenses under subdivision 1 of section 261 of the Penal Code, the rape being accomplished without force, and the female being over the age of 16 years and under the age of 18 years, in which cases the jury has discretionary power to fix the place of imprisonment in either the county jail or in the state prison. In the case at hand, the offense was under subdivision 3 of the section, being accomplished over the resistance of the prosecutrix, by means of force and violence.

The application for a writ is denied.

53 Cal. App. 786

BERONIO v. EVERETT-JOHNSON LUMBER CO. (Civ. 3795.)

(District Court of Appeal, First District, Division 1, California. Aug. 9, 1921. Hearing Denied by Supreme Court Oct. 6, 1921.)

Brokers ⇨94—Mere soliciting agent could not bind seller.

A mere soliciting agent employed to obtain orders, which were subject to the approval of the seller, and for which, when accepted, he received a commission, had no power to bind the seller by making a sale.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. V. Beronio against the Everett-Johnson Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Brownstone & Goodman, of San Francisco, for appellant.

Henry A. Jacobs and G. B. Blanckenburg, both of San Francisco, for respondent.

KERRIGAN, J. Action for damages for failure on the part of defendant to deliver a carload of lumber. Plaintiff had judgment for \$562.50, and defendant appeals. Appellant urges several grounds for reversal. It is first contended that the alleged order of sale was taken by a soliciting agent of defendant, subject to confirmation, which was never had, and that such agent had no express or implied authority to make the sale. It is also urged that the parties never reached an agreement with respect to the terms of sale. Objection is also made that whatever agreement was entered into was violative of the statute of frauds, for the reason that it did not contain the essential terms and conditions of the alleged sale, nor

was it signed or delivered or intended to bind defendant.

There is no conflict in the testimony concerning the transaction leading up to the alleged sale. The entire case in this respect rests upon the testimony of plaintiff and the agent of defendant company. It appears therefrom without contradiction that defendant was engaged in the business of manufacturing and selling lumber, its principal place of business being at Portland, Ore. One E. L. Fifield was employed by the company as a soliciting agent for the sale of its products. Fifield maintained an office in San Francisco. On or about April 10, 1919, plaintiff called upon him at his place of business concerning the purchase of certain lumber. Fifield informed plaintiff that he had a carload of the character of lumber desired, and they then proceeded to discuss the price and terms of sale. These they agreed upon. The alleged sale consisted of 25,000 feet of manufactured lumber at the price of \$38.50 per 1000 feet. This agreement between plaintiff and Fifield was entirely oral. They then discussed the terms of payment, but the record is not clear that any definite arrangement was agreed upon between them upon this subject. Plaintiff testified that he was willing to pay in the usual way—80 to 90 per cent. after receipt of the bill of lading. Whatever these terms might be, they were acceptable to Fifield. Upon concluding these arrangements Fifield forwarded a memorandum of the agreement, signed by himself, to defendant. Both plaintiff and defendant testified that the order was sent to defendant for confirmation. Upon receiving the order defendant company refused to accept the same unless plaintiff would agree to honor a sight draft in payment of the lumber, and so advised Fifield. Plaintiff would not agree to these terms, and nothing was further done in the matter.

We have examined the record carefully, but we fail to find any evidence which shows that Fifield had any authority to complete a sale for the account of defendant. On the contrary, it affirmatively appears without contradiction that he was a mere soliciting agent employed to obtain orders, which were subject to the approval of the company, and for which, when accepted, he received a commission. This being so, he had no power to bind defendant, and, if his act could be construed as an attempt to do so, it was without authority.

The conclusion we have reached makes it unnecessary to discuss the various questions arising under the statute of frauds relating to the sufficiency of the memorandum made by Fifield.

The judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 783

WAGNER v. MEINZER. (Civ. 3823.)

(District Court of Appeal, First District, Division 2, California. Aug. 9, 1921.)

1 Appeal and error ⇨1011(1)—Findings based on conflicting evidence not disturbed.

Findings of trial court on conflicting evidence cannot be disturbed on appeal.

2. Adverse possession ⇨90—Payment of taxes on land described sufficient establishment of title to overlap by adverse possession.

The payment of taxes on land assessed according to description in a deed is a payment of taxes on land included in an overlap, for the purpose of establishing a title thereto by adverse possession.

3. Appeal and error ⇨1170(3)—Misstatements in pleadings held harmless.

Inaccuracy in stating facts in answer and cross-complaint in ejectment suit were harmless, and a reversal could not be had of a judgment in favor of the defendant where all the facts proven were beyond dispute, and were within the knowledge of both parties before the trial, in view of Const. art. 6, § 4½.

4. Appeal and error ⇨1097(1)—Decision on former appeal law of case.

The decision of a case on appeal is the law of the case on a subsequent appeal, where the facts are substantially unchanged, except that on the second trial there was a conflict in the evidence on a question which on the first appeal was admitted, which conflict was resolved by the trial court in favor of the party that prevailed on the prior appeal.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Anna M. Wagner against Gottlieb Meinzer. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 189 Pac. 435.

Fabius F. Finch and Paul F. Fratessa, both of San Francisco, for appellant.

Carl W. Mueller, of San Francisco, for respondent.

LANGDON, P. J. This is an action in ejectment to recover possession of about 7 feet 10 inches of land on Nebraska street, San Francisco, together with damages for its retention. The judgment was in favor of the defendant, from which the plaintiff appeals.

[1] This is the second trial of the action. Upon the first trial, judgment was in favor of plaintiff, defendant appealed, and the judgment was reversed. The opinion of Division 1 of this court upon the former appeal appears in 38 Cal. App. 670, 177 Pac. 293. From the statement of facts in the opinion upon the former appeal, it would seem that the facts shown are substantially the same upon both appeals. The additional testimony

upon this appeal is stated by appellant to be the testimony of Jacob Corinson, called by plaintiff in rebuttal, but this negative testimony at best raises a conflict in the evidence which was resolved against the plaintiff by the trial court, and cannot be disturbed here. It would therefore appear that there is no substantial difference in the record upon the two appeals which would change the rule of law announced by the court upon the former appeal.

[2] Appellant also urges that, because the defendant paid taxes upon land assessed in the manner described in his deed, and not upon land assessed in accordance with the proper description of the land actually occupied by him, he has not complied with the statutory rule with reference to payment of taxes upon land held adversely. That contention is fully met by the case of Price et al. v. De Reyes, 161 Cal. 484, 119 Pac. 893, where it was held that as a division line, established as in the present case, attaches itself to the deeds of the respective coterminous owners, and defines the lands described in each deed, so that the one in possession of the overlap holds title thereto by the same tenure as he holds the lands technically embraced in the description, the payment of the taxes on the land assessed according to such description is a payment of taxes on the land included in the overlap, for the purpose of establishing a title thereto by adverse possession.

[3] The only other matter deserving attention is with reference to the pleadings. Counsel for appellant has most ably made the most of every possible technical argument on this point. It is true the defendant, in his answer and cross-complaint, has opened the way to these objections by reason of certain errors in descriptions, and other inaccuracies in stating the facts, as they were developed without controversy, by the evidence. However, there are two answers to appellant's objections. One is, that the defendant would have been entitled to amend to conform to the proof, and there is no claim that such an amendment would have taken the plaintiff by surprise. On the contrary, it is perfectly clear that all the facts proven are beyond dispute, and were within the knowledge of both parties before the trial. Therefore, no prejudice was suffered by appellant on this account. The other answer to these objections is that the record presents essentially the type of case to which section 4½ of article 6 of our Constitution was intended to apply. It is apparent from the entire record that substantial justice has been done between the parties, except for the fact that the defendant has been done an injustice in being subjected to this needless second appeal upon a record substantially the same as the one previously passed upon in his favor by the appellate

court, and by the Supreme Court in its denial of a hearing of the case.

[4] The decision of this case upon the former appeal is the law of this case, because the facts are substantially unchanged, the difference being that on the present appeal there is a conflict upon a question which on the former appeal was admitted, but that conflict was resolved by the trial court in favor of the defendant.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

53 Cal. App. 377

PFITZER et al. v. CANDEIAS. (Civ. 2257.)

(District Court of Appeal, Third District, California. Aug. 4, 1921. Hearing Denied by Supreme Court Oct. 4, 1921.)

1. Evidence ☞13—Common knowledge that live stock may tramp out alfalfa.

It is a matter of common knowledge that alfalfa may be tramped out or damaged by live stock when land is not wet.

2. Landlord and tenant ☞105—Lease held to entitle lessor to cancel for damage to alfalfa.

A lessor might forfeit where lessee breached covenant not to turn live stock upon alfalfa when land was wet, although the lessor under the lease had the option of requiring the lessee to reseed.

3. Landlord and tenant ☞105—Notice to lessee to keep stock off of wet alfalfa held unnecessary before forfeiture.

A notice to surrender possession was not insufficient because it did not require the performance of lessee's covenant to keep his stock off of alfalfa land while wet, since the performance of the covenant was impossible in so far as past breaches were concerned, in view of Code Civ. Proc. § 1161.

4. Landlord and tenant ☞105—Lease held properly cancelled for breach of covenant.

In action to cancel lease because of breach by lessee of a covenant not to permit live stock to go upon alfalfa land while wet, held that a forfeiture was properly granted as against an objection that the injury caused by the breach was capable of compensation in damages under Civ. Code, § 3275, lessee having willfully refused to comply with such covenant.

5. Appeal and error ☞1170(3)—Use in pleading of term rental value instead of damages held not prejudicial.

In an action by lessor to cancel lease, held that plaintiff's use in his complaint of the term "rental value," rather than the word "damages," was harmless in view of Code Civ. Proc. § 1174, and Const. art. 6, § 4½.

6. Landlord and tenant ☞286—No adjudication of future damages.

Civ. Code, § 3283, providing that damages may be awarded for detriment certain to result

in the future, does not authorize a judgment in favor of plaintiff in an action to cancel a lease in addition to past damages, "the further sum of \$4.05 per day for each day hereafter during the time that defendant occupies said premises."

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by William Pfitzer and another against A. S. Candeias. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

L. C. Pistolesi, of San Francisco (O. F. Meldon, of Sacramento, of counsel), for appellant.

F. W. Henderson, of Merced, for respondent.

FINCH, J. Plaintiffs were given judgment, under the provisions of section 1174 of the Code of Civil Procedure, for the cancellation of their lease of certain premises to the defendant, on account of his breach of one of the covenants thereof, and for damages to the lands leased and those occasioned by the unlawful withholding thereof after the default of which complaint is made.

The defendant was in possession of the premises under a lease for the term of five years from the 1st day of January, 1918. A large part of the lands leased was in alfalfa. By the terms of the lease the defendant agreed "to keep all stock off the alfalfa land when the same is wet." The lease further provided:

"If default shall be made in any of the covenants herein contained, that it shall be lawful for the said parties of the first part to re-enter said premises, and to remove all persons therefrom."

From evidence in which there was a substantial conflict, the court found:

"That said defendant * * * has failed and refused to keep his said stock off of said alfalfa land when the same was wet; that said defendant suffered and allowed his stock, consisting of dairy cattle in large numbers, to run upon the land seeded to alfalfa upon said premises while the same was wet; that on numerous occasions in the year 1920, prior to the filing of the complaint in said action and the service of the notice requiring possession as hereinafter found, said defendant suffered and allowed his said stock to run upon the land in alfalfa so leased to him while the said land was wet; that there was a good stand of alfalfa upon not less than 45 acres thereof; that, by reason of its being wet, cattle pasturing thereon bogged into same, tracked it up and injured and destroyed to a great extent the alfalfa growing thereon."

The lease provided that—

"In the event that any of the alfalfa is tramped out or damaged by stock, said second party agrees to reseed the same at his own cost and expense."

[1, 2] Appellant contends that—

"The idea that a forfeiture was intended to result from the mere circumstance of stock going upon the alfalfa land when wet is negated by the provision requiring the lessee to reseed such land."

It is a matter of common knowledge, however, that alfalfa may be "tramped out or damaged" by live stock when the land is not wet. Therefore the provision requiring reseeded can be given effect independent of its application to injuries of the character charged. Doubtless the lessors could have waived the forfeiture and required the lessee to reseed the land, but they were not limited to the latter remedy. The lessee expressly covenanted "to keep all stock off of the alfalfa land when the same is wet," and that his breach of "any of the covenants" should work a forfeiture. Under the findings of the court, he willfully refused to comply with his agreement, and the choice of remedy for the breach is not with him, but with the lessors.

[3] Appellant urges that the notice to surrender possession was insufficient, because it "did not require of him the performance of his covenant to keep his stock off of the alfalfa land while wet." The contention is without merit. Manifestly the performance of the covenant was then impossible in so far as past breaches were concerned. Section 1161, Code of Civil Procedure, provides that, where performance of a covenant is no longer possible, demand for the performance thereof is not required. *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449; *Zucco v. Farullo*, 37 Cal. App. 562, 174 Pac. 929; *Mathews v. Digges*, 188 Pac. 283.

[4] It is next contended that it was error to declare a forfeiture of the lease, because, it is argued, the injury caused by the breach was capable of compensation in damages, citing section 3275, Civil Code. That section provides:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

In the case of *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702, it is said that the word "willful," as used in section 3275, means "voluntary" or "intentional" and does not imply a malicious breach. The opinion further states that—

"The authorities clearly show that the cases where compensation has been allowed were * * * where, as was said by Chief Justice Redfield, it would not be necessary to send the issue of the amount of damages either to a jury or masters, before the court could grant relief. In *Wafer v. Mocato*, 9 Mod. 112, it was said: 'For this court never relieves but in

such cases * * * where there is some rule to be the measure of such damages, to avoid being arbitrary.'"

premises"—and as so modified, the judgment is affirmed, neither party to recover costs of appeal.

See, also, *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666.

We concur: HART, J.; BURNETT, J.

[5] The plaintiffs were given judgment for the amount due as rent up to the time the judgment was rendered at the rate of \$4.05 a day, being $\frac{1}{365}$ part of the annual rental provided for in the lease. The answer alleges "that the rental value of said premises is no more than is mentioned in said lease." Conceding that under the provisions of section 1174, Code of Civil Procedure, a judgment for rent, as such, is authorized only in case of default in payment of rent, that section provides for the assessment of damages occasioned by the unlawful detainer, and the minimum damages in such a case is the rental value of the premises. In this case the plaintiffs alleged that the rental value was \$6 a day, and prayed for judgment at that rate. The defendant did not demur to the complaint, but alleged that the rental value was what the court found it to be. The case was tried upon the theory that the rental value was an issue, and it would be substituting form for substance to hold on appeal that the judgment must be reversed on the purely technical ground that the term "rental value" was employed rather than the word "damages." In the absence of other damages shown, the rental value of the premises was the measure of damages, and it is not perceived in what manner the appellant could have suffered prejudice by the use of the one term rather than the other. It is a clear case for the application of the rule prescribed by section 4½ of article 6 of the Constitution.

[6] The court rendered judgment for "the further sum of \$4.05 per day for each day hereafter during the time that defendant occupies said premises." Respondents contend that this part of the judgment is authorized by the provision of section 3283, Civil Code, that damages may be awarded "for detriment * * * certain to result in the future." In cases of this character, a defendant may hold possession, under certain conditions, pending appeal. It may be months, or even years, before the defendant is required to surrender possession. It does not appear by what means the court can determine what damages are "certain to result in the future." The value of the use and occupation may be greater or less than at the time of the trial. No statute or decision has been cited, and none has been found, which would authorize a judgment of the character rendered for future damages.

The judgment is modified by striking therefrom the following: "And for the further sum of \$4.05 per day for each day hereafter during the time that defendant occupies said

In re WALL'S ESTATE.

WALL v. HUNTER. (L. A. 6623.)

(Supreme Court of California. Sept. 13, 1921.
Rehearing Denied Oct. 13, 1921.)

1. Wills ⚡159—Undue influence must operate at time of execution.

Undue influence which will invalidate a will must operate upon the mind of the testator at the time of its execution.

2. Wills ⚡286—Failure to deny undue influence held immaterial.

In a proceeding to revoke probate of a will for undue influence, where executor answered, but heirs charged with undue influence, and cited as required by Code Civ. Proc. § 1328, did not answer, failure of heirs to answer the charge of undue influence did not relieve contestant from proving all material allegations put in issue by the executor.

3. Wills ⚡283—Denial of evidentiary matters unnecessary in proceeding to revoke probate.

In proceeding for revocation of probate of a will for undue influence, it was not necessary to deny allegations of matters of an evidentiary nature, such as the fact that defendants had at previous times secured property from the testator without consideration, and by the exercise of undue influence, it being sufficient that the answer specifically denied each and every allegation of exercise of undue influence upon the testator at the time of or in connection with the execution of the will.

4. Wills ⚡166(5)—Gift of small amount to wife not substantial evidence of undue influence.

A will leaving only \$100 to wife was not of itself sufficient evidence of undue influence.

5. Jury ⚡70(8)—Special venire discretionary.

Court has discretion to order a special venire as provided in Code Civ. Proc. § 226, notwithstanding that there are sufficient names in the term trial jury box.

6. Appeal and error ⚡231(1)—Defect in order for venire not considered where not pointed out.

Error of the court in an order directing sheriff to summon 24 good and lawful "men" of the county, whereas, by reason of the amendment to Code Civ. Proc. § 226, by St. 1917, p. 1284, the venire should have required the summoning of good and lawful "persons," will not be considered on appeal where the objection was not specifically pointed out to the trial court.

7. Jury ⚡115—No right to challenge panel in civil case.

The right to challenge the entire panel exists in criminal cases (Pen. Code, §§ 1055, 1064), but in civil cases the right of challenge is confined to the individual juror (Code Civ. Proc. § 601).

8. Jury ⚡70(11)—Sheriff, because of relations with attorney, not disqualified to summon a special venire.

In a proceeding to revoke probate of a will, sheriff was not disqualified to summon a

special venire by reason of the fact that one of the attorneys in the case who was charged with undue influence was also an attorney for a corporation of which the sheriff was a director, and there was no basis for a challenge to the entire panel, even if such a challenge was permissible in a civil case, as in a criminal case (Code Civ. Proc. § 602, Pen. Code, § 1064).

9. Wills ⚡350—Judgment for revocation of probate after reciting verdict for defendant should have formally denied petition.

A judgment against petitioner in a proceeding for revocation of probate of a will, which, after stating that the jury "duly rendered their verdict in favor of defendant," decreed that the executor recover his costs from plaintiff, was erroneous, as not formally denying the petition, but the petitioner was not injured by the omission.

In Bank.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

In the matter of the estate of Thomas D. Wall, deceased. Proceeding by Sarah J. Wall, surviving wife, against J. George Hunter, executor, for revocation of probate of will. From a judgment sustaining the will, the wife appeals. Affirmed.

See, also, 199 Pac. 775.

D. B. Chapin, of Los Angeles, for appellant.
Adair & Winder, of Riverside, for respondent.

WILBUR, J. This is an appeal by the surviving wife from a judgment sustaining a will in a proceeding for the revocation of the probate of a will instituted by her. The grounds of contest were undue influence and insanity. The issue of insanity was submitted to the jury, and a verdict was rendered in favor of the respondent, sustaining the will. As no substantial evidence of insanity was produced, the verdict of the jury holding the decedent to be sane is not attacked by appellant. The issue of undue influence was withdrawn from the jury on motion of the executor on the ground that there was not sufficient proof of undue influence to go to the jury, and this order withdrawing such issue appellant claims to be erroneous.

[1] The will is charged to have been secured by undue influence of John J. Wall, a brother of the testator, and Eliza Smith and Ann McLennan, sisters of the testator, and J. George Hunter and A. H. Winder, who were nominated as executors of the will, and were subscribing witnesses thereto. A. H. Winder was consulted by the deceased as his attorney and drew the will in that capacity. J. George Hunter had nothing to do with the execution of the will except to act as witness thereto at the request of the testator. There is no evidence that either of these parties exercised any influence

whatever over the testator in connection with the execution of the will. There is no evidence whatever that the brother or sisters in any manner participated in or had anything to do with, or exercised any influence over or held any communication, with the testator in relation to the execution of the will. Undue influence must operate upon the mind of the testator at the time of the execution of the will. Not only is there no evidence of the exercise of influence at or about the time of the execution of the will, but also there is no evidence that at any time any of the parties charged with the exercise of undue influence, other than the attorney who prepared the will, ever addressed themselves in any manner directly or indirectly to the deceased in relation to the execution of the will in question, or any other will, and there is no evidence that the attorney exercised any undue influence over the testator. It follows that the order of the court withdrawing the issue of undue influence from the jury was proper.

[2] However, before leaving this branch of the case, we will state in a general way the position of the appellant, the plaintiff in the court below, and indicate the answer to her contentions. First. The appellant relies upon the fact that certain allegations of her petition were not denied by some of the heirs charged with undue influence. The situation in that regard is as follows: Upon the filing of the plaintiff's petition for the revocation of the will a citation was issued and served as required by section 1328, Code of Civil Procedure, directed to the executor of the will and to all the legatees and devisees mentioned in the will and heirs residing in the state, requiring them to appear and show cause why the probate of the will should not be revoked. The only answer filed to the petition was that of the executor, which he filed on behalf of himself and all other persons who had appeared in the proceeding. The answer of the executor denied the allegation of the petition now relied upon by the appellant in support of her claim that undue influence was established, but she contends that the failure of the heirs charged with undue influence to deny the allegations of the petition amounted to an admission of the truth of such allegation. This claim, and others based upon it, may be dismissed from further consideration upon calling attention to the fact that, as between the executor and the plaintiff, the facts alleged and relied upon by the plaintiff were put in issue, and that therefore the failure of the heirs to deny such allegations is of no significance whatever. The plaintiff could not secure the revocation of the will without overcoming all of the opposition to such revocation, and this required her to prove all the petitioner's material allegations put in issue by the executor.

[3] The answer of the executor directly

denied the allegation of insanity, and directly denied the exercise of undue influence by any of the parties charged therewith. The petition alleged many matters of an evidentiary nature, such, for instance, as the fact that some of the brothers and sisters had at previous times secured property from the testator without consideration, and by the exercise of undue influence. It was not necessary to deny these evidentiary matters, and the failure to do so did not admit such evidence where the answer specifically denied each and every allegation of the exercise of undue influence upon the testator at the time of or in connection with the execution of the will in question. *Racouillat v. Rene*, 32 Cal. 450; *Wormouth v. Hatch*, 33 Cal. 121; *Jones v. City of Petaluma*, 36 Cal. 230, 233. For this reason we will not enter into a detailed consideration or discussion of the facts claimed to have been admitted. Most of these, however, were formally and specifically denied for lack of information and belief by respondent.

[4] It is claimed that the will itself is evidence of undue influence, because of its unnatural character. It is true that the will left only \$100 to the wife, but in view of the fact that she alleges that decedent had already begun one action for divorce against her, and contemplated another, it is not surprising that she was not left a larger amount. Letters by the testator, written long before the will was executed, make it plain that he had no affection or regard for his wife. The will was not unnatural under the circumstances; but, even if it was, this alone could not only justify a verdict based upon undue influence. The evidence, considered without the facts erroneously claimed by the appellant to be admitted by the pleadings, falls so far short of constituting substantial or sufficient evidence of undue influence to be presented to the jury that we refrain from further discussion thereof.

The appellant relies upon other alleged errors for a reversal, and we proceed to a consideration of those which merit discussion. Plaintiff made a motion for a judgment on the pleadings. In view of the fact that all material facts were put in issue by the answer, the motion was properly denied.

[5] Plaintiff made a motion that the case be tried by a jury drawn from the trial jury box. This motion was denied, and the trial court ordered a special venire, no jury being in attendance or drawn. It is shown by affidavit that at the time the motion was made, and at the time of trial, there were 250 names in the term trial jury box, properly placed therein. The better practice is to use jurors whose names are drawn from the term trial jury box. *People v. Suesser*, 142 Cal. 354, 360, 75 Pac. 1093. It is well established, however, that the court had dis-

cretion to order a special venire, as provided in section 226, Code of Civil Procedure, notwithstanding the fact that there are sufficient names in the term trial jury box, *People v. Suesser*, supra; *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, 103 Pac. 190, and cases there cited. The denial of petitioner's motion was within the discretion of the trial court.

At the time of trial the plaintiff challenged the jury panel upon the following grounds: First, that the panel was not drawn according to law; second, that the panel was not drawn in compliance with plaintiff's demand heretofore made—that it was not summoned to attend forthwith as required by section 226, Code of Civil Procedure; and, third, that the sheriff was disqualified to act.

[6] The order for a special venire was erroneous, for the reason that it directed the sheriff to summon 24 good and lawful men of the county, whereas, by reason of the amendment of 1917 (St. 1917, p. 1284) to said section 226, Code of Civil Procedure, the venire should have required the summoning of good and lawful persons. This objection, however, was not specifically pointed out to the trial court, and would, no doubt, have been corrected had the specific objection been made; and therefore we will not consider the objection upon appeal.

[7, 8] The contention that the sheriff was disqualified to summon a jury, was based upon the fact that Mr. Winder, one of the attorneys in the case who was charged with undue influence, was also an attorney for a corporation of which the sheriff was a director. This was insufficient to show disqualification. The right to challenge the entire panel exists in criminal cases (sections 1055, 1064, Pen. Code), but in civil cases the right of challenge is confined to the individual juror (section 601, Code Civ. Proc.); moreover, the basis of the challenge would have been insufficient even if such a challenge was permissible in a civil case as in a criminal case (Code Civ. Proc. § 602; Pen. Code, § 1064).

[9] Appellant complains of the form of judgment which, after stating that the jury "duly rendered their verdict in favor of defendant," decrees that the executor recover his costs from plaintiff. The judgment should have formally denied the petition for the revocation of the probate of the will, but we cannot see that the appellant is injured by the failure to expressly deny her petition.

The appellant objects to the exclusion of certain evidence offered to prove undue influence. The evidence is set out in the transcript. It is unnecessary to consider in detail its admissibility, for the reason that giving to it all the probative value claimed for it by the appellant, it is insufficient, together

with all other evidence produced by the appellant, to justify the submission of the issue of undue influence to the jury.

All other alleged errors claimed by the appellant are either disposed of by what has already been stated or are too trivial to merit discussion.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; SHAW, J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

187 Cal. 104

CHAMBERS, State Controller, v. HATHAWAY et al. (L. A. 6183.)

(Supreme Court of California. Sept. 16, 1921.)

1. Domicile ⇨4(2)—Domicile a question of intent.

Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternatively, the question which of the two places is his legal residence is almost altogether a question of his intent, under Pol. Code, § 52.

2. Domicile ⇨10—Registration affidavit held to constitute declaration as to residence.

An affidavit, made by one registering as a voter, stating his residence to be at a certain place within the state, constituted a declaration that at that time his legal residence was at such place.

3. Evidence ⇨75—Failure to introduce records raised inference that property was not taxed in state.

In action tried in Los Angeles by state controller to recover inheritance taxes, where records of taxation were at hand but were not introduced in evidence, an inference arises, that there was no record of any taxation of decedent's choses in action at such place, under Code Civ. Proc. § 2061, subd. 6.

4. Taxation ⇨867(1)—Finding that decedent was resident of state not supported by evidence.

In an action by state controller to recover inheritance taxes, a finding that decedent was a legal resident of the state at the time of his death held unsupported by the evidence.

5. Taxation ⇨900(5) — Decree determining taxability of property of decedent held appealable.

A decree in a special proceeding by state controller under Inheritance Tax Act, § 17, determining that the property of decedent's estate was subject to inheritance tax, was appealable under Code Civ. Proc. § 963, subd. 1; subsequent appraisal and collection of the tax being merely the process of enforcement of the judgment so given.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceeding for collection of inheritance tax by John S. Chambers, as controller of the State of California, against Julia A. Hathaway and another. From a decree in favor of the controller, the named defendant appeals. Reversed.

Anderson & Anderson, of Los Angeles, and W. W. Wight, of Milwaukee, Wis., for appellant.

John W. Carrigan and Edwin H. Pennock, both of Los Angeles (James L. Atteridge and Robert A. Waring, both of Sacramento, of counsel), for respondent.

SHAW, J. This is a proceeding by the state controller, under the inheritance tax act, for the collection of inheritance tax alleged to be due upon the estate of Frederick N. Finney, deceased. Julia A. Hathaway is interested in said estate as one of the executors of the will of said decedent under an appointment by the court of probate in the state of Wisconsin, and also as a beneficiary under his will. She alone has appealed from the decree of the court below in favor of the controller.

The complaint alleges that Finney died the owner of notes, bonds, and stocks of the value of \$138,300, and other property, and that at the time of his death he was a resident of Los Angeles county, Cal. The answer denied the allegations as to the residence of the decedent and averred that at the time of his death he was a resident of Milwaukee, Wis. Upon this issue the court below decided in favor of the plaintiff. The sole point for consideration upon this appeal is the question whether the decision on that issue is supported by substantial evidence.

The rules for determining the place of residence of a person are thus stated in the Political Code (section 52):

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

"(1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose;

"(2) There can only be one residence;

"(3) A residence cannot be lost until another is gained; * * *

"(7) The residence can be changed only by the union of act and intent."

Clauses 4, 5, and 6 of the above section have no application to the present case.

[1] Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternatively, the question which of the two places is his legal residence is almost altogether a question of his intent.

"If a party has two residences, that will be esteemed his domicile which he himself selects or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen." 9 Rul. Case Law, 558.

See, also, 19 Cor. Jur. p. 401.

Upon the trial in the lower court the parties stipulated that Finney was and had been a resident of the state of Wisconsin for many years prior to 1907, and that from that time until his death on March 13, 1916, he passed a part of each year in South Pasadena, Cal., and a part of each year in Milwaukee and the East, usually spending from October or November to May or June in South Pasadena and the remainder of the time in Milwaukee and the East. The evidence shows that he built a house of 14 rooms in Milwaukee, Wis., in the year 1884 for his permanent dwelling, and that he continuously maintained that house, having therein three or more servants and all of his furniture and a large number of curios and other articles which he had collected in his numerous travels; that his wife died in 1899, and that thereafter during the remainder of his life his son and family remained in the house with him and took care of the same, but that he paid all the expenses of the establishment; that when in Milwaukee he lived in that house. Upon coming to California in the fall of 1907 he rented a furnished house for the winter and lived in it with a Miss Renold, who had been his housekeeper in Wisconsin. In 1908 he came again and rented a furnished house, which was kept for him by Miss Renold. During that visit, some time in 1909, she purchased a house in which she continued to reside thereafter until her death in August, 1915. During his subsequent sojourns in California he lived in her house. In 1912, because of her financial distress, he purchased the house from her and continued to own the same until his death.

It is apparent, therefore, that the facts make a case where a person has two residences, either of which might be his lawful residence, according to his intention, and that the question which one was his lawful residence at the time of his death depends altogether upon his intention regarding them. Under the rule above stated, if his intent was to have his Milwaukee home as his residence, that was the place of residence at his death. If his intent was to make his California house his lawful residence, that was his lawful residence at the time of his death.

We think it must be conceded that upon all the facts in the case his intent, so far as it is to be deduced from his acts and conduct, shows that the Milwaukee residence was his real home. It was a large establishment, he had built and kept it for a permanent home, he requested his son and wife to live in it and keep it for his use, and he had paid the expenses of maintaining it, even purchasing a farm near the city, on which a tenant lived, who produced milk and vegetables for the family use. His business headquarters were in Milwaukee. He kept safe-deposit

boxes there in which he stored all his stocks and bonds and other valuable papers. His son or his secretary had access thereto and in his absence they cut off the coupons from the bonds, received the dividends on his stocks, and deposited the same to his bank account in Milwaukee banks. He kept in a California bank only such funds as were required for his expenses while living there. All of his investments were made from Milwaukee and during his absences the business was carried on by his son and secretary. He had a safe-deposit box in California, but kept there only such papers as he desired to have with him while he remained away from his main place of business. Under the circumstances of the case, the fact that he lived in California during the greater portion of each year is of no substantial significance with respect to the question of his intent. 19 Cor. Jur. p. 403. The evidence shows that in 1907 he decided to spend the winters in California because the severity of the winters in Wisconsin was detrimental to his health and comfort in his declining years. It was for this reason he came and for this reason that he continued to come yearly thereafter. The fact that he rented houses in California and that he brought and kept there during his stay his two driving horses and that he also had an automobile there was of small significance, considering his wealth and station. He was a man who was given to travel, even in his later years. In the year 1912, being then of the age of 80, he spent two months traveling in Europe. His last illness occurred while he and his daughter were on a trip to Honolulu, and he died in San Francisco shortly after his return therefrom. All these circumstances go to indicate that his sojourn in California was not in pursuance of a design to change his former residence.

The only direct evidence of his intent on the subject is found in certain declarations shown to have been made by him. That upon which the plaintiff relies, and which is practically the only one favorable to the plaintiff, was a declaration made by him on May 13, 1912, for the purpose of registering as a voter in South Pasadena, Los Angeles county, Cal. In that affidavit he stated that his place of residence was in South Pasadena and that he "will have resided in this state one year, and in said county ninety days and in said precinct thirty days next preceding the next ensuing election, and will be an elector of said county at the next succeeding election." The affidavit contains blank forms for noting whether or not the person voted at any election thereafter. The record shows no entries indicating any vote by Finney.

[2, 3] This affidavit constitutes a declaration by Finney that at that time his residence was in South Pasadena, and it must be understood as a declaration that that was

his legal residence at that time. If it had remained unexplained by him and there was no other evidence of a subsequent change of intention, this, of course, would be sufficient to uphold the finding of the court. The decedent, however, subsequently explained the reason for this registration and stated that he had decided not to change his residence to California, and the record contains abundant evidence that thereafter he had the fixed intent to be a resident of Milwaukee, Wis. Afterwards, in that same year of 1912, during a trip to Europe with an old friend, speaking of his house in Milwaukee, he said that he thought its value would not then exceed \$45,000; that Milwaukee was his home, and that during his lifetime he had no disposition to give up that home or dispose of that residence. In December of 1913, his son, John, had written to him, and in reply he wrote from South Pasadena, December 18th, saying:

"I did intend taking citizenship here last year but their politics were so bad that I concluded not to do so. * * * I have decided not to change my residence."

In March, 1915, he purchased some land in Hennepin county, Minn., and he desired to have the title thereto registered under the law of Minnesota. He made an application therefor, duly sworn to in accordance with that law, in which he stated that his residence was No. 34 Prospect avenue, city of Milwaukee, county of Milwaukee, state of Wisconsin. In October of that year he executed two deeds for his two lots in California, in each of which he recited that his residence was Milwaukee, Wis. In the summer of 1915 one of his old friends, who at that time lived in California visited Finney in Milwaukee at his residence there. To him Finney said that he had always kept his house in Milwaukee open and intended to do so as long as he lived. In March, 1915, he executed his last will and therein recited that he was "of the city of Milwaukee in the state of Wisconsin." His will contained provisions for charitable bequests of more than one-third of his estate, and which, as to the excess, would have been void if executed in California, and with respect to the personal property which attends the person would have been ineffective as a disposition thereof if his residence was in California. This will was drawn by an attorney. It was discussed by him with the testator for several weeks before its execution. The attorney stated to him that the bequests made in the will of more than one-third of the estate to eleemosynary institutions would be in conflict with the California law if California was his residence, and thereupon Finney stated positively and repeatedly that he was a resident of Milwaukee and had always maintained his home there and that his California house

was merely for his use in winter. If he had been a resident of California during these years, it would have been his duty in giving in his list of property in California to have included therein all his choses in action, and they appear to have been of great value. The evidence shows that this property was taxed regularly every year in Wisconsin and there is no evidence of any taxation thereof in California. As the case was tried in Los Angeles, Cal., where the records of such taxation were at hand, an inference arises that, since no evidence was given, no record of that character existed. Code Civ. Proc. § 2061, subd. 6.

[4] This constitutes clear and convincing evidence that whatever his design may have been at the time he registered for voting in California in 1912, he afterwards formed a decided intention to retract that decision and to have his residence at his old home in Milwaukee. As he was repeatedly present in that home, using it as a residence after the year 1912, the union of act and intent as required by our Political Code was sufficiently manifested thereby, and his residence in Milwaukee, Wis., was thereby established. There is no contradiction whatever of this evidence as to the subsequent intent and we deem it to be conclusive on the subject. The court below should have held that at the time of his death he was a resident of the city of Milwaukee, Wis., and not of the state of California.

[5] We think there is no doubt of the right to appeal from the decision in a case of this character. The Code authorizes an appeal from a final judgment in any special proceeding. Code Civ. Proc. § 963, subd. 1. Section 17 of the Inheritance Tax Act (Stats. 1913, p. 1078) authorizes the state controller to institute a special proceeding for the determination of the liability to taxation under the act of any property which has been transferred, in cases where there is no proceeding pending in any court of this state, wherein the taxable character of such property could be determined, and it provides that in such a proceeding there may be a contest by persons interested in the property transferred, and that the court thereupon may determine whether or not the property is subject to such tax. The act (section 1) defines the word "transfer," and as so defined it includes the passing of property by will. The petition of the state controller stated the facts which bring the proceeding within the class thus authorized. The determination of the question whether or not the property is subject to the tax is the principal object to be accomplished by the proceeding. The decree or judgment on that subject is the final judgment sought. The act in effect provides that if such judgment is against the controller the proceeding is

terminated absolutely. If it is in his favor, the act provides that the court must so adjudge. The status of the property as property subject to taxation in this state is thereby finally determined, and section 17 declares that in that event "the same shall be appraised and taxed as in other cases." The subsequent appraisal and collection of the tax are merely the process of enforcement of the judgment so given. In such cases the right of appeal is given by section 963 aforesaid.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.

187 Cal. 38

**NORTHWESTERN MUT. FIRE ASS'N v.
PACIFIC WHARF & STORAGE CO.
(L. A. 6117.)**

(Supreme Court of California. Sept. 13, 1921.)

1. Pleading ⚡434—Objection that defense not specifically pleaded not considered on appeal where evidence introduced without objection, and court found on such issue.

In an action by an insurer to recover the amount paid by it under a policy insuring lumber deposited on defendant's wharf, though the defense that defendant was relieved from liability under a contract with the owners of the lumber, whereby the deposit thereof was accepted subject to the owner's risk, was not expressly raised by the pleadings, objection on such ground will not be considered on appeal where evidence as to such contract was introduced without objection, plaintiff cross-examined the witness as to such agreement, and the trial court specifically found on such issue.

2. Warehousemen ⚡24(7)—Wharves ⚡20(1)—Notice of nonassumption of liability for loss of goods deposited during strike held sufficient to cover loss by fire.

A notice by a wharf and storage company to a lumber company that there would be a strike of longshoremen and wharf handlers on a certain date, after which it would not receive a shipment of lumber except subject to its not assuming any responsibility for delivery, loss, damages, thefts, or other cause of that nature until the strike was over, was sufficient to cover a loss by fire caused by its negligence and the negligence of its employees after the inauguration of such strike in regard to an oil tank on its wharf, and not as a result of the strike; the rule that a bailee or depository cannot restrict his duty to use care in the ordinary course of business (Civ. Code, §§ 1846, 1852, 1858e) not being applicable.

3. Warehousemen ⚡24(6)—Wharves ⚡20(5)—Liability of warehouse man.

A lumber company did not exercise business prudence or ordinary care within Civ. Code, § 1714, in placing lumber on a wharf after notice from the wharf and storage com-

pany that, on account of a threatened strike, it would not receive the lumber save on the assumption of risk by the lumber company, which was advised to leave the lumber on board the ship or take it back whence it came.

4. Warehousemen 24(3)—Wharf company not liable as depositary for loss of goods deposited on wharf but not stored by it.

Where a wharf and storage company notified a lumber company that on account of a threatened strike, it would not receive lumber save on the risk of the lumber company, which expressly agreed thereto, and placed lumber on the wharf, where it was burned by the negligence of the wharf and storage company, it was not liable as a depositary, it not having stored the lumber as it intended later to do.

5. Contracts 108(2)—Wharfinger's contract with lumber company that latter assume risk of loss of lumber deposited on wharf during strike held not contrary to public policy.

In contracting with a lumber company that the latter assume liability for the loss of lumber deposited on a wharf during a strike of longshoremen, the wharfinger violated no law against public policy.

6. Warehousemen 24(7) — Wharves 20(1)—Contract that lumber company assume risk as to lumber deposited during strike, being accepted, held not unilateral.

Where a lumber company, after receiving notice from a wharf company that there would be a strike of longshoremen and wharf handlers on a date, after which it would not receive a shipment of lumber except subject to its not assuming any responsibility for loss or damage until the strike was over, rough-piled the lumber on the latter company's wharf, there was not a unilateral contract on the part of the wharfinger, the lumber company by such act having accepted the conditions stated, and affirmatively agreed to relieve the wharf company from all risks.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Northwestern Mutual Fire Association, a corporation, against the Pacific Wharf & Storage Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Goodwin & Morgrage and W. N. Goodwin, all of Los Angeles, for appellant.

Hahn & Hahn, of Los Angeles, for respondent.

SLOANE, J. This is an appeal from a judgment awarding damages to plaintiff for loss by fire of lumber stored on defendant's wharf. The plaintiff, an insurance company, sues on its own and the assigned claims of other insurance companies, arising upon subrogation to the rights of the owners of the lumber, represented by the Union Lumber Company, a corporation, from having paid the losses to the owners upon policies of in-

surance thereon. The defendant, the owner of the wharf, and engaged in the wharfage and storage of lumber, disputes this liability for the loss in question on the ground that it was relieved from such liability by reason of a special contract with the owners of the lumber whereby defendant accepted the deposit of this consignment of lumber subject to the owner's risk.

It is true that this issue is not expressly raised by the pleadings. The complaint avers:

That "at all times herein mentioned defendant has maintained and operated, and does now maintain and operate at South San Pedro, Cal., a storage wharf for hire," and, that "on the 18th day of August, 1916, the Union Lumber Company, a corporation, was the owner of certain lumber and timber products which were there stored, and situate upon the wharf and premises maintained and operated by defendant at East San Pedro, Cal., as a wharf and premises for hire; * * * that on said date said lumber and timber products were in the care and custody of defendant for a consideration, awaiting orders from its owner as to its disposition and removal therefrom," and was damaged by fire through defendant's negligence.

The defendant contents itself with simply denying "that, at the time or times in said complaint mentioned, defendant has maintained or operated, or does now maintain or operate at San Pedro, Cal., a storage wharf for hire," or that on the 18th day of August, 1916, the lumber in said complaint described was "stored upon the wharf or premises maintained or operated by defendant." It also denies that the loss occurred through defendant's negligence; but there is no reference to the special defense that the lumber was placed on the wharf at the risk of the owner.

[1] It is not the fact, however, as suggested by respondent, that this defense was raised for the first time on appeal. It was raised in the evidence and by the findings of the trial court. Evidence as to the special contract under which it is claimed that this lumber was stored on defendant's wharf, with a waiver of liability against defendant, was introduced by defendant without objection, and the trial court specifically finds upon the issue thus raised.

It is settled law under the decisions of this state that, where a case is tried without objection upon a showing of facts not pleaded, but supported by the evidence and covered by the findings, objection will not be considered on appeal that the pleadings do not present the issue. *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444; *King v. Davis*, 34 Cal. 100; *Barbour v. Flick*, 126 Cal. 628, 632, 59 Pac. 122; *Rudel v. County of Los Angeles*, 118 Cal. 281, 50 Pac. 400; *Fernandez v. Western*

Fuse, etc., Co., 34 Cal. App. 420, 423, 167 Pac. 900. Not only was the evidence as to this waived of liability introduced without objection, but the plaintiff participated in its introduction by cross-examining the witness as to the agreement. Had objection been made, the pleading could properly have been amended to conform to the facts as testified to.

The finding of the trial court upon this issue was that before the lumber was received upon the wharf the defendant company notified said Union Lumber Company as follows:

"That there would be a strike of the long-shoremen and the wharf handlers June 1st; that it would not receive said shipment of lumber after June 1, 1916, except subject to its not assuming any responsibility for delivery, or loss, or damages, or theft, or any cause whatever of that nature, until the strike was over, and it was in a position to handle the same; that with said understanding, and shortly after June 1, 1916, said lumber and timber products were removed from said steamer Noyo by the master of said steamer, and piled in the rough upon defendant's said wharf for the express purpose of having the same stored by defendant."

[2] The evidence clearly supports this finding that such notice was given, and that the lumber was landed upon the wharf with that understanding. The terms of the notice of nonassumption of liability were amply sufficient to cover the loss by fire complained of. The only question open to discussion is the right of the defendant to exempt itself from liability for the negligence of its own employees.

The general rule that a depositary or bailee for hire in the course of his ordinary business cannot relieve himself by contract or notice from responding in damages for loss arising from his own negligence or that of his agents or servants, may be conceded. *Railroad v. Lockwood*, 17 Wall. (84 U. S.) 357, 21 L. Ed. 627; *Minnesota Butter & Cheese Co. v. St. Paul Cold Storage, etc., Co.*, 75 Minn. 445, 77 N. W. 977, 74 Am. St. Rep. 515; *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664.

But in this case the owner had notice that the defendant was not accepting the responsibility of storing the lumber in the ordinary course of its business, but under special conditions. It was anticipating a strike, which actually occurred, and it had reason to believe that its facilities for handling business would be so disturbed as to render it unsafe to assume the usual risks. It, in effect, notified the plaintiff that it had suspended its usual line of business, and would only accept the lumber upon its wharf at the owner's risk. Even so, an individual bailee might not be permitted to excuse himself from damages caused by his personal want of ordinary care, but in the case of a strike, with its attendant disorganization of discipline and

system, it would be strange indeed if an employer, and particularly a corporation which can only act through its employees, could not refuse to accept goods in storage except on condition of being released from liability for damages that might in any way be traceable to such disorganized conditions.

It is true in this instance that the loss by fire was not the direct result of the strike. It was contributed to, at least, by failure to construct an oil tank maintained on the wharf of defendant, as required by an ordinance of the city of Los Angeles, but the immediate cause of the fire was the negligence of one of the defendant's employees in operating machinery to which this oil tank was attached. To what extent the conditions brought about by the strike may have contributed to such want of care of the employee cannot be determined, but it was a contingency to be anticipated, and which the defendant had a right to protect itself from by a special contract as to the liability assumed.

This case comes to us on rehearing from the District Court of Appeal, and we accept the conclusions of that court, and the reasoning on this point presented in the following language:

"With reference to the lumber destroyed by fire, it is evident that the defendant did not receive it as a wharfinger, nor was it received as a depositary, gratuitous or for hire, so long as the lumber remained on the wharf under the agreed conditions herein.

[3] "But for comparison, the degree of care to be exercised by a depositary and his liability for loss or damage to the thing stored will be stated. The Code provides for the degree of care and limitation of liability in case of a deposit. If for hire, the depositary must use at least ordinary care for the preservation of the thing deposited (section 1852, Civ. Code); and if gratuitous only, at least slight care (section 1846, Civ. Code). 'No warehouseman or other person doing a general storage business is responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its protection and preservation.' Section 1858e, Civ. Code. If such be the rules by which the liability of the depositary is measured in the event of the destruction of the deposit, it would seem that nothing short of gross or wanton negligence would make a defendant responsible for the loss of the lumber placed on the wharf with the express understanding that the defendant would be relieved from all liability, and that the Union Lumber Company would take all the risks if permitted to pile its lumber there awaiting storage. From the foregoing testimony, the strong inference is that the Union Lumber Company had control of the lumber until piled and stored in the yard back of the wharf. Then the situations of the parties were that of contracting parties dealing at arm's length. The defendant refused to receive the lumber in the usual way, and informed the Union Lumber Company of the danger and risk of leaving this lumber even on the wharf during the strike. It permitted the

Union Lumber Company to pile the lumber on its property under the express agreement that it (the defendant) would be under no obligation for its loss or damage, and that Union Lumber Company would take all the risk. When this agreement was made the defendant realized the dangers attending the strike which it knew would surely take place on June 1st. The strike did come, and was serious. It was necessary to place watchmen on duty around the property. Even then there was violence and threats made against the defendant. Some of its 'employees were beaten up rather badly.' Such a contract, under existing conditions, not to take any risk for any loss or damage to the lumber from whatever cause, was not only within the rights of the defendant, but was an act of good business judgment. At the time the contract was made, the Union Lumber Company was told by the defendant that it could leave the lumber on board ship, or it could take its lumber 'back to Redondo or take it back where it came from.' By placing it on the wharf in the face of the strike, and the conditions under which it was permitted to place it there, the Union Lumber Company did not use business prudence or ordinary care. Section 1714, Civ. Code.

[4, 5] "Even if the defendant did not exercise ordinary care in the preservation of said lumber, it violated no state law as a depository. It had not stored the lumber, and was therefore, independent of the contract, not liable as a depository. In making its contract with the Union Lumber Company, it violated no law against public policy. The public had nothing to do with the transaction, was not in any way interested in the matter. The transaction was a common sense mutual arrangement between two competent contracting corporations concerning their private affairs. Such a contract is not only not against public policy, but it is binding upon the parties, and will operate to relieve the defendant from the negligence of its employees while in its service. *Stephens v. Southern Pac. Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17. 'The authorities all agree that the contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.' *Griswold v. Ill. C. R. Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647. 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that every contract, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts of justice. Therefore, you have this paramount public policy to consider that you are not likely to interfere with this freedom of contract.' 3 Eng. & Am. Ency. of Law (Old Ed.) note 3, p. 875.

[6] "It should be constantly borne in mind that this was not a unilateral contract on the part of the defendant. The Union Lumber Company, by accepting the conditions upon which it was permitted to rough-pile the lumber on the defendant's premises, accepted those conditions and affirmatively agreed to relieve

defendant from all risks. The defendant and the Union Lumber Company freely contracted with all of the possible dangers in mind which might attend a tie-up of a large business by means of a strike of a comparatively large body of employees. The contract was to the effect that the defendant would not be responsible for the delivery, or loss, or damage of this lumber. The terms of the agreement are broad enough in meaning to guard the defendant against all loss or damage by fire or other cause attending a general strike of its employees, including any loss or damage caused by reason of disturbed conditions, in consequence of, as a sequence to, a strike; shortage of help, overwork, and overwrought remaining employees, interruption of the ordinary conduct of the business; a want of ordinary and usual care of employees in doing their work under stress and disturbance and threats; for lack of efficiency in coping with fire or other destructive agencies because of the condition of or scarcity of employees."

In the light of the conclusion reached by the Court of Appeal and by this court that the defendant was released by its contract from liability for the damage sued for, and the trial court having found that the lumber was accepted upon defendant's wharf in pursuance of said agreement, and understanding that it was so received at the owner's risk, the judgment is reversed, with directions to the lower court to amend its conclusions of law in accordance herewith, and render judgment for the defendant.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SHURTLEFF, J.; LAW-LOR, J.; LENNON, J.

187 Cal. 71

KINLEY v. LARGENT. (L. A. 5848.)

(Supreme Court of California. Sept. 15, 1921.)

1. Witnesses  181—Incompetency of claimant to testify as to matter occurring before decedent's death may be waived by personal representative.

The incompetency of a witness under Code Civ. Proc. § 1880, subd. 3, providing that parties or assignors prosecuting claim or demand against the estate of a deceased person "cannot be witnesses" as to any matter occurring before the death of such deceased person, can be waived by the decedent's personal representative, since such statute merely means that a claimant is incompetent to testify against the estate.

2. Witnesses  181—Administrator held to have waived incompetency of plaintiff suing on claim against estate.

In action against an administrator on a claim against the estate, in which the administrator expressly declined to object to the plaintiff as a witness on the ground of incompetency under Code Civ. Proc. § 1880, subd. 3,

making a claimant an incompetent witness as to any matter occurring before the deceased's death, the plaintiff should have been permitted to testify, since in such case the administrator waived the incompetency.

3. Judgment 688—Judgment for claimant in action against executor or administrator not conclusive against heirs.

A judgment for claimant in action against an executor or administrator is not conclusive against the heirs, since such judgment only establishes the claim in the same manner as if it had been allowed by the executor or administrator, and a judge under Code Civ. Proc. § 1504, and since all matters, including allowed claims not passed upon on the settlement of any former account or in rendering an exhibit or in making a decree of sale, may be contested by the heirs for cause shown on the settlement of an account, under section 1636.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Anna Kinley against W. T. Largent, administrator of the estate of James Kinley, deceased. From a judgment for plaintiff giving her insufficient relief, she appeals. Reversed.

James M. O'Brien, of Los Angeles, for appellant.

James B. Barry, of Sawtelle, for respondent.

LAWLOR, J. This is an appeal by the plaintiff, Mrs. Anna Kinley, from a judgment which she recovered from the administrator of the estate of James Kinley, deceased. The decedent and appellant were husband and wife.

The action was brought to recover the sum of \$3,444, which appellant had turned over to decedent for investment in street bonds. Up to the time of his death he had made no report on the investment. Appellant presented a demand to the administrator for the said sum, which was disallowed upon the ground that under subdivision 3, § 1880, Code of Civil Procedure, appellant was incompetent to testify against the estate, and that respondent was unwilling to assume the responsibility of waiving the incompetency. This action followed.

Upon the trial appellant offered herself as a witness, whereupon the following statements by the court and the respective counsel were made:

"The Court: Is this such a claim against an estate as bars the claimant from being a witness under section 1880 of the Code of Civil Procedure?"

"Mr. O'Brien: I presume that the claimant would be disqualified as a witness under that section if an objection were made to her testimony. This matter, however, has already been discussed with the administrator and his attorney, and, in view of the fact that both the ad-

ministrator and his attorney are convinced that an injustice would result if such an objection were made, they have decided not to make any objection to the competency of the plaintiff as a witness in her own behalf in support of her claim against the estate.

"Mr. Barry: I want to say, your honor, that Mr. Largent, the administrator of decedent, was a next-door neighbor of the plaintiff and her husband for a long time prior to the latter's death. He became intimately acquainted with them, and knew, prior to the death of Kinley, that moneys had been so advanced to him by his wife, as now claimed by her. Under those conditions we feel that to interpose a technical objection to the competency of the plaintiff to testify as a witness in her own behalf in this suit would result in an injustice. As we have no desire to be the cause of an injustice, we do not feel it right or proper to make such objection.

"The Court: I am inclined to the opinion that the statute cannot be waived by a failure of the administrator or his attorney to make the objection. I will hear your evidence and make a ruling on this point later."

Appellant identified five drafts, aggregating \$2,467.10, which were admitted in evidence, and testified to other advances aggregating \$979.50, but, as this latter amount depended on her testimony alone, the evidence was excluded, the court saying:

"I will allow the plaintiff the aggregate amount of the several drafts which she has identified. I cannot consider her testimony as to the other advancements. The rule is a harsh one and even works injustice, but it is absolutely necessary to protect an estate from injustice. I have no doubt in my mind that Mrs. Kinley's claim is a just one. No objection is necessary. The statute is provided for just that purpose."

[1] Appellant's position is thus stated:

"There is only one point involved on this appeal. If the incompetency prescribed by section 1880 of the Code of Civil Procedure cannot be waived, the judgment of the lower court must be affirmed. If it can be waived, it was waived in this case, and the lower court should be directed to enter judgment for the entire amount and interest claimed by the plaintiff. The principle which we urge to be the law may be stated thus: The statutory incompetency of parties or assignors of a party to an action or proceeding, or persons in whose behalf the same is prosecuted, against an executor or administrator upon a demand against the estate of a deceased person to testify as to any fact occurring before the decedent's death, is not absolute, but may be waived, and, if waived, the testimony of such person must be considered."

Section 1880 of the Code of Civil Procedure reads, in part, as follows:

"Persons who cannot testify.—The following persons cannot be witnesses:

"3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against

an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

There is no authority in this jurisdiction directly on the question whether the personal representative of a deceased person may waive the incompetency contemplated by this provision. In other jurisdictions it has been held that the incompetency of a claimant to testify under their respective statutes may be waived, and in *Jones on Evidence*, vol. 4, § 780, it is said, referring to the incompetency of a claimant to testify against an estate of a deceased or incompetent person:

"This exception to the statutory rule removing the incompetency of parties was introduced for the benefit of those representing the deceased or incompetent person; and their representatives may, if they choose, waive this privilege. All objection to the competency of a witness as to a transaction with an incompetent or deceased person will be deemed waived if it is not made at the time the evidence is given. * * * An administrator and his counsel cannot sit by without objecting to the admission of incompetent evidence and expect the trial judge to rule it out on his own motion. The objection must be to the competency of the witness, not merely to the competency or relevancy of the evidence."

Numerous authorities are cited in support of the text. In general, the statutes of other jurisdictions only disqualify the claimant to testify against the estate. See compilation of statutes in *Wigmore on Evidence*, § 488. Section 1880, on the other hand, provides that a claimant cannot be a witness as to any matter or fact occurring before the death of the deceased person. However, in construing this section it has been held, notwithstanding its broad language, not to mean that the claimant cannot become a witness under any circumstances. Thus, in *Chase v. Evoy*, 51 Cal. 618, the claimant was made a witness and allowed to testify on behalf of the estate. The court declared:

"The language of the statute is very broad, and, if literally construed, might exclude all parties to the action, whether called to testify for or against the estate. But to give it this construction would defeat the manifest purpose of the act, and we think the language is capable of a different interpretation. Parties to the action, or in whose behalf it is prosecuted, are not allowed to testify against the estate in a suit to establish a demand against it. One of the parties to the transaction out of which the demand originated being no longer in esse, it was deemed unwise to permit the other party to testify to his version of it, when called by the plaintiff in a proceeding against the estate to establish the demand. The statute, it is true, provides in general terms that 'the parties to an action or proceeding' against the estate shall not testify; but the obvious meaning of this provision is that a party to the action shall not testify against the executor or admin-

istrator. * * * But, in view of the evil to be remedied, the Legislature could have hardly intended to prohibit the executor or administrator from calling a party to the action to testify in behalf of the estate. On the opposite theory, the defendant, representing the estate, would not be permitted to call the plaintiff himself to prove that the demand was fraudulent or had been fully paid. Such a construction is wholly inadmissible, and would be at variance with its manifest intent."

In *Roche v. Ware*, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539, the claimant was made a witness for the purpose of identifying certain books connected with his claim against the estate. *Colburn v. Parrett*, 27 Cal. App. 541, 150 Pac. 786, was a similar case.

It is proper to point out that in some of the cases under this subdivision language is used which might indicate that the incompetency was absolute. Thus, in *Rose v. Southern Trust Co.*, 178 Cal. 580, 174 Pac. 28, it was remarked that "such a witness must not testify." However, in that case the opinion shows that the testimony was objected to on the trial of the action, so the question of a waiver was not presented. Moreover, as already shown, there are cases in this jurisdiction where, even against objection, the party was allowed to become a witness for some purposes.

[2] It is clear that subdivision 3 is to be given no broader effect than if it merely provided that a claimant is incompetent to testify against the estate. This interpretation gives to the statute the same meaning as that expressed in those statutes of other jurisdictions wherein it is held, as has been seen, that the personal representatives of the deceased may waive the incompetency. Allowing this waiver will not operate to defeat the object of the statute; for it is always in the power of the administrator or executor by timely objection to bar the witness. It follows that under subdivision 3 of section 1880 the personal representative should be permitted to waive the incompetency. Hence, as the administrator herein expressly declined to object to the witness on the ground of incompetency, the waiver should have been allowed, and the witness permitted to testify.

[3] It should be noted that—

"A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge" (section 1504, Code Civ. Proc.), and that "all matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown," on the settlement of an account (section 1636, Code Civ. Proc.).

It thus appears that the judgment in an action such as this against the executor or

administrator is not conclusive against the heirs.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.

187 Cal. 45

RALPH v. ANDERSON. (L. A. 6802.)

(Supreme Court of California, Sept. 13, 1921.)

1. Assignments ⚡121—Assignee may bring suit in own name.

Assignee of a chose in action may bring suit thereon in his own name.

2. Assignments ⚡34—Assignment of a chose in action need not be in writing.

An assignment of a chose in action, such as right to damages arising out of automobile collision, need not be in writing, and parol evidence of a transfer is admissible.

3. Assignments ⚡137—Transfer of chose in action sufficiently shown by testimony of assignor.

In a suit by assignee of a chose in action, a claim for damages arising out of an automobile collision, oral testimony of assignor himself to the effect that he had transferred his claim was sufficient to bind him, and support a finding that an assignment had been made.

4. Assignments ⚡121—Assignee for collection may sue in own name.

An assignee of a chose in action is not deprived of his right to sue in his own name by the fact that the claim is assigned merely for collection, debtor being completely protected by the assignment whatever collateral arrangements are made.

5. Evidence ⚡117—Interest in chose in action by third person admissible.

In an action by alleged assignee of claim for damages arising out of collision between automobiles, evidence of insurance company's interest in the claim was admissible, subject to plaintiff connecting this interest with his action by proof of authorization to sue.

6. Appeal and error ⚡882(11)—No complaint of lack of proof excluded through appealing party's act.

Defendant, in an action by assignee of claim for damages arising out of an automobile collision, cannot complain that an assignment to plaintiff was in fact an assignment to him only as agent for an insurance company, and that there was no showing of authority on the part of the plaintiff to maintain the action, where defendant made objection to proof of such authorization, and there was ample evidence to prove a direct assignment to plaintiff.

7. Appeal and error ⚡882(3)—No complaint of theory of cause induced by own conduct.

Complaint cannot be made that case was tried on an erroneous theory when the court

and parties were led into the acceptance of that theory by complainant's own counsel.

8. Appeal and error ⚡1058(2)—No complaint of sustaining of objection to evidence subsequently admitted.

Complaint cannot be made on appeal of rulings of court sustaining objections to questions where the objection was subsequently overruled and the witness permitted to answer a similar question.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Archibald S. Ralph against Joseph Anderson. Judgment for plaintiff, and defendant appeals. Affirmed.

Scarborough, Forgy & Reinhaus, of Santa Ana, for appellant.

Head & Rutan, of Santa Ana, and David R. Faries and Ivan Kelso, both of Los Angeles, for respondent.

LENNON, J. The automobile of one H. O. Henderson was damaged in a collision with the automobile of Joseph Anderson. Archibald S. Ralph instituted the present action against said Joseph Anderson for damages, alleging that the collision was the result of defendant Anderson's negligence, and that said H. O. Henderson duly assigned, sold, and transferred his claim against the said defendant as sued for in this action "to the plaintiff herein [Ralph], who is now the owner and holder thereof." Judgment having been rendered in favor of the plaintiff, defendant appeals, upon the ground that the evidence is insufficient to show that plaintiff Archibald S. Ralph is the owner of the claim sued upon, or is authorized to bring suit in his own name and therefore that a judgment in plaintiff's favor would not protect defendant against a subsequent suit upon the claim by the real owner. This is the only question raised upon the appeal.

[1-3] If there is sufficient evidence to support the finding that the owner of the claim assigned the same to plaintiff, the judgment in plaintiff's favor must be affirmed, for it is the settled rule that an assignee of a chose in action may bring suit thereon in his own name. *Wiggins v. McDonald*, 18 Cal. 126; *Gradwohl v. Harris*, 29 Cal. 150; *Reios v. Mardis*, 18 Cal. App. 276, 122 Pac. 1091. Upon the assignment phase of the case, Mr. Henderson, the owner of the damaged automobile, was called as a witness for the plaintiff. The record discloses that he testified (1) that he assigned any claim that he might have against the defendant to Archibald S. Ralph, the plaintiff; (2) that the assignment was made shortly after the accident; (3) that the assignment was oral, and consisted of a direction to Ralph to collect the damages from

the defendant. There was no attempt to prove that the assignment was written, and, since there is no statutory provision requiring an assignment of such a claim to be in writing, parol evidence of the transfer was admissible. *Humboldt Milling Co. v. N. W. Pac. Ry.*, 166 Cal. 175, 135 Pac. 503; *Shoenhair v. Jones*, 33 Cal. App. 545, 165 Pac. 971; Civ. Code, § 1052. In a suit by the assignee upon a claim so assigned, the oral testimony of the assignor himself to the effect that he has transferred his claim is sufficient to bind the assignor and support a finding that an assignment has been made. *Bruno v. Severini*, 196 Pac. 501. The testimony of the original owner of the claim that he had assigned the same to the plaintiff in the instant case by oral assignment was therefore sufficient proof of an assignment.

[4] It is true that it also appears from the testimony of both the assignor, Henderson, and the assignee, Ralph, that Henderson was, at the time of the collision, insured in the Automobile Indemnity Exchange of Orange county, an interinsurance association organized pursuant to statutory provisions (St. 1917, p. 1170, amended St. 1919, p. 1270), of which plaintiff Ralph was the attorney in fact and manager. And it may further be gathered from the testimony that it was understood between Henderson and Ralph that the amount of any judgment collected in this action was to be turned over to the said indemnity exchange. This agreement restricting the disposition of the proceeds recovered in no way detracts from plaintiff's capacity to sue, for an assignee is not deprived of his right to sue in his own name by the fact that the claim is assigned merely for collection. *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 33 Pac. 550. Provided the assignment, whether verbal or written, is absolute, so as to vest the apparent legal title in the assignee, the latter—

"is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account." *Pomeroy's Code Remedies* (4th Ed.) § 70; *Grant v. Heverin*, 77 Cal. 263, 18 Cal. App. 647, 19 Pac. 493; *Ingham v. Weed*, 5 Cal. Unrep. 645, 48 Pac. 318.

However, defendant advances the theory that it is apparent from the evidence adduced upon the whole case that the Automobile Indemnity Exchange of Orange county, and not the plaintiff Ralph, is the assignee of the claim, and is the real party at interest. It is pointed out, in support of this contention, that the evidence shows that Henderson was insured in the interinsurance company above mentioned, and that the company has become subrogated to Henderson's claim against defendant by reason of having assumed charge

of and paid for some of the repairs to the Henderson automobile; and, furthermore, that, aside from the right arising from subrogation, the actual assignment testified to by Henderson was not an assignment to Ralph individually, but solely in his capacity as agent for the said exchange. It is therefore urged that the present action should not have been prosecuted by plaintiff in his individual capacity. *Swift v. Swift*, 46 Cal. 266; *Chin Kem You v. Ah Joan*, 75 Cal. 124, 16 Pac. 705.

[5-7] Upon the trial of the case, counsel for defendant repeatedly and successfully objected to all questions of counsel for plaintiff tending to bring out the interest which the said Automobile Indemnity Exchange possessed in the claim sued upon. Objection was likewise made to plaintiff's attempt to prove an authorization from the interinsurance company to plaintiff to bring suit upon the claim. Evidence of the interinsurance company's interest in the claim was admissible, subject, of course, to plaintiff connecting this interest with the present action by proof of his authorization to sue. *Bauer v. State*, 144 Cal. 740, 78 Pac. 280; *Ferguson v. McBean*, 4 Cal. Unrep. 429, 35 Pac. 559. However, as a result of the attitude of defendant's counsel, plaintiff was compelled to try the case upon the theory of a direct assignment of the claim to plaintiff subject to a collateral agreement concerning the disposition of the proceeds. The trial court having found, upon ample evidence, that plaintiff sustained the burden of proving such a direct assignment, defendant cannot, upon appeal, raise objection that certain evidence is lacking when his attorneys are responsible for its omission, nor complain that the case was tried upon an erroneous theory when the court and parties were led into the acceptance of that theory by defendant's own counsel. *Powell v. Ross*, 4 Cal. 197; *Merrill v. Kohlberg*, 29 Cal. App. 382, 155 Pac. 824; *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28.

[8] It is contended that the court erred in sustaining objections to questions put to the witness H. O. Henderson by defendant's counsel as to whether or not he (Henderson) had assigned the claim in question to the Automobile Indemnity Exchange. The correctness of these rulings need not be investigated, for it appears that the court subsequently overruled the objection of plaintiff's counsel and permitted the witness to answer the following question:

"Is it not, Mr. Henderson, a fact, that prior to the filing of this suit you assigned all of your rights, titles, and interests to any claim, cause of action arising out of this accident, if any you had, to the Automobile Indemnity Exchange of the Orange County Automobile Club?"

In response, the witness stated, in effect, that the only assignment of the claim made

by him was the oral assignment concerning which he had already testified. This question and answer brought forth all the information called for by the questions previously ruled out, and it follows that, if any error was committed, it was not prejudicial to the defendant.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; SHAW, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.

187 Cal. 80

ATHEARN v. NICOL et al., Judges.
(Sac. 3266.)

(Supreme Court of California. Sept. 16, 1921.)

1. Judges $\S$ 16(1)—Governor could appoint judges from other counties to try cases under statute.

Under Const. art. 6, § 8, the Governor has power to appoint judges from other counties to hear a proceeding relating to issuance of bonds for assessments for improvements under St. 1919, p. 1093, §§ 4, 5, supplementing St. Ex. Sess. 1911, p. 117, St. 1913, p. 252, St. 1915, p. 1338, St. 1919, pp. 1091, 1122, 1209, even though the Legislature has no authority to direct the Governor to nominate judges from other counties to hear such proceedings, especially as the superior court judge of the county is disqualified from hearing such proceedings when they affect or relate to real property in his county under Code Civ. Proc. § 170, subd. 5.

2. Courts $\S$ 101—Judges assigned from other county may sit together in cause.

Three judges from other counties appointed by Governor to try proceedings relating to issuance of bonds for assessments for improvements under St. 1919, p. 1093, §§ 4, 5, supplementing St. Ex. Sess. 1911, p. 117, St. 1913, p. 252, St. 1915, p. 1338, St. 1919, pp. 1091, 1122, 1209, may sit together and dispose of the matter, under Const. art. 6, § 8.

3. Courts $\S$ 67, 101—As many sessions as judges, and all judges may sit together.

There may be as many sessions of the superior court in the city and county of San Francisco as there are superior court judges in the county, including those assigned thereto by the Governor, and those acting pro tempore, and all these judges can sit together at one time for the trial of a case, under Const. art. 6, §§ 6-8.

4. Courts $\S$ 102(1)—Majority of judges may render decision.

Where authority is conferred upon a court of more than one judge, the majority can render decisions of the court, in the absence of express statutory or constitutional provision to the contrary.

5. Constitutional law $\S$ 46(1) — Question of validity of statutory directions as to judges held immaterial.

On application for writ of prohibition to prevent three judges appointed by Governor under statutory direction to try a proceeding relating to issuance of bonds for assessments for improvements under St. 1919, p. 1093, §§ 4, 5, it was immaterial that the Legislature had no right to direct the Governor to appoint three judges, or to direct that two or three judges might render a decision, or that the Governor had no authority to require the three judges to sit together, since they could hear the case without the statutory directions.

6. Courts $\S$ 2—Prohibition $\S$ 28—Sufficiency of document filed to invoke jurisdiction does not affect jurisdiction.

If a court has jurisdiction and authority to pass on the validity of an assessment, and the questions arising with relation thereto, the sufficiency of a complaint or document filed to invoke that jurisdiction is one to be determined by them upon the hearing, and does not affect their jurisdiction to pass thereon, and need not be considered on application for prohibition.

7. Constitutional law $\S$ 46(3)—Question of constitutionality of statute because prohibiting new trial and appeal not considered on application to prevent judges from hearing proceedings.

That St. 1919, p. 1093, §§ 4, 5, providing special procedure on hearings of objections to issuance of bonds for assessments for improvements, is unconstitutional as constituting a special ruling of practice, in that it prohibits the granting of a motion for a new trial, and deprives defeated party of a right to appeal, is immaterial on application for prohibition to prevent judges from hearing proceedings invoked, since the question of constitutionality of the statute in that respect will arise when the jurisdiction of the court is invoked, either upon a new trial or upon an appeal.

In Bank.

Application by F. G. Athearn for writ of prohibition, prayed to be directed to G. W. Nicol and others, extra judges of the Superior Court, designated to determine certain questions concerning the validity and apportionment of an assessment for drainage work, requiring them to desist from the contemplated trial of certain issues. Writ denied.

Haven, Athearn, Chandler & Farmer, of San Francisco (Geo. A. Clarke, and Elston, Clark & Nichols, all of Berkeley, amici curiæ), for petitioner.

Frank Freeman, of Willows (Robt. T. Devlin, of San Francisco, amicus curiæ), for respondents.

Thomas Rutledge and Brown & Alberry, al of Colusa, and Mastick & Partridge, of San Francisco, for West Side land owners.

WILBUR, J. The petitioner asks for a writ of prohibition directed to the respond-

ents, who are judges of the superior court, requiring them to desist from the contemplated trial of certain proceedings instituted under and by virtue of an act of the Legislature (St. 1919, p. 1092, §§ 4, 5) relating to the issuance of bonds for assessments for improvements in the Sacramento and San Joaquin drainage district. The respondents have been designated by the Governor to sit as judges of the superior court in and for the county of Sutter to hear and determine the questions that may be raised before them concerning the validity and proper apportionment of assessments of said district aggregating over \$8,000,000. The procedure followed in this case is in accordance with an act of the Legislature of the state of California (St. 1919, p. 1092, §§ 4, 5), supplementing other legislation (St. Ex. Sess. 1911, p. 117; St. 1913, p. 252; St. 1915, p. 1338; St. 1919, pp. 1091, 1122, 1209), concerning the organization and powers of said district. By such legislation authority is given for the construction and maintenance of improvements in said district, and the levying of assessments upon the property within the district.

The statute under consideration provides that, after the levy of the assessment by the assessor, and the approval thereof by the reclamation board, a proceeding shall be instituted by the reclamation board in the "superior court of the state of California in and for the county" wherein a majority of the realty affected by the assessment is contained. Upon the filing of the assessment with the clerk of said court, notice is given by publication of the date of the hearing of objections to such assessment. It is provided that the court shall hear objections to the assessment and render a decision thereon, which shall be final and conclusive (St. 1919, pp. 1092, 1095, § 12), and from which no appeal can be taken and no new trial can be granted (section 8, p. 1094). This proceeding is to be heard before three judges of the superior court selected by the Governor from counties not within the drainage district.

Acting in accordance with the provisions of this legislation, the reclamation board has filed with the county clerk of the county of Sutter its assessment, and the Governor has designated the three respondents to hear such proceedings, and they are now proposing to hear the proceedings, unless prohibited from so doing by this court.

It is claimed that the Legislature had no authority to direct the Governor to nominate three of the judges of the superior court from counties other than the one in which the proceeding is filed to hold such court. This may be conceded; and yet if the Governor had the authority to do so, under the Constitution, without the request or direction of the Legislature, and he has exercised that authority

by the appointment of the respondents, we need not concern ourselves with the question of whether or not the Legislature has any power to enact such a statute.

[1] We will first consider the authority of the Governor under the Constitution itself. Section 8 of article 6 of the Constitution provides that a judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the Governor it shall be his duty so to do. While, no doubt, the ordinary course of procedure has been for the Governor to name a judge of another superior court to sit for or in the place of some disqualified judge of the county in which he is requested to sit, it is clear from the Constitution that any superior court judge of the state of California can hold a superior court in any county of the state of California when requested so to do by the Governor. The number of judges of the superior court in the county to which he is assigned by the Governor is thus increased. And, if the Governor, in the exercise of his prerogative, assigns three judges to a given county in addition to those provided by the Constitution and Legislature for the county, the number of judges who can hold separate sessions of the superior court in the county is thus increased by the number so assigned by the Governor to the county. In addition to the number of superior court judges provided by the Legislature and elected by the people, and those acting upon the request of the Governor, the Constitution provides for judges pro tempore to try specific cases upon the agreement of the parties thereto. This matter of pro tempore judges is only germane to the discussion in that it shows that there may be many more judges exercising the power and authority of superior court judges in a given county at a given time than those designated in the Constitution or by the Legislature. For instance, in Los Angeles county the Constitution provides for 2 superior court judges (article 6, § 6). This number has been increased by the Legislature to 23 (St. 1921, p. 1177).

The Governor of the state is thus authorized to temporarily increase the number of superior court judges in a county by a request that judges from other counties sit within that county as superior court judges.

Before the latest increases in the number of judges of the superior court in Los Angeles and San Francisco, several extra sessions of the superior court were held simultaneously with and in addition to all the usual departments of the superior court. Sometimes as many as three or four extra sessions were held at one time. Superior court judges for such extra sessions were designated by the Governor from other counties, and his authority to do so has never

been questioned; indeed, in view of the plain language of the Constitution, it could not well be questioned. It is therefore apparent that there is nothing illegal in the selection by the Governor of the respondents to sit in the county of Sutter as superior court judges. Assuming that the matter involved is a judicial question now pending before the superior court of the county of Sutter, as the statute expressly declares, and that the respondents have severally been selected to hold court in that county, it is obvious that the court has jurisdiction of the matter in question, and that the respondents, acting as judges of that court, have jurisdiction to proceed to dispose of the matter.

Before considering the question as to whether or not the 3 respondent judges can sit together and hear the proceedings, a preliminary question should be mentioned. The judge of the superior court of the county of Sutter is disqualified to hear these proceedings by reason of subdivision 5 of section 170 of the Code of Civil Procedure, which disqualifies a judge of a county from hearing such proceedings when they affect or relate to any real property within his county. This provision has been held constitutional. *Sacramento and San Joaquin Drainage Dist. v. Rector*, 172 Cal. 385, 156 Pac. 506. From this it follows that the judge of the superior court of the county of Sutter, elected by the people thereof, is disqualified to try these proceedings and that 3 respondents properly assigned by the Governor to that county are each qualified and empowered to dispose of the matter.

[2, 3] So far we have considered only the authority of the Governor to assign these judges to the superior court of Sutter county. When so assigned they derive their powers from the Constitution itself. It remains to consider the questions of whether or not they can sit together and dispose of the matter, and whether the Legislature has any authority to direct that they shall do so. This involves a further consideration of the terms of section 8 of article 6 of the Constitution. This section provides:

"There may be as many sessions of a superior court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges pro tempore. The judgments, orders, acts and proceedings of any session of any Superior Court held by *one or more judges acting upon request*, or judge or judges pro tempore, shall be equally effective as if the judge or all of the judges of such court presided at such session." (Italics ours.)

Section 7 of the same article provides as follows:

"If any county, or city and county, other than the city and county of San Francisco, in which there shall be more than one judge of the superior court, the judges of such court may hold as many sessions of said court at the same time

as there are judges thereof, and shall apportion the business among themselves as equally as may be."

While, in the city and county of San Francisco, by the terms of section 6 of article 6 of the Constitution, it is also provided that there may be as many sessions of said court at the same time as there are judges thereof, it is provided that they shall select a presiding judge, who shall distribute the business of the court among the judges thereof and prescribe the order of business. It is then provided (and this provision would seem to be applicable to all superior courts):

The judgments, orders, and proceedings of any session of the Superior Court held by *any one or more of the judges* of said courts, respectively, shall be equally effectual as if *all the judges of said respective courts* presided at such session." (Italics ours.)

From these sections it is apparent not only that there may be as many sessions of the court as there are superior court judges in the county, including those assigned thereto by the Governor and those acting pro tempore, but also that all of these judges can sit together at one time for the trial of the case; hence, the provision that the decision of one judge sitting at a separate session of the superior court is equally effective as though all the judges of the superior court were sitting and rendering judgment. The Constitution also contemplates a session held by "one or more judges" as well as by one, and by all. The authority is found in section 8, above quoted.

"The judgments," etc., "of any session of the superior court held by *one or more judges acting upon request*, or judge or judges pro tempore, shall be equally effective as if the judge or all of the judges of such court presided at such session." (Italics ours.)

The question of whether or not the Governor has the power to request 3 superior court judges to sit together and try a single case and thus impose upon them the obligation to do so is not necessarily involved in this proceeding, for, if the 3 judges selected by the Governor, and requested to sit in Sutter county, become thereby invested with the authority so to do under the Constitution, they can so act if they so desire, by reason of their constitutional authority to sit together in the trial of a single case, and this it is alleged they propose to do.

It is provided in section 7 of article 6 of the Constitution, above quoted, that the judges of the superior court of counties other than San Francisco "shall apportion the business among themselves as equally as may be." If we concede that the Legislature had no power to enact legislation requiring that a certain proceeding shall be heard before a session of the superior court presided over

by 3 judges, and that the statute so providing has no more effect than as a formal request by the Legislature that it be done, and if we further concede that, while the Governor has authority to name 3 judges and request that they sit in the county for the purpose of trying such a proceeding, such request has no other effect than to create said judges for the time being judges empowered to hold sessions of the superior court in and for the county of Sutter, still, if they then have the discretion to sit together for the consideration of a case or cases submitted to that court, and if they desire to accede to the request of the Governor and to the request of the Legislature so to do, their consent so to do and their action in pursuance of such request and purpose constitutes them judges of the superior court of the county of Sutter, authorized by the Constitution to sit together for the disposition of any case or cases brought before them, including the case they are thus proceeding to try. There is, therefore, no ground for interference by us because of the alleged lack of power of the Legislature to create a department of the superior court of the county of Sutter for the purpose of trying such an action, and no reason to consider the authority of the Governor to compel judges so to act. The question before us thus reduces itself to this simple proposition: Can 3 judges of the superior court of the county of Sutter sit together for the hearing of the proceeding in question? To this question the Constitution makes a plain answer that 3 judges of the superior court may, if they choose, sit together for the purpose of hearing any proceeding over which the court itself has jurisdiction.

[4, 5] Other constitutional questions are raised by the petitioner. It is claimed that the Legislature had no right to direct that 2 out of 3 judges may render a decision in the case. Unless the Constitution authorizes 2 of the 3 judges to render a decision where 3 sit together, it is clear that the Legislature had no power to make such a provision. The general rule, however, is that, where authority is conferred upon a court of more than one judge, the majority can render decisions of the court in the absence of express statutory or constitutional provision to the contrary (15 C. J. [Courts] § 362, p. 965; Austin v. Harbin, 95 Tenn. 598, 32 S. W. 628. That question, however, is not involved here so far as the case has proceeded. The respondents have agreed to sit together and to try the same, and so far have not been called upon to rule upon any matters involved in the case. If upon the conclusion of the case 2 judges take one view and 1 another, the question as to whether or not 2 of the 3

judges can decide the case would be important.

[6] Petitioner contends that the filing of the assessment cannot be treated as the filing of a complaint to validate the assessment, for to do so would be to violate the constitutional provision prohibiting the Legislature from special legislation relating to the practice of the courts. This question need not be considered upon this hearing, for the reason that, if the court has jurisdiction and authority to pass upon the validity of the assessment and the questions arising with relation thereto, the sufficiency of the complaint or document filed to invoke that jurisdiction is one to be determined by them upon the hearing, and does not affect their jurisdiction to pass thereon. *Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605.

[7] It is claimed that the legislation, which prohibits the granting of a motion for a new trial in such a proceeding, and deprives the defeated party of a right to appeal, is unconstitutional, for the reason that it constitutes a special rule of practice. If this be conceded, it is immaterial. That question will arise when the jurisdiction of the courts is invoked either upon a new trial or upon an appeal.

The respondents argue at length that, in the exercise of their powers under the statute in question, they are not acting as judges of the superior court, but as a special board selected for the purpose of determining the particular matter with relation to the assessments, and that while so acting they are merely one of the boards charged with quasi judicial functions in the collection of a tax. It is very clear that the Legislature contemplated a court proceeding. It provided that the judicial proceedings to validate the assessment should be commenced in the superior court. It declared the proceedings to be judicial proceedings, and it is manifest throughout that the whole scheme was to have a judgment of the superior court affirming the validity of the bonds before they were issued, and to permit no other attack thereon, and there is no doubt that the proceedings are in a large part judicial. While many interesting and important questions are thus raised by the petitioner, the only thing that we are called upon to decide, or can properly pass upon in this proceeding, is the jurisdiction of the respondents to proceed in the matter. It is clear that they have such jurisdiction. We are not concerned at the present time with their method of exercising that jurisdiction.

The writ will be denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

187 Cal. 34

In re AUFRET'S ESTATE.**Appeal of STATE.**

(S. F. 9428.)

(Supreme Court of California. Sept. 13, 1921.)

- 1. Executors and administrators** $\hookrightarrow$ 314(7) — Answer to nonresident aliens' petition for distribution of estate more than five years from time of succession held insufficient.

Answer of the state to a petition for distribution of the estate of a decedent, alleging that petitioners are citizens and residents of France, that petition was filed more than five years after decedent's death, and that petitioners have not appeared and claimed the estate within five years after decedent's death, without alleging that petitioners were not residents and citizens of the state or of the United States at the time of the decedent's death, held insufficient to show petitioners not entitled to the estate under Civ. Code, §§ 672, 1404, requiring nonresident aliens to appear and claim property taken by succession within five years from the time of succession.

- 2. Appeal and error** $\hookrightarrow$ 907(2)—Decree of distribution not reversed for want of a finding in absence of evidence.

A decree distributing estate to nonresident alien petitioners more than five years after the time of succession will not be reversed for want of a finding that no claim was made within the five-year period within which claim was required to have been made under Civ. Code, §§ 672, 1404, in the absence of an answer to the petition setting forth a defense, and in the absence of the evidence, since it will be presumed in favor of the judgment that the proof showed that petitioners had within five years after the decedent's death appeared and claimed the succession.

- 3. Appeal and error** $\hookrightarrow$ 900—Error not presumed.

Error is never presumed, all intendments being in favor of the judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Suzanne Aufret, deceased. Petition of Mathurin Marie Le Ralle and others for a decree of distribution. From the decree the State of California appeals. Affirmed.

U. S. Webb and Frank L. Guereña, both of San Francisco, for the State.

S. J. Brun and J. A. Fairchild, both of San Francisco, for respondent.

SHAW, J. This is an appeal on behalf of the state of California from a decree of distribution of the estate of Suzanne Aufret, deceased, distributing the property to the respondents Mathurin Marie Le Ralle, Marie Louise Bichelot, and Marie Ange Bichelot, in

certain proportions not material to the inquiry on this appeal. The record on appeal consists of the following documents:

(1) The petition of the respondent, Mathurin Marie Le Ralle, asking distribution of the estate to the two respondents as heirs at law of the decedent. It alleges the death of the decedent on May 18, 1908; that the estate was in San Francisco, and was personality; that the public administrator had been appointed administrator of the estate, and had duly administered the same; that his accounts had been settled, showing a balance of \$2,126.41 in money; that the respondents were the heirs of the decedent, by reason of their relationship to her, as set out in the petition, stating their respective shares and rights therein; and that they were residents of France at the time of the filing of said petition on March 18, 1919. It does not aver that they were aliens, or that they ever were subjects of France.

(2) An answer to the petition by the Attorney General, on behalf of the state. It alleges that the aforesaid respondents are all citizens and residents of the republic of France; that the aforesaid petition for distribution was filed and the claim of succession to the said estate made more than five years after the death of the decedent; and that neither of the respondents had appeared and claimed such estate by succession within five years from the death of the said decedent. It asks that the petition be denied and that the property be distributed to the state.

(3) The decree of distribution appealed from. It recites that on the hearing of the petition evidence was introduced by the respective parties; that the decedent was a resident of Algiers, Africa, at the time of her death, which occurred on May 18, 1908; that the estate was ready for distribution and consisted of the sum of money above stated; that the respondents were her next of kin entitled to succession, and that at the time of her death the respondent, Le Ralle, was and "still is" a resident and subject of France; that one Marie Anne Le Ralle Bichelot, a niece of decedent, was at the death of the decedent a resident and subject of France; that said Marie Anne Le Ralle Bichelot died on March 17, 1913, and was then a resident and subject of France, and left surviving her the respondent Marie Ange Bichelot, her husband, and the respondent Marie Louise Bichelot, her child, "both of whom are residents and subjects of France." It does not state that respondent Le Ralle was a resident or citizen of France at any time between the date of May 18, 1908, and the date of the decree, to wit, September 29, 1919, or that the deceased niece was not a resident of this country from the time of the death of the decedent Aufret until the date of her own death, or that her surviving hus-

band and child aforesaid were not residents and citizens of this country at all times prior to the date of the decree. Thereupon it ordered distribution of the estate to them as aforesaid.

There was no recital or finding upon the subject of their having appeared and claimed the estate within five years after the death of said decedent, except the recital that they were entitled to succession. No bill of exceptions or other statement showing the evidence introduced and proceedings taken at the trial appears in the record. No findings or decision in writing were signed or filed, other than the aforesaid recitals in the decree of distribution.

[1] The answer does not state facts sufficient to show that the respondents are not entitled to the estate under the provisions of our Civil Code on the subject. Section 672 declares that—

"If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred."

Section 1404 provides, further, that aliens may take by succession the same as citizens—

"but no nonresident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

The answer does not aver that the respondents, or either of them, were not residents and citizens of California, or of the United States, at the time of the death of Suzanne Aufret in 1908, and ever since, until the time of the filing of the answer in the year 1919. If they were such residents or citizens at the time of the death of the decedent, they would immediately succeed to the title, free from the condition expressed in section 1404, and no claim on their part would be necessary to enable them to take by the succession. On the face of the petition and answer thereto since the relationship was not disputed, the court below was authorized to make the distribution to the respondents, as it did. In our consideration of the case, since the answer stated no defense, it may be entirely disregarded.

The recitals of the decree do not preclude the respondent from taking the succession. As to respondent Le Ralle, the recitals do not say that he did not become a resident of this country immediately after the death of the decedent, and remain such resident until the date of the decree, or that he did not become a citizen of this country in that interval, or that he did not appear within the first five years and claim the succession. As to the deceased niece, the recitals do not say that she did not appear and claim the succession before her death, or that her successors, her

husband and child, did not do so after her death. The recitals, therefore, do not warrant the conclusion that the decree was erroneous.

[2, 3] We know of no decision to the effect that a judgment or decree for a petitioner may be reversed for want of a finding, where the answer does not set forth any defense. Error is never presumed. All intendments are in favor of the judgment. In the absence of the evidence, it will be presumed that there was proof to the effect that the respondents had, within five years after the death of the decedent, appeared and claimed the succession to the property. It has been said that such—

"claim may be in pais, as by taking possession of the property, or conveying or contracting with respect to it." State v. Smith, 70 Cal. 156, 12 Pac. 123.

We can perceive no reason why this statement is not a correct interpretation of the statute. But even if it were held that the claim must be manifested by some formal document of record or on file in the proceedings in probate for the settlement of the estate, the result would be the same, for, in view of the decree and the lack of any evidence to show that such claim was not so shown, we must presume that it was so manifested.

The decree is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; SHURTLEFF, J.; LENNON, J.

187 Cal. 56

PEOPLE ex rel. COE v. CITY OF LOS ANGELES. (L. A. 6525.)

(Supreme Court of California. Sept. 15, 1921.
Rehearing Denied Oct. 13, 1921.)

Municipal corporations ~~§~~34 — Consolidation not effected by vote on ballot not stating proposition of assuming indebtedness.

Under St. 1913, p. 577, as amended (St. 1915, p. 311) § 5, providing that when a petition for consolidation with another city requests the submission to the electors of the question of assuming the bonded indebtedness of such city, the question of consolidation must be submitted the same as under section 2, requiring only the submission of such question where no assumption of indebtedness is contemplated, except that the notice of election must also distinctly state the proposition of assumption, where such notice, though it included the latter proposition, provided for a ballot containing only the question of consolidation, the proposition of assuming such indebtedness was not submitted to the electors, as required by Const. art. 11, § 8½, subds. 6, 7, and no consolidation was therefore effected, though a majority voted in favor thereof.

Wilbur, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Quo warranto by the People of the State of California, on the relation of Charles Coe, against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed.

See, also, 183 Pac. 822.

U. S. Webb, of San Francisco, Delphin M. Delmas, of Los Angeles, and F. G. Blood, of San Diego, for appellant.

Chas. S. Burnell, Wm. P. Mealey, J. H. O'Connor, and Jess E. Stephens, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. This proceeding is one of quo warranto instituted by the Attorney General on the relation of Charles Coe. By it the people of the state assail the validity of the consolidation proceedings under which it is claimed by the city of Los Angeles that the city of Sawtelle has become consolidated with, and is a part of, the city of Los Angeles, and under which the latter city is exercising municipal governmental functions over the city of Sawtelle. The judgment of the trial court was in favor of the defendant, and we have before us an appeal from such judgment.

The city of Sawtelle existed up to May 4, 1917, as a separate municipality of Los Angeles county. On that day an election was held therein, pursuant to proceedings theretofore regularly had, to determine whether it should be consolidated with the larger city of Los Angeles, with the result that by a majority of three or four out of a total vote of something over a thousand, it was declared that the cities should consolidate. No question is raised as to the effectiveness of the election held in the city of Los Angeles. The principal claim of appellant is that by reason of the form of ballot used in the election in Sawtelle the question to be submitted to the electors thereof was never submitted to nor voted upon by such electors, with the result that the election therein was ineffective for any purpose. It would follow, the consent of the electors manifested by their votes at such an election being essential to a consolidation, that no consolidation was ever effected.

At the time of the proceedings the city of Los Angeles had a large existing bonded indebtedness, for which, of course, none of the property in the city of Sawtelle was liable. It was proposed, as one of the conditions of consolidation, that for the payment of a very considerable part of such bonded indebtedness the property in the city of Sawtelle should, after consolidation, be subject to taxation in common with the property in the city of Los Angeles as it had theretofore existed. This condition was fully expressed in the petition originating the consolidation

proceeding and in the various orders and notices in such proceeding in both cities. It is conceded by both parties, as it must be, that the question to be submitted to the electors of each city was the single and indivisible proposition that the two cities be consolidated with the assumption by the city of Sawtelle of the burden of taxation for the payment of the specified part of the existing bonded indebtedness of the city of Los Angeles, and that unless the proceedings were such as to impose that burden on Sawtelle no consolidation was effected.

The proceedings were had under the provisions of an act "to provide for the consolidation of municipal corporations," approved June 11, 1913 (Stats. 1913, p. 577), as amended April 29, 1915 (Stats. 1915, p. 311). Section 2 of that act, having to do with such proceedings where no assumption of existing bonded indebtedness by either city is contemplated, provided, among other things, that upon the filing of the proper petition with the legislative body of the city having the smaller population, that body must call a special election, "and submit to the electors of such municipal corporation the question whether such municipal corporation shall be consolidated." Notice of such election is required to be given, which notice, among other things, "*shall distinctly state the proposition to be submitted*" (italics ours). It further provided that upon the ballot there shall be printed the words "Shall the cities of — and — be consolidated?" with the words "Yes" and "No," with voting squares in which the voter was to stamp a cross to indicate his vote. Various other provisions as to time and manner of notice, voting precincts, election officers, polls, etc., are included. Section 3 had to do with the subsequent proceedings in the larger city, and it is here expressly provided that "the question" submitted to the electors thereof "shall be stated in the notice of such election *and on the ballots* to be used at such election." Section 5, as amended April 29, 1915, had to do with such consolidation where there was an existing bonded indebtedness on the part of either or both of the municipalities as to which assumption was desired. It provided that in such a case "the petition * * * may contain a request that the question to be submitted to the electors of the municipal corporations proposed to be consolidated shall be, *whether such municipal corporations shall be consolidated, as hereinbefore in this act provided, and the property in such municipal corporations, shall after such consolidation, be subject to taxation at the same rate, to pay any of such bonded indebtedness specified in said petition.*" It was then provided that, if such request be made in the petition, "the question of such consolidation shall be submitted to the electors in such municipal corporation not having the greatest population, *the same*

in all respects as upon a petition presented under the provisions of section two, excepting that the notice of election shall, in addition to the matters required by said section, distinctly state that it is proposed that the property in such municipal corporation shall be taxed at the same rate to pay such bonded indebtedness set forth in said petition." (Italics wherever used are ours.)

The petition here did ask for the submission of this question of consolidation and assumption by Sawtelle of the burden of taxation with the city of Los Angeles for certain specified portions of the bonded indebtedness of the city of Los Angeles. The ordinance of Sawtelle calling the election was one "calling a special election to submit to the electors of the city of Sawtelle" the question, "Shall the cities of Sawtelle and Los Angeles be consolidated and the property in the said city of Sawtelle thereafter be taxed * * * to pay for certain bonded indebtedness of said city of Los Angeles." The notice of election distinctly stated the proposition "to be so submitted" as including said burdening of the property in Sawtelle with a part of the Los Angeles indebtedness, such part amounting to something over \$30,000,000. The notice, however, provided for an official ballot entirely silent on the question of bonded indebtedness, and containing only the questions, "Shall the cities of Sawtelle and Los Angeles be consolidated?" "Yes," and "Shall the cities of Sawtelle and Los Angeles be consolidated?" "No," with a voting square to the right of and opposite each proposition, in which the voter, to whom such official ballot was delivered at the polling place, was called upon to vote by stamping a cross. The notice of election stated if he stamped a cross in the square after "Yes" his vote should be counted in favor of consolidation, and if in the square after "No" the vote should be counted against the consolidation.

The ballot used at the election was as follows:

"Instructions to Voters.

"To vote on the question or proposition, stamp a cross (X) in the voting square after the word 'Yes' or after the word 'No.' All marks, except the cross (X) are forbidden. All distinguishing marks or erasures are forbidden and make the ballot void. If you wrongly stamp, tear or deface this ballot, return it to the inspector of election and obtain another.

Shall the cities of Sawtelle and Los Angeles consolidate?	Yes	☐
	No	☐

At the time of the proceedings, subdivisions 6 and 7 of section 8½ of article 11 of the state Constitution provided as follows:

"Subdivision 6: " * * * No property in any territory hereafter consolidated with or annexed to any city or county shall be taxed for the payment of any indebtedness of such city or city and county outstanding at the date of such consolidation or annexation and for the payment of which the property in such territory was not, prior to such consolidation or annexation, subject to such taxation, unless there shall have been submitted to the qualified electors of such territory the proposition regarding the assumption of indebtedness as hereinbefore set forth and the same shall have been approved by a majority of such electors voting thereon."

Subdivision 7: "In all cases of * * * consolidation of two or more incorporated cities, assumption of existing bonded indebtedness by * * * either of the cities so consolidating may be made by a majority vote of the qualified electors voting thereon in the territory or city which shall assume an existing bonded indebtedness."

It is obvious, in view of the constitutional provisions set forth, that consolidation upon the basis of subjecting property in Sawtelle to taxation for the payment of any part of the existing bonded indebtedness of Los Angeles was not effected "unless there" was "submitted to the qualified electors" of Sawtelle "the proposition regarding" such assumption, and such proposition was approved "by a majority of such electors voting thereon." This is conceded. But it is claimed, despite the fact that there was no word upon the official ballot to suggest that any question regarding assumption of indebtedness was involved, that the proposition was nevertheless "submitted to the qualified electors" of Sawtelle, and approved by a majority thereof, because of the statement of the proposition "to be * * * submitted" contained in the notice of election, and the requirement in said notice as to the form of ballot to be used at the election, which requirement, it is insisted, was in strict accord with the provisions of the act of June 11, 1913, as amended April 29, 1915, hereinbefore noted. By this notice, it is said, the electors were given full and specific notice that a vote for consolidation meant consolidation with assumption of the indebtedness specified in the notice, and the ballot used being, it is claimed, in the form required by the act, the proposition of assumption of indebtedness was, in fact, submitted to and approved by a majority of the electors.

The only votes for consolidation at the election in Sawtelle were such as were indicated by a cross stamped in the square at the right of the word "Yes" on such a ballot. No opportunity was given to any elector to vote in any other way or upon any proposition other than the one printed therein.

It is to be observed that under our law relative to consolidation of municipal corporations there may be a consolidation without any assumption of existing bonded indebtedness, a consolidation with the assumption of all the existing bonded indebtedness, and a consolidation with an assumption of only a

part of the existing bonded indebtedness. The proposition here "to be submitted" was the last of these, a consolidation with an assumption by Sawtelle of a part of the existing bonded indebtedness of Los Angeles. It was placed upon the official ballot furnished the electors just as though it were the first of these, viz. a proposition for consolidation without any assumption of existing bonded indebtedness, a perfectly legal proposition under the law, but, in view of that very fact, one essentially misleading under the circumstances of this case. The ballot professed on its face to tell the voter what proposition he was to vote on, but told only half the story, omitting all reference to the very essential part relative to the assumption of any existing bonded indebtedness, the thing as to which it has been deemed proper by the people of the state to enact a constitutional provision requiring submission of the proposition to the electors and approval by them before it could be accomplished.

The importance of stating upon the official ballot, at least in terms sufficiently specific to bring home to the voter knowledge of the general nature of the proposition upon which he is to vote, has been uniformly recognized by all our laws relative to elections under the so-called Australian ballot system. It is a matter of common knowledge that a great proportion of the electors have no other official knowledge of the matters to be voted on. The power of the Legislature to prescribe the form of ballot may be fully conceded, but certainly it is not to be assumed that such body ever intended to provide a form of ballot that would present a proposition to the elector in such a way that it would appear to him to be an entirely different proposition from the one actually intended, even if we should assume it could legally do this. To our minds, under a fair and reasonable construction of the Consolidation Act of June 11, 1913, as amended April 29, 1915, no support can be found therein for the ballot that was used at the Sawtelle election. It cannot fairly be disputed that it was the design of the act that the proposition to be submitted was to be stated upon the official ballot in terms sufficiently specific to tell the voter in a general way what the whole proposition was. As we have noted, section 2 had to do solely with consolidations without any assumption of existing bonded indebtedness, and it was as to such a consolidation that the requirement as to the statement of the question on the ballot was made. As to such a consolidation, the statement there set forth was a full and complete statement of the proposition to be voted on, and the act, in terms, required this statement to be made on the ballot. In other words, the Legislature said that the proposition must be stated on the official ballot. Can it be fairly doubted that such, viz. that the proposition, must be stated on the ballot, was the intent of the Legislature in

section 5 of the act, the section relative to consolidations with assumption of indebtedness? As we have seen, this section in terms states, as the question to be submitted in such a case, a very different question from that submitted under section 2, one expressly including the matter of assumption of indebtedness, and the section expressly provides that "the question of such consolidation" be submitted to the electors, meaning, of course, that the question theretofore described be submitted, with the reasonable implication to our minds that such be the question to be, in substantial part at least, printed on the ballot. In other words, the act, fairly construed, requires the proposition to be submitted to be printed, in substantial part at least, on the official ballot. The language of section 5 of the act that, except as to certain matter required to be distinctly stated in the notice of election, "the question" in such a case is to be submitted "the same in all respects as upon a petition under the provisions of section two," specially relied on by learned counsel, cannot be fairly construed, in the nature of things, as referring to the form of statement of the question on the ballot, and as authorizing a statement misrepresenting the question submitted, and not in accord with the fact. It is the question to be submitted that is to be submitted in all respects as on a petition presented under section 2, and the provision simply means that such question, not some other question, is to be submitted in all respects as the question arising under section 2 is submitted, which, to our mind, includes the statement of such question on the ballot.

The departure from the form of ballot requisite in this case under the consolidation act was so substantial in nature that it cannot be held not to have affected the result. It is very clear that, in view of the facts, it must be held that, under the provisions of that act, the proposition of assumption of indebtedness was never in fact submitted to the electors of Sawtelle or approved by them. This being our conclusion as to the proper construction of the act, it is unnecessary to consider any question as to its validity under a different construction.

From the foregoing it follows that there has been no consolidation of the city of Sawtelle with the city of Los Angeles.

The material facts we have discussed, which are undisputed, are sufficiently shown by the findings to warrant, as asked by the appellants, direction that judgment be entered in their favor.

The judgment is reversed, with directions to the court below to enter judgment, upon the findings already made, in favor of plaintiffs, in accord with the prayer of their complaint.

We concur: SHAW, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

SHURTLEFF, J., not having heard the oral argument does not participate herein.

WILBUR, J. I dissent. The statute under which the election was held expressly provides for the form of ballot. Ballots in this form were used at the election. Section 5 of the act, which regulates the procedure in the event that the assumption of a portion of the bonded indebtedness of the larger city is involved, after expressly providing for the filing of a petition praying that "the property in such municipal corporations, shall after such consolidation, be subject to taxation at the same rate, to pay any of such bonded indebtedness specified in said petition, * * *" then provides, as stated in the main opinion, that "the question of such consolidation shall be submitted to the electors in such municipal corporation not having the greatest population, the same *in all respects* as upon a petition presented under the provisions of section two, *excepting that the notice of election shall*, in addition to the matters required by said section, distinctly state that it is proposed that the property in such municipal corporations shall be taxed at the same rate to pay such bonded indebtedness set forth in said petition." (Italics mine.) Thus the Legislature dealt with the question of what differences are to be made in the procedure by reason of the submission to the electors of the question of the assumption of a bonded indebtedness. In the very sentence dealing with this proposition it is provided that the proceedings shall be the same in all respects as in the case where no question of bonded indebtedness is involved, with the single exception that in the former case the notice of election shall specify the bonded indebtedness to be assumed. If the form of ballot is changed so as to include therein a statement of the assumption of indebtedness, then the election is not conducted "in all respects" as it would otherwise be conducted, with the single exception mentioned in the statute; there are two exceptions, because the exception applicable to the notice of election is read into the form of ballot and made applicable thereto, as well as to the notice of election. To express this meaning the clause of the sentence in the statute under consideration should read as follows:

"* * * In all respects as upon a petition presented under the provisions of section two, excepting that (ballot and) the notice of election shall, in addition to the matters required by said section, distinctly state that it is proposed that the property in such municipal corporations shall be taxed at the same rate to pay such bonded indebtedness set forth in said petition."

It is conceded in the main opinion that the form of the ballot is a matter for legislative determination. If that is true, the Legislature of the state in such statute either did or

did not provide the form of ballot. If it did provide the form of ballot in the case at bar, what is to be printed thereon as a statement of the proposition to be voted upon, and who is to determine the exact language thereof? The statement of the indebtedness contained in the election notice is as follows:

"That it is proposed to consolidate the city of Sawtelle with the city of Los Angeles (a city contiguous thereto and having a greater population), and that the property in the city of Sawtelle shall, after consolidation, be subject to taxation equally and at the same rate with property in the city of Los Angeles, to pay certain bonded indebtedness of said city of Los Angeles outstanding at the date of consolidation, or indebtedness theretofore authorized, to be represented by bonds of said city of Los Angeles thereafter to be issued from the hereinafter set forth list:

"That the improvements for which such indebtedness of said city of Los Angeles was so incurred or authorized, the amounts of such indebtedness already incurred, outstanding at the date of the first publication of this notice, and the amounts of such indebtedness of said city theretofore authorized and to be represented by bonds hereafter to be issued, and the maximum rate of interest payable or to be payable on such indebtedness, are as follows:

"Water Works Bonds' authorized September 7, 1915, in the sum of \$1,500,000, to provide the city of Los Angeles with a water supply in the Owens River Valley, and bearing interest at the rate of 4 per cent. per annum, of which there is outstanding \$1,087,500;

"Water Works Bonds' authorized June 12, 1907, in the sum of \$23,000,000, for the purpose of acquiring and constructing waterworks for supplying the inhabitants of the city of Los Angeles with water from the Owens River Valley, bearing interest at the rate of 4 per cent. per annum and 4½ per cent. per annum, of which there is outstanding \$20,968,400;

"Electric Plant Bonds' authorized April 19, 1910, in the sum of \$3,500,000, for the purpose of acquiring and constructing works for generating and distributing electricity for the purpose of supplying the inhabitants of the city of Los Angeles with light, heat, and power, and bearing interest at the rate of 4½ per cent. per annum;

"Harbor Improvement Bonds' authorized April 19, 1910, in the sum of \$3,000,000, for the purpose of opening streets, constructing docks, wharves, and warehouses at Los Angeles Harbor, and the constructing and maintaining of canals and waterways, and the acquisition of the necessary lands for said improvements, and bearing interest at the rate of 4½ per cent. per annum, of which there is outstanding \$2,625,000;

"Water Works Bonds,' authorized April 15, 1913, in the sum of \$1,500,000, for the purpose of acquiring and constructing works for conducting water of the Los Angeles Aqueduct to the city of Los Angeles for domestic, irrigating, and other uses, and to be known as the 'Los Angeles City Trunk Line' and bearing interest at the rate of 4½ per cent. per annum, of which there is outstanding \$1,350,000;

"Harbor Improvement Bonds,' authorized

April 15, 1913, in the sum of \$2,500,000, for the purpose of opening streets, constructing docks, wharves, and warehouses at Los Angeles Harbor, and the constructing and maintaining of canals and waterways, and the acquisition of the necessary lands for said improvements, and bearing interest at the rate of $4\frac{1}{2}$ per cent. per annum, of which there is outstanding \$2,305,000;

"Electric Plant Bonds" authorized May 8, 1914, in the sum of \$6,500,000, for the purpose of acquiring and constructing works for generating and distributing electricity for the inhabitants of the city of Los Angeles with heat, light, and power, bearing interest at the rate of $4\frac{1}{2}$ per cent. per annum."

Is this whole statement of the nature and character of the indebtedness to go on the ballot? Must the ballot show not only the actual bonds sold, but the amount of bonds which the city is already authorized to sell by reason of the voting of the bond issue? If this whole statement is not to be incorporated on the ballot, who is to determine what portion is to be inserted and what is to be omitted? It would seem clear that if the Legislature had contemplated that any statement in regard to the indebtedness should be actually printed on the ballot, they would have indicated some short method of stating the proposition.

The scrupulous care with which the Legislature considered the effect upon the proceedings of the assumption of bonded indebtedness is shown by the special provision contained therein with reference to the particular case where the annexed territory is to assume its proportion of all of the bonded indebtedness of the city. In such case it is provided that it is sufficient in the petition and in all other proceedings to describe the same as the bonded indebtedness of [Los Angeles, for instance]. The particular language is as follows:

"Provided, however, that if such petition contains a request that the property in such municipal corporations be, after such consolidation, subject to taxation to pay all of the bonded indebtedness incurred or authorized of such municipal corporations, such bonded indebtedness and improvements for which such bonded indebtedness was incurred or authorized may be described in such petition and in all other proceedings hereunder as 'the bonded indebtedness of — (insert the names of the municipal corporations),' without specifying the improvements."

If the Legislature has not covered the form of ballot for the particular case where the question of consolidation and assumption of indebtedness are both submitted as a single proposition to the voters, the question is whether the officials conducting the election are charged with the obligation of determining the exact language to be printed upon the ballot. It would seem clear that the authority should be exercised by the legislative body or bodies intrusted with the conduct of

the election rather than by the clerk who prepares the form of ballot for the printer.

The board of trustees of the city of Sawtelle by ordinance No. 186 made provision for the conduct of the election in question, and caused a notice of election to be published in accordance therewith, in which it was said:

"That upon the ballots to be used at said special election, in addition to the other matter required by law, there shall be printed the following: 'Shall the cities of Sawtelle and Los Angeles be consolidated?' 'Yes,' and 'Shall the cities of Sawtelle and Los Angeles be consolidated?' 'No;' and there shall be a voting square to the right of and opposite each proposition, and on separate lines."

Then follow directions for the marking of the ballot. This form of ballot was that by which the trustees of Sawtelle submitted to the electors thereof the single question whether the two cities should be consolidated and the territory formerly under the jurisdiction of the city of Sawtelle be subjected to taxation for the portion of the indebtedness of the city of Los Angeles specified in the notice of election.

In so far as this form of ballot fails to show on its face the results with reference to the indebtedness which are to be brought about by the affirmative vote, it is suggested that the ballot is deceptive. Surely the voters must have known that consolidation would have some effect upon the indebtedness of both cities involved. "As a rule, existing debts of the corporation contracted before the limits were extended, unless otherwise provided by law, are chargeable upon the added territory as well as that comprehended by the boundaries before they were altered or extended." McQuillin on Municipal Corporations, § 294. In the absence of any notice to the contrary, therefore, the voters voting at the election would assume that the effect of consolidation would be to charge them proportionately with the entire indebtedness of the city of Los Angeles. It is true, as pointed out in the main opinion, that the particular statute under consideration does permit a consolidation of city governments whereby neither city would assume any of the indebtedness of the other. It is fundamental in the administration of the law that every one is presumed to know the law. The voter, therefore, is presumed to know that he is to ascertain the effect of his ballot in this particular instance by consulting the notice of election and the petition originating the proceedings. No voter is entitled to have printed upon the ballot all of the information which may be necessary for him to exercise an intelligent choice. All he is entitled to in this regard is that his ballot may be deposited by him in such fashion as to clearly indicate his decision upon the question submitted to the voters. And this is

usually done by merely stamping a cross in one or another of two places upon the ballot. If there is any difficulty in this case it arises not from any uncertainty in the form of ballot or as to the issues submitted to the voters, but from a failure to incorporate in the ballot information which would assist the voter in determining how he should cast his vote.

I fully agree with the majority of the court that it would have been desirable to have indicated in some form upon the ballot the fact that the effect of the vote was to charge the property within the former territory of Sawtelle with a portion of the indebtedness of the city of Los Angeles, thus calling the attention of the careless voter to the significance of his vote; but the determination of the form of the ballot is one for the Legislature, and I think that the form of the ballot is so clearly indicated in the statute in question that no executive officer charged with the preparation of ballots could think of departing from the plain terms of the statute nor would well advise city councils to do so. They would do what was done in this case to clarify the exact proposition submitted to the voters by a declaration thereof in the ordinance calling the election and in the notice of election, and by expressly providing for the form of the ballot which would be used in the determination of the question submitted, such form to accord with the statutory provision.

There was no chance for the voters of Sawtelle to be defrauded or misled in this matter. If they were not informed as to the terms of the statute, and if they were unfamiliar with the express statute, and merely relied upon general principles in voting, they knew that the property in the city of Sawtelle would have been charged with a larger indebtedness than that actually assumed by the vote for consolidation.

In view of the opinion of the majority of the court, the constitutional question raised in the petition for rehearing in this court becomes unimportant to a decision. If, however, the statute is construed as I contend it should be, the constitutional question is involved, and, as a conclusion in favor of the appellant would require a concurrence on my part in the main opinion, I briefly state my views in relation thereto. Section 8½, art. 11, of the Constitution, as amended in 1918, quoted in the main opinion, provides that no property in any territory hereinafter con-

solidated with or annexed to a city shall be taxed for the payment of any outstanding indebtedness of the city unless the proposition of incurring the assumption of indebtedness is approved by a majority of the electors voting thereon. If this section requires that the fact of indebtedness and of its proposed assumption be printed upon the ballot, then the statute under consideration as construed by me would be unconstitutional, for it provides for the consolidation of cities and an assumption of indebtedness without such a statement on the ballot. But in order to submit a question to the voters it is not necessary that it should be printed upon the ballot; for instance, constitutional amendments are submitted to the people without printing more than a mere indication of the tenor thereof upon the ballot. The section of the Constitution under consideration (article 11, § 8½) expressly provides:

"The Legislature shall enact such general laws as may be necessary to carry out the provisions of this section and such general or special laws as may be necessary to carry out the provisions of subdivisions 5 and 6 of this section. * * *"

In the constitutional provision providing for the initiative and referendum (article 4, § 1), the Secretary of State is required to submit to the electors for their approval or rejection the initiative or referendum matters, but the form of the ballot by which they are to be submitted is not provided therein. It is further provided:

"This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

The form of ballot is in the control of the Legislature. *Haskell v. City of Long Beach*, 153 Cal. 543, 96 Pac. 92. I therefore conclude that the city authorities having pursued the method indicated by the Legislature for ascertaining the will of the voters, and the voters having expressed their will in the form provided by law, that the annexation of Sawtelle to Los Angeles has been effected, and that the territory within the former boundaries of Sawtelle is liable to be assessed with other property within the city of Los Angeles for that portion of the indebtedness set out in the notice of election.

137 Cal. 20

Ex parte HEIKICH TERUI. (Cr. 2390.)

(Supreme Court of California. Sept. 12, 1921.)

1. Treaties ⇐1—Alien Poll Tax Law held void as to Japanese subjects.

Alien Poll Tax Law, enacted pursuant to Const. art. 13, § 12, requiring alien male inhabitants to pay a poll tax without making such requirement applicable to similarly situated citizens of the United States, *held* void as to Japanese subjects, being violative of the treaty between the United States and Japan of April 5, 1911 (37 Stat. 1504), providing that the citizens or subjects of each of the parties shall enjoy in the territories of others the same rights and privileges as are granted to native citizens or subjects.

2. Treaties ⇐2—May provide that subjects of foreign nation shall not be discriminated against in taxation.

Under Const. U. S. art. 1, § 10, art. 2, § 2, the United States has the power to provide in a treaty with a foreign nation that the subjects of such country in the territory of the United States shall not be discriminated against in the matter of taxation by reason of their alien citizenship.

3. Treaties ⇐8—Treaties between United States and Japan relating to rights of Japanese in "territories" of United States applicable to territory of the several states.

The treaty between the United States and Japan of April 5, 1911 (37 Stat. 1504), relating to the rights of the subjects of each of the parties in the "territories" of the other, *held* applicable to subjects in Japan in the several states as well as in the territorial possessions of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Territory.]

In Bank.

Application for writ of habeas corpus by Heikich Terui against the Chief of Police of the City of Oakland. Petitioner discharged from custody.

Albert H. Elliott and Guy C. Calden, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, C. J. The petitioner, an alien male inhabitant of the state of California of the age of about 35 years and a subject of the empire of Japan, is held in custody by the chief of police of the city of Oakland, upon a complaint charging him with having failed to register as required by the terms of an act of the Legislature, entitled "An act to add a new chapter to title nine of part three of the Political Code, to be numbered chapter nine thereof, embracing sections three thousand eight hundred thirty-nine to three thousand eight hundred fifty-six, both inclusive, providing for the levy and

collection of poll taxes pursuant to the provisions of section twelve of article thirteen of the state constitution as adopted November 3, 1920," enacted at the legislative session of 1921.

This act, commonly known as the alien poll tax law, provides that—

"Every alien male inhabitant of this state over twenty-one years of age and under sixty years of age, except paupers, idiots and insane persons, must annually pay a poll tax of ten dollars. * * *

In the year 1921 this tax becomes due and payable on the 1st day of August, and delinquent if not paid on or prior to December 1st. It contains provisions requiring "every person liable to pay such poll tax" to register as provided in the act, such registration in the year 1921 to be effected on or before July 31st.

As is stated in the title to the act, it was enacted pursuant to the mandate of section 12 of article 13 of the Constitution as amended under the initiative provisions of our Constitution, at the general election of 1920. Prior to the amendment, this section of the Constitution was as follows:

"No poll tax or head tax for any purpose whatsoever shall be levied or collected in the state of California."

By the amendment of 1920 it was made to read as follows:

"The Legislature shall provide for the levy of an annual poll tax, and the collection thereof by assessors, of not less than four dollars on every alien male inhabitant of this state over twenty-one and under sixty years of age, except paupers, idiots and insane persons. Said tax shall be paid into the county school fund in which county it is collected."

The legislation, both in the Constitution and the act, is purely for revenue purposes, an exercise solely of the power of taxation, and contains nothing in the nature of an exercise of the police power of regulation; the provisions relative to registration being solely for the purpose of facilitating the collection of the tax from those liable therefor, and merely incidental to the matter of collecting the tax. It is indeed expressly declared in section 2 of the act that it is one "providing for a tax levy," and therefore that it "shall take effect immediately." It is provided in the act that "every person subject to the payment of the poll tax hereby imposed who shall, 1. Fail, neglect or refuse to register as herein provided" shall be "guilty of a misdemeanor, and, upon conviction thereof, shall be punished in the manner provided by law." It should be noted that under our laws no poll tax or capitation tax, or its equivalent, is levied upon citizens of the state.

Petitioner seeks his discharge from cus-

today, claiming that the complaint fails to state a public offense. His specific claims in this regard are: First, that the act is entirely ineffective as to all aliens who are subjects of the empire of Japan in view of a provision in the existing treaty between this country and the empire of Japan, proclaimed April 5, 1911; and, second, that the act is void as to all alien inhabitants of the state in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of a provision of section 1 of article 14, Amendments to the Constitution of the United States.

As to the first claim, viz. that the act is ineffective as to all aliens who are subjects of the empire of Japan in view of a provision in the existing treaty between this country and the empire of Japan, proclaimed April 5, 1911 (37 Stat. 1504):

Article 1 of this treaty, after providing that "the citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade," etc., "and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established," provides:

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

It is, of course, obvious that the alien poll tax law of California does, without any pretext whatever, require Japanese subjects, as well as all other aliens, to pay taxes both other and higher than those required to be paid by citizens of the United States. No poll tax or its equivalent is required to be paid by the latter, and the alien is liable equally with the citizen for all other kinds of taxes imposed, with the result that this poll tax is an additional tax imposed solely by virtue of his being an alien. It would seem also that the effect of such a tax would be that the alien is not allowed to enjoy in respect to "the most constant protection and security for their persons and property" the "same rights and privileges as are or may be granted to native citizens, * * * on their submitting themselves to the conditions imposed upon the native citizens. * * *" No one can fairly dispute that the act openly and avowedly discriminates against alien residents in the matter of taxation for revenue purposes.

It cannot be disputed at this stage in our history that, if these provisions of the treaty were intended to be applicable in the several states of the United States, as well as in its other territorial possessions, and are within the proper scope of the treaty power of the United States, they render our alien poll tax absolutely ineffective as against alien residents who are Japanese citizens or subjects. Certain propositions with relation to treaties between the United States and other nations are now so thoroughly settled, in view of express constitutional provisions and the decisions thereunder, that they are practically elementary law. While the government of the United States is a government of delegated powers, the states retaining such powers as they have not delegated or surrendered to it, the people of the several states have surrendered the whole treaty-making power to the federal government, and vested it in the President and Senate of the United States (section 2, art. 2, Const. U. S.), and have expressly excluded each state from all power in this regard (section 10, art. 1, Const. U. S.). They have further expressly declared in the federal Constitution as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Section 2, art. 6.

From the first decision of the Supreme Court of the United States upon this subject, rendered in 1796 (*Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568), to the present day, it is uniformly declared, as the express language of the federal Constitution unequivocally requires, that as to all matters within the treaty-making power conferred by the federal Constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate is a part of the supreme law of the land, binding on all states and to which all state enactments in conflict therewith must yield. See *Geofroy v. Riggs*, 133 U. S. 258, 266, 10 Sup. Ct. 295, 33 L. Ed. 642; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628. As was said in *Ware v. Hylton*, supra:

"It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state Legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole."

As was said in *Hauenstein v. Lynham*, supra:

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution."

The learned Attorney General of course does not dispute these well-settled propositions.

[1, 2] It is suggested, however, that the subject here covered by the treaty, including, as it does, matters relative to the exercise of their sovereign power of taxation by the several states, is not within the proper scope of the treaty-making power conferred by the people in the federal Constitution. It is to be noted at once that the treaty provisions in no degree purport to limit the several states in the matter of imposing or collecting taxes, except simply to require that in such matter there shall be no discrimination as against Japanese citizens residing therein, the express provision with regard to taxes being that neither American citizens residing in Japan nor Japanese citizens residing in America shall be compelled "to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects." This is simply a provision to prevent discrimination on the part of one against the subjects of the other residing in its territory, placing, in so far as the kind and amount of taxes are concerned, native citizens and the subjects of the other nation upon an equal footing.

It may at once be conceded for all the purposes of this case that there are matters without the proper scope of the treaty power of the United States, matters which could not fairly be held to be included in the grant of that power by the people of the several states to the federal government. We are aware of no decision of the Supreme Court of the United States by which a treaty provision has been declared to be beyond the treaty power, but it may fairly be claimed that there are such matters. But that the treaty-making power includes such matters as are covered by the provisions here involved cannot be seriously questioned. The rule, as declared in *Geofroy v. Riggs*, 133 U. S. 258, 266, 10 Sup. Ct. 295, 297 (33 L. Ed. 642), by the Supreme Court of the United States, the ultimate authority on such a question is that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations," and, with regard to such matters, is "in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states." The court there said that it would not be contended that

it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. The court then said:

"But, with these exceptions [i. e., those stated in portion last above quoted], it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country"—citing cases, including our own case of *People v. Gerke*, 5 Cal. 381.

In *Geofroy v. Riggs*, supra, it was held that it was clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. See, also, in this connection, *Hauenstein v. Lynham*, 100 U. S. 483, 489, 490, 25 L. Ed. 628. It seems to us to be too clear to admit of argument that the protection which should be afforded to the citizens of one country residing in another against discrimination in matters of taxation based solely on their alien citizenship is a proper subject of negotiation between our government and the governments of other nations and that there is nothing in the provisions under discussion that was beyond the treaty power of the United States.

[3] We have assumed thus far, contrary to a suggestion of the learned Attorney General, that the provisions of the treaty here involved must be construed as applicable to the several states of the United States, as well as in its other territorial possessions. As to this there cannot be the slightest doubt. There is no word in the treaty to indicate an intention to make such an unreasonable limitation on its provisions relating to the rights of the citizens of one nation "in the territories of the other," and one so contrary to the whole intent and purpose of a treaty between sovereign nations. The word "territories" used in article 1 of the treaty was undoubtedly used as meaning the entire domain over which dominion was exercised by each of the sovereign nations, which, of course, in so far as the treaty-making power was concerned, included all of the states of the United States.

There is no possible escape from the conclusion that, in view of the provisions of the existing treaty between the United States and Japan, the alien poll tax law is ineffective for any purpose with relation to any citizen of Japan. The complaint under which petitioner is held charges only a violation of this act. It therefore fails to state a public offense as against him.

In view of our conclusion on the matter discussed, it is unnecessary in this case to

discuss the claim made under the Fourteenth Amendment to the Constitution of the United States.

It is ordered that the petitioner be discharged from custody.

We concur: SHAW, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.

187 Cal. 27

Ex parte KOTTA. (Cr. 2394.)

(Supreme Court of California. Sept. 12, 1921.)

1. Constitutional law $\S$ 229(1), 283—Taxation $\S$ 55—Alien Poll Tax Law held unconstitutional.

The Alien Poll Tax Law of 1921, imposing a poll tax on alien inhabitants without requiring such tax to be paid by similarly situated citizens of the United States, held violative of Const. U. S. Amend. 14, $\S$ 1.

2. Constitutional law $\S$ 210—Word "person" within equal protection of laws clause includes aliens.

The word "person" within Const. U. S. Amend. 14, $\S$ 1, prohibiting a state from denying to any "person" within its jurisdiction the equal protection of the laws, includes aliens.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

3. Constitutional law $\S$ 211—Laws placing a higher burden on only a portion of similarly situated persons denies to such portion the equal protection of the laws.

Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is, all those among whom no difference which bears a reasonable and just relation to the matter exists, exempting the remaining portion from the burden, are not equal laws, and their enforcement would deprive persons so burdened of the equal protection of the laws guaranteed by Const. U. S. Amend. 14, $\S$ 1.

In Bank.

Application by Guillermo D. Kotta for writ of habeas corpus against the Chief of Police of the City and County of San Francisco. Petitioner discharged from custody.

M. A. Thomas, Albert H. Elliott, and Guy C. Calden, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., for respondent.

ANGELLOTTI, C. J. The petitioner, an alien male inhabitant of the state of California of the age of about 48 years, and a citizen of the United States of Mexico, is held in custody by the chief of police of the city and county of San Francisco under a complaint charging him with failure to register as required by the terms of the act known as the alien poll tax law of 1921, discussed in the opinion filed in the matter of

Terui on Habeas Corpus (Crim. No. 2390) 200 Pac. 954, on September 12, 1921. His case is the same as that of Terui in all material respects, except that he claims no protection under any treaty. It is said by his counsel that there is no treaty provision in any treaty between the United States and the United States of Mexico that affords protection against such discrimination against resident aliens in the matter of taxation as is created by the alien poll tax act. His sole claim is that this act is void as to all alien inhabitants of the state, in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of a provision of section 1 of article 14, Amendments to the Constitution of the United States. The section referred to is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Italics are ours.)

It is upon the portion of this section that we have italicized that the claim of petitioner is based.

All that we have said with relation to this legislation (the alien poll tax act of 1921) in our opinion in the Terui Case is applicable in this case and need not be repeated here, further than to say that the law was enacted solely in the exercise of the power of taxation for the purpose of raising revenue for state purposes, containing no provision whatever attributable to the exercise of the police power of regulation, and that it imposes on alien inhabitants of the state between certain ages, solely because of their alien character, a tax different in kind from and additional to the taxes required to be paid by all inhabitants, citizens, and aliens, alike. No such tax or its equivalent is imposed by our laws on any except alien inhabitants. The law thus imposes an additional burden in the matter of taxation upon such aliens solely because of their alien character, and in this way discriminates against them.

[1] This being the situation, in view of the decisions of the Supreme Court of the United States, there is no escape from the conclusion that the alien poll tax law cannot be enforced, for the reason that by its enforcement the state of California would deny to persons within its jurisdiction the equal protection of its laws, in violation of the provision of section 1 of the Fourteenth Amendment that no state shall "deny to any person

within its jurisdiction the equal protection of the laws."

[2] It is settled that the word "person" as used in this amendment includes aliens. It was said in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 1070 (30 L. Ed. 220):

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."

The rights of subjects of the emperor of China were here being discussed. In *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283, decided November 1, 1915, the rights of an alien who was a citizen of Austria and resident of the state of Arizona, were involved. The Supreme Court, speaking through Mr. Justice Hughes, said (239 U. S. 39, 36 Sup. Ct. 9, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283):

"Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. * * * Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth amendment to the equal protection of its laws. The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens."

The court then quoted approvingly the portion of the opinion in *Yick Wo v. Hopkins*, supra, that we have quoted above. See, also, *Fraser v. McConway*, (C. C.) 82 Fed. 257. Petitioner, therefore, though an alien inhabitant of California, is by this provision of the federal Constitution guaranteed the equal protection of the laws of California.

The meaning of "the equal protection of the laws" thus guaranteed by the federal Constitution to every person within the jurisdiction of a state is not left in doubt by the decisions in so far as such an act as the one here involved is concerned. In *Yick Wo v. Hopkins*, supra, it is said that "the equal protection of the laws is a pledge to the protection of equal laws." This was approvingly quoted in *Truax v. Raich*, supra. In *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359 (28 L. Ed. 923), the Supreme Court of the United States declared that it was undoubtedly intended thereby:

"That equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue

their happiness and * * * enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; *that no greater burdens should be laid upon one than are laid upon others in the same calling and condition,*" etc. (Italics ours.)

As is shown by the opinion in *Yick Wo v. Hopkins*, supra, the legislation enacted by Congress for the enforcement of the amendment, popularly known as the civil rights statutes, declared that—

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens *and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other*" (Italics ours.)

What is said in *Barbier v. Connolly*, supra, and the federal statute just quoted sufficiently shows the subject-matter as to which the alien inhabitant is given by the Constitution "a pledge of the protection of equal laws," laws free from discrimination based solely on his alien character. Stated very generally, the requirement is for equal protection and security for all, citizens and aliens alike, under like circumstances in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc. As is stated in the opinion in *Truax v. Raich*, supra, the constitutional guaranty, in so far as an alien is concerned has no application to laws of a state relating to such matters as the regulation or distribution of the public domain or of the common property or resources of the people of the state, or, it is suggested, laws relating to the devolution of the real property therein. See *Truax v. Raich*, 239 U. S. 39, 40, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283. But that it does guarantee the alien "equal laws" in the matter of the imposition of such burdens on him and his property as taxes seems clear. No question of discriminatory taxation laws was directly involved in the decisions of the Supreme Court that we have cited but the rule of these decisions is clearly applicable to such a case. In the *Railroad Tax Cases* (C. C.) 13 Fed. 722, Justice Field, in his opinion in the Circuit Court, said:

"The Fourteenth Amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation." Whatever

the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. * * * Unequal exactions in every form, or under any pretense, are absolutely forbidden, and of course unequal taxation, for it is in that form that oppressive burdens are usually laid."

See, also, *Fraser v. McConway, etc., Co.* (C. C.) 82 Fed. 257; *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 40 Atl. 977, 42 L. R. A. 442, 67 Am. St. Rep. 579.

[3] This is so clearly true, in view of the general principles declared by the United States Supreme Court in the cases we have cited, as not to require discussion. Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is, all those among whom no difference "which bears a reasonable and just relation" to the matter exists (*Gulf, etc., Ry. Co. v. Ellis*, 165 U. S. 150, 155, 17 Sup. Ct. 255, 257 [41 L. Ed. 666]), exempting the remaining portion from the burdens, are not "equal laws," and their enforcement would deprive the persons so burdened of the equal protection of the laws. We do not see how this can be, fairly questioned.

That the act does this very thing is clear. The sole distinction between the male inhabitants of California so burdened with the poll tax and those not so burdened, in so far as all matters material to imposition of the tax is concerned, is that the former are aliens and the latter citizens. This is the sole basis of the attempted classification. As was said in *Gulf, etc., Ry. Co. v. Ellis*, supra, 165 U. S. at page 165, 17 Sup. Ct. at page 261, 41 L. Ed. 666:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In the case at bar the only difference is such that, in view of the language of section 1 of the Fourteenth Amendment relative to equal protection of the laws, it cannot in the nature of things constitute a proper basis for classification; for the plain effect of that section is to forbid any distinction in such a matter as this based on that fact alone.

It follows from what we have said that the alien poll tax law must be held to be in violation of the terms of section 1 of the Fourteenth Amendment of the Constitution of the United States, which by the express terms of section 2 of article 6 thereof is declared to be "the supreme law of the land,"

binding on the judges in every state, "anything in the Constitution or laws of any state to the contrary notwithstanding." It is therefore ineffective for any purpose.

The petitioner is discharged from custody.

We concur: SHAW, J.; LINNOR, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.

187 Cal. 76

TURNER v. FIDELITY & DEPOSIT CO. OF MARYLAND. (L. A. 5704.)*

(Supreme Court of California. Sept. 16, 1921. Rehearing Denied Oct. 13, 1921.)

1. Principal and surety ⇐97—Unauthorized alteration in obligation assumed releases guarantor.

The rule that guarantor or surety may insist on the strict terms of his contract, and any unauthorized alteration of the obligation releases the surety, is largely relaxed as far as surety companies are concerned.

2. Attachment ⇐337—Amendment of complaint increasing amount of damages does not discharge surety on bond for release.

A surety company, executing a bond to release an attachment, such bond undertaking to pay any judgment obtained in the action, is not discharged, under Civ. Code, § 2819, by an amendment of the complaint, not setting up a new cause of action, but merely increasing the amounts demanded for breach of contract.

3. Attachment ⇐337—Surety on bond to release attachment is not discharged by death of defendant before judgment.

In view of Code Civ. Proc. §§ 385, 1504, 1637, death of defendant in an attachment suit, who has given bond to discharge the attachment, and the revival of the suit against his administrators, does not discharge a surety company executing the release bond, and such company is liable on the bond, to the extent of the penalty thereof, for the amount of judgment against the administrator.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Frank C. Turner against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, defendant appeals. Affirmed.

S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for appellant.

Stephens & Stephens, of Los Angeles, for respondent.

Short, Lindsay & Woolley, of Fresno, amici curiæ.

SLOANE, J. This is an appeal from a judgment holding the defendant corporation liable upon a common-law bond given on release of an attachment in an action between the plaintiff and one John Howse. This bond

recites that an action was pending wherein it was claimed that there was due and owing from the defendant Howse to the plaintiff the sum of \$23,401.76, and that an attachment had been issued against the property of defendant, and that the defendant was desirous of releasing said property from the attachment. It then provides that—

"The undersigned, Fidelity & Deposit Company of Maryland, * * * in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, does hereby undertake in the sum of \$24,000, and promises that, in case the plaintiff recovers judgment in the action, the defendant will, on demand, pay to the plaintiff the amount of whatever judgment may be recovered in said action, together with interest and costs."

The effect of this bond is that the security company guarantees the payment by the defendant on demand of any judgment recovered in said action, and, on default in such payment, to indemnify the plaintiff to the amount of the judgment, not to exceed the sum of \$24,000. Pending the final determination of this suit, the defendant died, and the action was carried on against his administrators, and judgment was obtained against them for the sum of \$30,813.51 and costs, to be paid from the assets of deceased defendant's estate in the due course of administration. After this judgment became final, plaintiff demanded the payment thereof from the administrators of decedent's estate, and, payment being refused, this suit was brought against the surety company upon the bond given for release of attachment, and the judgment was obtained which is the basis of this appeal. The judgment against the surety company is for \$24,000, the full penal sum of the bond, together with interest thereon and costs.

The principal contention of the appellant surety company is that it was exonerated from the penalty of its undertaking by reason of amendments to the complaint in the original action, made after the bond was executed, whereby the liability of the surety was changed. The action as set forth in the original complaint against the defendant Howse alleged a contract between the plaintiff and said Howse relating to the subdivision and sale of a tract of land, whereby the latter had become liable to plaintiff for \$14,800 for failure to pay a note and mortgage upon plaintiff's land, for \$5,000 damages for failure to pave a certain street, and \$3,601.76 on the release and transfer of certain lots.

This was the statement of the cause of action at the time the bond on release of attachment was made. Subsequently plaintiff filed an amended complaint, in which he alleged his claims under the same general contract, upon the note and mortgage for the same amount as in the original complaint,

but set out in the second count, in place of the allegation of failure of defendant to "grade or pave one street" to his damage in the sum of \$5,000, that the defendant "wholly failed" to put in the street work, sidewalks, and curbs as required by the contract, to the damage of plaintiff in the sum of \$7,500, and as a third count, instead of 17 lots released at \$390.62 each, in the sum of \$3,601.67 and interest, as pleaded in the original complaint, he alleged 23 lots released at \$390.62 each, in the entire sum of \$5,945.48. The amended complaint also contained an item of \$458.11 for failure of defendant to pay certain taxes covered by the contract, but this was not allowed in the judgment.

Without going into further details as to the amendment of the pleadings, it is sufficient to say that both the original and amended complaints were upon the same general contract and stated the same cause of action. The amendments did, however, serve to state a greater liability against the defendant than could have been recovered under the original complaint; and whereas, the amount demanded under the original complaint, as recited in the bond for release of attachment, was \$23,401.76, the amounts claimed under the amended complaint aggregated \$27,903.59, besides interest and costs, and the judgment recovered amounted to \$30,813.51. It appears from the recitals of the judgment that the above total was made up of \$17,296.94 on the first count, \$4,988.15 on the second, and \$8,528.42 on the third count.

[1] It is the settled law of this state that a guarantor or surety may stand upon the strict terms of his contract, and that any unauthorized alteration of the obligation assumed, whether detrimental to the guarantor or not, releases him from liability. *Driscoll v. Winters*, 122 Cal. 65, 54 Pac. 387; *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683; *First Congregational Church v. Lowrey*, 175 Cal. 124, 165 Pac. 440; *Michelin Tire Co. v. Bentel*, 193 Pac. 770. This rule is succinctly stated in our Codes. Section 2819 of the Civil Code, relating to the exoneration of guarantors, provides that—

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

The latest expression of this court on the subject recognized this application of the rule to undertakings on release of attachments, as affected by subsequent amendments of the complaint by releasing the sureties. *Michelin Tire Co. v. Bentel*, supra. In that case the undertaking of the bond was to "pay the amount of the judgment recovered in the action" in case of default

by the defendant in making such payment. In the Michelin Case, however, an entirely new cause of action was set out in the amended complaint. The plaintiff had instituted suit upon a claim which at the time belonged to another related corporation, and therefore the plaintiff named had no cause of action at the time the undertaking on release of attachment was given. By stipulation between the plaintiff and defendants an amended complaint was filed, setting up an assignment of the claim to the plaintiff corporation, made subsequently to the release of attachment. This was equivalent to the commencement of a new action, and the judgment obtained was not in the action in which the undertaking was given. That decision is therefore easily distinguishable from the one before us on its facts, as here there was no change in the cause of action, and the judgment sued on was the judgment recovered in the action which was pending when the bond was given.

It is argued, however, that the reasoning of the opinion applies in this case. It is there said, quoting from *Cassidy v. Saline County Bank*, 7 Ind. T. 567, 104 S. W. 838:

"The surety upon a bond given by the defendant to dissolve an attachment takes his obligation with reference to the cause as it then stands; and, should the plaintiff afterward so change his pleadings as to make virtually a new action, how can it be said that the surety would have obligated himself under such new order of things? He may have been satisfied that the plaintiff could not recover in the action, and may therefore have been willing to give the defendant present relief by signing as his bondsman, though he would not have signed had the suit been well grounded."

The amendment above referred to consisted in changing the cause of action from one on open contract to one on a judgment obtained in another state upon the same contract. The force of the decision in its application to the matter before us is, however, lost by the circumstance that the appellate court there held that the amended complaint stated a new cause of action. The opinion in *Michelin Tire Co. v. Bentel*, supra, further quoting from *Quillen v. Arnold*, 12 Nev. 244, recognizes the doctrine that while the power to allow amendments—

"may be and is very liberally exercised, and very properly so, as between the parties to the action in furtherance of justice, it cannot be exercised with the effect of changing the rights and liabilities of third parties."

In all but one of the cases cited in the Michelin Tire Co. Case in support of the opinion, there was by the amendments complained of either a change of the cause of action, or a change of parties to the action. In *Prince v. Clark*, 127 Mass. 599, there is some support to appellant's contention for exoneration, on the face of the opinion. The action in that case as originally brought

was for a balance on account after allowing certain credits. The complaint was amended by omitting the credits and suing on the entire claim. This was held such a variance as to release the securities. There are other decisions cited by appellant open to the same construction.

[2] The weight of authority, however, seems to sustain the rule that unless the amendments are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties or guarantors are bound by the judgment. It is generally held that, where a surety's obligation discharges from attachment the assets of the debtor upon which the attaching creditor had a right to rely for security of his claim, such surety ought not to be exempted from liability unless the obligation with reference to which he had contracted has been essentially changed without his consent. Having made himself responsible for "any judgment recovered in the action," it would be unduly limiting his agreement to permit him to plead successfully an amendment that did not alter the "nature and character" of the original claim. *Warren Bros. v. Kendrick*, 113 Md. 603, 77 Atl. 847, 140 Am. St. Rep. 445; *Russia Cement Co. v. Le Page*, 174 Mass. 349, 55 N. E. 70; *Jayne's Ex'x v. Platt*, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; *Driscoll v. Holt*, 170 Mass. 262, 49 N. E. 309; *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *Morton v. Shaw*, 190 Mass. 554, 77 N. E. 633; *Hammond v. Starr*, 79 Cal. 556, 21 Pac. 971.

The confusion that has arisen in this case, and in some of the authorities cited, has resulted from a failure to distinguish between the complaint and the cause of action attempted to be stated in the complaint. The complaint filed in a suit is not the obligation, nor the basis of the obligation of the principal which the surety guarantees. The contract of the surety company in this action was that it would undertake that the defendant would pay to plaintiff the "amount of whatever judgment may be recovered in said action." The obligation which it was sought to enforce against the principal through the suit and judgment demanded was the payment of the liability arising under the contracts set out in the original complaint. There was no alteration or modification of that contractual liability of the defendant. The plaintiff was not estopped by his original complaint from making any corrections or supplying any omissions by amendment which were proper or necessary to fully set forth the liability of the defendant under the contract sued on. The surety entered upon its contract to guarantee payment of the judgment, any judgment on the cause of action, with presumptive understanding that the original complaint might be amended to cover any damages which had occurred prior to commencement of suit from

a breach of the contracts which constituted the cause of action though omitted from the original complaint. *Bierce v. Waterhouse*, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. Ed. 237.

If the liability of the release bond had been predicated upon a judgment on the precise facts pleaded in the original cause of action, then such complaint would be the measure of the liability; but the surety contracted upon the basis of whatever judgment was obtained in the action, and it will be presumed to have taken into consideration the possibility of changes by amendment in the extent and nature of the liability incident to the cause of action. Indeed, the surety company here did safeguard itself from any material increase in its liability through amendments to the complaint by fixing the penalty of its bond at a sum only sufficiently greater than demanded by the prayer of the original complaint to cover prospective interest and costs.

[3] Appellant makes the further point on this appeal that the bond is exonerated, or at least the right of recovery suspended by the death of the defendant and the prosecution of the action to judgment against the administrators of his estate. It is true that the death of the defendant is held to operate to dissolve an attachment. *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49; *Ham v. Cunningham*, 50 Cal. 365. The right to pursue the debtor's property under attachment ends with his death, the attached property falls into the estate, and the only right left the attaching creditor as against the decedent's estate is to follow it under the modes of disposition provided by the probate law. But here the remedy of the plaintiff is not concerned with the estate of the deceased debtor. He has an independent remedy created by his contract with the surety company.

That fact is also an answer to the objection that there is no judgment that is enforceable except in the due course of administration. As against the administrators and the property of the estate the judgment recovered is only payable from the assets of the estate in due course of administration. It is the law of California, as affecting the administration of estates, that such judgment is only the equivalent of an allowed and approved claim. Code Civ. Proc. § 1504; *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299; *Estate of Hellier*, 169 Cal. 77, 145 Pac. 1008; *Haub v. Leggett*, 160 Cal. 491, 117 Pac. 556.

There appears to be no reason, however, for putting this limitation upon the effect of such judgment in fixing the liability of a guarantor under an original and independent contract to respond in the penal sum of its undertaking upon failure of payment on demand of any judgment in the action. The judgment against the administrators is still a judgment, qualified only by the limitation that it may be contested by the heirs

upon the settlement of the account of the administrator. Code Civ. Proc. § 1637; *Haub v. Leggett*, supra. The judgment in this action fixes the liability of the surety, so far as the conclusiveness of the judgment on the original claim is concerned, and the plaintiff is under obligation to look no further than to his surety in enforcing collection. Moreover, it is pleaded in the complaint, and found by the court, that the appellant's liability on this bond has been presented and allowed as a contingent claim against the estate, and confirmed by a decree settling the account of the administrators in which this claim is returned as one of the liabilities of the estate. Code Civ. Proc. § 1637.

As to the survival of the right of action upon the bond for release after the death of the debtor in attachment proceedings, it is held by the Supreme Court of Illinois in a similar case (*Sharpe v. Morgan*, 144 Ill. 382, 33 N. E. 22) that, after attachment released on giving of bond the action proceeds in personam (*Hill v. Harding*, 93 Ill. 77), and in event of the death of original defendant and further prosecution of the suit to judgment against his administrators, the judgment obtained is a personal judgment, and neglect by administrators to pay the same is a breach of the bond. In its opinion in the above case the court says:

"Appellant [the surety] voluntarily joined with the attachment debtor, and took upon himself the obligation prescribed by the statute, to pay whatever judgment might be rendered in that action. He was bound to know that upon the death of Allison [the defendant] the suit would not abate, but might proceed to final judgment against his personal representative."

The undertaking in the cited case was a statutory bond, and the parties were bound by the intendments of the statute in interpreting its obligations. But the conclusion can be no different here under the implied understanding of the parties arising from the fact that they were contracting with presumptive knowledge of the law, and the surety here is presumed to have known and have in mind the fact that this suit would not abate in the event of the death of defendant but could be prosecuted against his administrators. Code Civ. Proc. § 385.

In this case the surety company stands upon a purely technical defense, and, while it is true that the rule is in its favor that it may rely upon the strict terms of its contract, there is no reason in law or equity why the same liberality of construction and interpretation of those terms should not be applied as in construing any other contract. In the matter of the obligations of corporations organized to execute surety bonds and securities as a business there is a growing disposition in the courts to hold such sureties to their obligations unless there has been some material departure from the con-

ditions of the agreement. 21 R. C. L. p. 1160; Ann. Cas. 1912B, p. 1087.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SHURTLEFF, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

187 Cal. 95

ANDERSEN et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR NAPA COUNTY et al. (S. F. 9795.)

(Supreme Court of California. Sept. 16, 1921.)

1. Dismissal and nonsuit §45—Requirement that action be dismissed five years after answer mandatory.

The requirement of Code Civ. Proc. § 583, that an action shall be dismissed, unless brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time be extended, is mandatory, and trial court is without discretion to refuse an order of dismissal.

2. Mandamus §4(3), 43—Proper proceeding to compel dismissal of action, remedy by appeal being inadequate.

If no other plain, speedy, and adequate remedy exists, mandamus is a proper proceeding to obtain dismissal of an action not brought to trial within five years after answer, under Code Civ. Proc. § 583, since an appeal does not lie directly from an order refusing to dismiss an action, and defendant should not be compelled to go to trial, and then appeal from the judgment, if adverse to him, in view of section 1085.

3. Mandamus §28—Questions of fact do not necessarily make mandatory acts dependent on judicial discretion.

That some question of fact must be determined before court may act under a mandatory provision of law does not alone make the act dependent on judicial discretion, since no duty is enjoined by law which does not first require as a condition of its enforcement proof of the jurisdictional facts.

4. Dismissal and nonsuit §60(3)—Stipulation only condition defeating right to dismissal after five years.

The only condition permitted by Code Civ. Proc. § 583, to defeat defendant's right to a dismissal after five years after answer is a stipulation extending the time.

5. Dismissal and nonsuit §60(1)—No discretion in court as to dismissal after five years, conceding that there be equitable grounds of estoppel.

Conceding that there may be equitable grounds of estoppel to enforcement of dismissal of action five years after answer, under Code Civ. Proc. § 583, the question is one of law, as to whether the facts pleaded and passed on by the trial court constituted sufficient ground for denying the motion to dismiss, as it can-

not be claimed that it is a matter within the discretion of the trial court to arbitrarily determine what extraneous circumstances will excuse a compliance with the statute.

6. Dismissal and nonsuit §60(3)—Death of plaintiff no defense to motion to dismiss after five years.

The fact that, from a date within a month after answer until after five years from filing of answer, there was no plaintiff in the action to bring the cause to trial, because of the death of plaintiff and failure to substitute personal representatives, could not defeat defendant's motion to dismiss, under Code Civ. Proc. § 583; there being no suspension of the running of the five-year limitation and section 353 not applying.

7. Limitation of actions §80—Death does not interrupt running of statute.

Where a cause of action arises in the lifetime of a person entitled to sue, his death does not interrupt the running of the statute of limitations, in the absence of some statutory provision to the contrary.

8. Motions §42—Statute relating to entertainment of second motion held not to go to jurisdiction.

Code Civ. Proc. § 182, does not apply to the renewal of a motion refused for informality of the moving paper or proceedings, or in cases where leave to renew is given, and in any event does not go to the jurisdiction of the court to entertain a second motion; penalty provided by section 183 being punishment for contempt and authority to the court to set aside an order obtained by a violation of the rule.

9. Motions §33—Motion to strike unauthorized motion from files proper practice.

The proper practice in case of an unauthorized motion is to strike it from the files.

In Bank.

Application by John Andersen and others for writ of mandate, prayed to be directed to the Superior Court of Napa County and Hon. R. L. Thompson, Judge thereof, to require the dismissal of an action. Writ granted.

E. L. Webber of Napa, for petitioners.

Percy King, Jr., of Napa, for respondents.

SLOANE, J. This matter comes before this court for hearing from the District Court of Appeal of the Third Appellate District upon petition for writ of mandate to require the superior court of the county of Napa to dismiss an action under section 583 of the Code of Civil Procedure for failure to bring the same to trial within five years after answer filed, in which action one Henry Weaver is named as plaintiff, and the petitioners here, John Andersen, W. P. Austin, and Janie M. Andersen, are defendants. A dismissal was had as to other defendants for failure to serve them with summons with-

in three years, under the requirements of section 581a, of the Code of Civil Procedure.

The action in question was commenced in December, 1914, and the answer of the defendants, who are petitioners here, was filed on the 27th of January, 1915. The cause was never brought to trial, and no attempt to set a day for trial seems to have been made until the 29th day of November, 1920, which was some months after the expiration of five years from the date when answer was filed.

[1] It is conceded in the record that no stipulation in writing was ever made extending the time prescribed by the statute. The requirement of section 583 of the Code of Civil Procedure that an action shall be dismissed by the court in which it is pending on motion of the defendant, after due notice to the plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time be extended, has repeatedly been held by this court to be mandatory. *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002; *Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670; *City of Los Angeles v. Superior Court*, 197 Pac. 79; *Rio Vista Mining Co. v. Superior Court*, 200 Pac. 616; *Ravn v. Planz*, 37 Cal. App. 735, 174 Pac. 690; *Boyd v. Southern Pacific R. R. Co.*, 197 Pac. 58.

The trial court is without discretion to refuse an order of dismissal, where it is made to appear that the action has not been brought to trial within the prescribed period and that no stipulation in writing to extend the time has been made.

[2] Under such conditions mandamus is a proper proceeding, if no other plain, speedy, and adequate remedy exists. Mandamus has been frequently upheld to enforce this provision of the Code. *Larkin v. Superior Court*, supra; *Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104; *City of Los Angeles v. Superior Court*, supra. However, treating the question as open for consideration, we think the practice thus sanctioned is justified. There is no other speedy or adequate remedy provided. An appeal does not lie directly from an order refusing to dismiss the action; and to compel a defendant to submit to an unwarranted trial of the cause, and then appeal from the judgment, if adverse to him, would not afford speedy or adequate relief. It was so held by this court in the opinion by Chief Justice Beatty in *White v. Superior Court*, 126 Cal. 246, 58 Pac. 451, involving the right to a writ of prohibition after refusal to dismiss an action under section 581 of the Code of Civil Procedure. It was there claimed that the writ of prohibition should not issue, because petitioner had a plain, speedy, and adequate remedy by ap-

peal in the ordinary course of law from any judgment that might finally be rendered against him in the action. The opinion states:

"Such remedy by appeal is, perhaps, plain, but can hardly be called speedy or adequate. Petitioner has a present right to the dismissal of the action as against himself, and the removal of the lien by which his property is incumbered, and such right cannot be protected or enforced by an appeal from a possible judgment in the action to foreclose."

To the same effect is *Davis v. Superior Court*, 195 Pac. 390.

The proposition so strongly urged in behalf of respondent, that mandamus will not lie in this proceeding because the matters submitted under the motion to dismiss called for the exercise of judicial and discretionary powers of the court, which cannot be called in question in this manner, is not maintainable. As already pointed out, the requirement to dismiss after five years, in the absence of a stipulation in writing extending the time, is mandatory. There was no issue presented that the five years had not elapsed, or that there had been a stipulation made between the parties. If such an issue had been made and the court had found as a fact in the case that no answer had been filed, or that five years had not elapsed, or that there had been a written stipulation between the parties for an extension of time, it may be conceded that the decision of the court as to such facts could not be reviewed in this proceeding. But where the express mandatory conditions for a dismissal are clearly established, and without contradiction, the court was without discretion in the matter.

[3] The distinction between a mandatory and discretionary act is illustrated by the two provisions of section 583. The first clause provides a discretionary ground of dismissal for want of diligent prosecution of an action after two years, and the action of the court in granting or refusing to dismiss could not be controlled by mandamus or certiorari, at least in the absence of clear abuse of discretion; while the second clause makes a fixed and arbitrary rule that requires the performance of "an act which the law specially enjoins" and which gives jurisdiction for the exercise of the writ of mandate under section 1085 of the Code of Civil Procedure. The mere condition that some question of fact must be determined before the court may act under a mandatory provision of law does not make the act dependent upon judicial discretion. No duty is enjoined by law which does not first require as a condition of its enforcement proof of the jurisdictional facts. The distinction may sometimes be confusing, but it is substantial.

The cases relied upon by respondents, and in the opinion of the learned Court of Ap-

peal in this matter, involved the decision of the question of fact upon which the law imposed the duty to dismiss. In *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110, mandamus was invoked to compel a dismissal by the trial court of an action on motion of the plaintiff under provision of the old Practice Act, corresponding to subdivision 1 of section 581 of the Code of Civil Procedure. The motion was opposed by defendant on the ground that he had filed a counterclaim for affirmative relief. The trial court had sustained the objection of the defendant to dismissal. This court, on the application for mandamus, says:

"We do not think mandamus will lie in this case. The real and substantial question presented for the decision of the court by the motion to dismiss was whether the defendant had set up a counterclaim against the plaintiffs upon which he was seeking affirmative relief. If he had not, the plaintiffs were undoubtedly entitled to the judgment which they asked, otherwise not. The solution of that question depended upon the judicial reading and construction of the defendant's answer and the stipulation between the parties, and the effect of the latter upon the former. It was claimed on the part of the plaintiffs, first, that the counterclaim made in the answer could not be legally made in the action; and, second, that the counterclaim had been withdrawn by the force and effect of the stipulation. Both of these propositions were denied by the defendant, and in deciding them the judge acted judicially, not ministerially; and, having decided them according to the best of his ability, a mandamus does not lie to compel him to reverse his decision and render a different one."

This is just such a case as we would have here, if the trial court had denied a dismissal upon a showing and finding that a written stipulation extending time of trial had been made.

People v. Superior Court, 114 Cal. 466, 46 Pac. 383, was a case in which the people, in a quasi criminal proceeding, had caused defendant's default to be entered on the ground that a verbal plea, entered as an answer to the complaint, was ineffective as an appearance, and applied to the court for a judgment on such default. The trial court held the plea sufficient and refused the application for judgment. In denying a petition for a writ of mandate this court says.

"But whether or not his plea of not guilty was a proper and sufficient plea is a question not here before us. That question was passed upon judicially by the court; and if it committed error in deciding that question, such error cannot be reviewed on mandamus."

If it had appeared in that case that no plea or answer at all had been made by the defendant, a question parallel to the one here might be presented.

[4, 5] Respondents, however, claim that the order of the trial court was based upon

other facts in issue and upon which it passed judicially. It might be said in answer to this that the only condition permitted by the statute to defeat petitioners' right to a dismissal after five years is the existence of a stipulation extending the time. But, conceding that there may be equitable grounds of estoppel to the enforcement of the dismissal of an action under section 583, Code of Civil Procedure, as is, perhaps, intimated in *Larkin v. Superior Court*, supra, and *Los Angeles v. Superior Court*, supra, the question to be first presented to this court under a mandamus proceeding would be one of law, as to whether the facts pleaded and passed upon by the trial court constituted a sufficient ground for denying the motion to dismiss. It cannot be claimed that it is a matter within the discretion of the trial court to arbitrarily determine what extraneous circumstances will excuse a compliance with the statute.

[6] In this instance the facts relied upon are that from a date within a month after the answer in the pending case was filed until after the five-year period had expired, there was no plaintiff in the action to bring the cause to trial. It is claimed that the plaintiff, Weaver, died about a month after answer filed, and there was no substitution of the personal representatives of the decedent as plaintiff in the action, until after five years, and but shortly before this motion to dismiss was made. It appears that representatives of the estate of decedent, in the persons of executors of his last will, were appointed, qualified, and acting at all times subsequent to May 14, 1915, which date was less than two months after his death. We do not see how, under this state of facts, it can be held that there was any suspension of the running of the five-year limitation against decedent's estate.

[7] It is a familiar and well established rule of law that where a cause of action arises in the lifetime of a person entitled to sue, his death does not interrupt the running of the statute of limitations in the absence of some statutory provision to the contrary, *McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; 25 Cyc. 1277; *Mereness v. Bank of Charles City*, 112 Iowa, 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. Rep. 318; *Tobias v. Richardson*, 26 Ohio Cir. Ct. R. 81; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796; 17 Rul. Case Law, p. 850. No reason is suggested, and we can think of none, why this rule should not extend in like manner to this provision of section 583. It is in effect a statute of limitation upon the time for bringing a cause to trial.

It is true that section 353 of our Code of Civil Procedure suspends the running of the statute as to time of commencing an action, after death of the person entitled to sue, for

a period of six months; but there is no authority for extending this provision beyond the proceeding to which it applies, and, if it were applicable to section 583, it would not relieve the situation for plaintiffs in this case, as the addition of six months to the five-year period of the statute would still leave them in default; the motion for dismissal not having been made for some ten months after the expiration of the five years.

This case is not affected by the portion of section 353, Code of Civil Procedure, invoked by respondents. That provision allows the commencement of an action against the representatives of a deceased person who dies pending the running of the statute within a year after the issuing of letters testamentary or of administration on his estate. In the case of a deceased plaintiff the action must be commenced by his representatives within six months after his death. It was incumbent upon the representatives of the estate of the deceased plaintiff to have the pending litigation brought to trial within the statutory period.

[8] As further ground of objection to the issuance of a writ of mandate in this matter, respondents urge that the motion for dismissal was properly denied for the reason that two previous motions based on the same grounds had been presented by these petitioners and denied by another judge of the same court, and that the motion before us was made in violation of the rule provided in section 182 of the Code of Civil Procedure. There is no transcript or record before us of the proceedings had on these previous motions. The petition for the writ of mandate on file here, however, purports to set out the substance of the prior petitions, and as the answer makes no denial of the correctness of the recitals we assume they correctly state the facts. It may be doubted therefrom if either of the former petitions stated facts sufficient to justify the relief provided by the second subdivision of section 583, Code of Civil Procedure. While the fact that five years had elapsed from the time of filing the answer in the original action could be ascertained from the dates given, the relief demanded was predicated upon the express statement that there had been a failure to set the cause for trial within five years of the date of the commencement of the action, and no allegation was made that there had not been a written stipulation extending the time. In denying the motion on these previous applications the trial court stated no grounds for its rulings.

It does not affirmatively appear that leave to renew the motion was not given. Section 182 does not apply to the renewal of a motion refused for informality of the moving papers or proceedings, or in cases where leave to renew is given, and, in any event,

does not go to the jurisdiction of the court to entertain a second motion. The penalty is provided by section 183 of the Code of Civil Procedure, and is punishment for contempt, and authority to the court to set aside an order obtained by a violation of the rule.

[9] In any event, the proper practice in the case of an unauthorized motion is to strike it from the files. *People v. Center*, 61 Cal. 191. In the matter before us the motion on which this proceeding is based was the first which stated sufficiently the grounds for dismissal under the five-year provision of section 583. It was heard on the merits. The grounds upon which the denial was made are not set out further than in the statement of the court according to the petition here that it "had no jurisdiction to grant the same." Respondents' answer alleges that the motion was denied on the ground, "among others," that prior motions had been made in violation of the provisions of section 182 of the Code of Civil Procedure.

In view of the obvious fact that this motion was heard on its merits, and the extreme vagueness of other details relating to the previous motions, we prefer to dispose of it upon its merits here. As heretofore pointed out, there has been a clear and unjustifiable failure on the part of the plaintiffs to bring this pending action to trial within five years after answer filed, and the motion to dismiss should have been granted.

A peremptory writ of mandate, requiring the superior court of the county of Napa, and the judge thereof, to enter an order dismissing said action as to these petitioners, is granted.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

53 Cal. App. 792

Ex parte KINNEY. (Cr. 572.)

(District Court of Appeal, Third District, California. Aug. 10, 1921.)

1. Intoxicating liquors ⚡132 — Liquor ordinance not invalid because it prescribes less severe penalty than Volstead Act.

A liquor ordinance is not invalid merely because it prescribes a less severe penalty than is prescribed by the Volstead Act for similar offenses.

2. Municipal corporations ⚡62—Trustees cannot delegate legislative authority.

The trustees of a city have no power to delegate legislative authority.

3. Municipal corporations ⚡62 — Ordinance may refer to act of other legislative body, if nothing is left to judgment of other body.

The rule against delegation of legislative authority does not prohibit reference to the act

of another legislative body, where nothing is left to the judgment of such other body.

4. Municipal corporations *§* 591—**Liquor ordinance referring to Volstead Act held not void, as delegation of legislative authority to Congress.**

Liquor ordinance providing that the manufacture, sale, etc., of liquor, where permitted by acts of Congress enacted for enforcement of Const. U. S. Amend. 18, shall not be deemed a violation of the ordinance, and that the definition of intoxicating liquor under the ordinance shall be the same as under the laws of Congress, *held* not void as against contention that it delegates to Congress legislative power vested in the city board of trustees.

5. Fines *§* 12—**Judgment providing for imprisonment on default of payment of fine valid, though ordinance did not provide alternative.**

A judgment of conviction for violation of liquor ordinance, imposing a fine or one day's imprisonment for each dollar of such fine in default of the payment thereof, *held* valid, though ordinance did not provide the alternative of imprisonment in case of nonpayment of fine; the provision as to imprisonment being authorized by Pen. Code, *§* 1446.

Application by H. S. Kinney for writ of habeas corpus against the Chief of Police of the City of Ft. Bragg. Writ discharged, and petitioner remanded.

M. H. Iversen and Mannon & Mannon, all of Ukiah, for petitioner.

Hale McCowen, Jr., of Ukiah, for respondent.

BURNETT, J. Petitioner was convicted of violating an ordinance of the city of Ft. Bragg, Mendocino county, prohibiting traffic in intoxicating liquors, and he was sentenced to pay a fine of \$225, and in default of the payment thereof to be imprisoned until its satisfaction at the rate of one day's imprisonment for each dollar of said fine.

Three contentions are made by petitioner:

"1. That the ordinance is without the powers of the board of trustees of the city.

"2. That the ordinance is invalid, for the reason that it attempts to delegate to the Congress of the United States legislative powers vested only in the city and its board of trustees.

"3. That the judgment, so far as it purports to adjudge imprisonment in default of payment of fine, is without the powers given to the recorder's court by the ordinance."

[1] The reason for the first contention is that the ordinance prescribes a less severe penalty than for similar acts is prescribed by what is known as the Volstead Act (41 Stat. 305), passed by the Congress of the United States. This question, however, has been recently considered by this court, and decided adversely to the position of petitioner, and it is sufficient to cite that case. In *re* Caesari Volpi, 199 Pac. 1090.

[2] The legal proposition involved in the second contention is undoubtedly sound. The trustees are powerless to delegate legislative authority. This is conceded, and is so elementary that no discussion of it is called for.

This claim is urged by reason of section 3 of the ordinance, as follows:

"It is provided and intended, however, that no manufacture, sale, gift, exportation, importation, transportation, or possession of such liquor which is, at the time of its commission, allowed or permitted by the laws then in force, enacted by the Congress of the United States for the enforcement of the Eighteenth Amendment of the Constitution of the United States, shall be deemed or considered any violation of the ordinance; and the definition of intoxicating liquors under the ordinance shall at all times be the same as under such laws of Congress at the time in effect."

[3] The rule against the delegation of legislative authority does not prohibit such reference to the act of another legislative body. If the ordinance had set out specifically the exemptions provided in said Volstead Act and the definition therein contained of intoxicating liquors, petitioner, of course, could not and would not urge this point. But the effect of the reference to said provisions of the act is to make them a part of the ordinance. If we grant that more apt language might have been chosen to express the intention of the trustees, and that it might be considered more satisfactory if said exemptions and said definition had been expressly set forth in the ordinance, no criticism of that kind would be of sufficient gravity to justify the writ of habeas corpus.

No doubt difficulty is sometimes experienced in making application of the rule, but if nothing is left to the judgment of another agency, and the ordinance or statute fully expresses the will and intention of the legislative body on the subject, there is no room for the claim that there has been a delegation of authority, although reference for existing facts may be had to other sources. 6 R. C. L. p. 165; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112. If the ordinance had left it to some future act of Congress to prescribe the exemptions and the definition of any of the terms employed, then, of course, we would have a different case, because the will of Congress would be substituted for that of the trustees. The learned district attorney of Mendocino county thus illustrates the situation:

"Had the passage of the city ordinance of Ft. Bragg preceded the enactment of the Volstead Act, then there would have been a delegation of authority, for prior to the enactment of the Volstead Act there were no laws of Congress prohibiting absolutely the traffic in intoxicating liquors and under those circumstances the ordinance would have been incomplete when it

came from the trustees and would consequently have been ineffective."

[4] If Congress should amend said act, this question might properly arise; but we think there can be no serious doubt that the effect of said reference was to adopt, as far as applicable, the Volstead Act, and make it a part of the ordinance. In this connection, the district attorney quite appropriately calls attention to the following analogous cases arising under the pure food laws and those regulating the practice of medicine, wherein reference is made to standards of purity, proficiency, etc., established by organizations or bodies over which the enacting legislative body has no control. *Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; *Arwine v. Board of Medical Examiners*, 151 Cal. 499, 91 Pac. 319; *St. Louis, I. M. & S. R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Cleveland Macaroni Co. v. State Board of Health of California* (D. C.) 256 Fed. 376; *People v. Fire Association of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380.

[5] It is true that the ordinance does not expressly provide the alternative of imprisonment in case the fine is not paid; but that is unimportant, since the general law covers the case. Section 1446 of the Penal Code is as follows:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine."

This section is a part of the chapter dealing with "Proceedings in Justices' and Police Courts," and section 1461 of the same chapter enumerates, among police courts, "all courts held by mayors or recorders in incorporated cities or towns." The sentence herein was by the recorder's court in said city, and there is nothing in the general municipal corporation act, under which it was organized, that changes or modifies in any manner any of said provisions of the Penal Code.

We are satisfied that there is no substantial merit in any of the contentions of petitioner, and the writ is therefore discharged, and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

53 Cal. App. 753

BAR ASS'N OF SAN FRANCISCO v.
CANTRELL. (Civ. 3437.)

(District Court of Appeal, First District, Division 2, California. Aug. 6, 1921.)

Attorney and client  61—Court may reinstate a suspended or disbarred attorney.

Whether the judgment is a judgment of disbarment or a judgment of suspension, the

court, in view of Code Civ. Proc. §§ 289, 290, and Civ. Code, § 3536, has a right at any future time to modify the judgment and to grant the accused such relief as he is entitled to.

In the matter of the application of the Bar Association of San Francisco against Russell W. Cantrell. Judgment of suspension vacated.

Perry Evans, of San Francisco, for accusant.

Thos. W. Forsyth, of San Francisco, for respondent.

STURTEVANT, J. On the 17th day of June, 1921, the petitioner, Russell W. Cantrell, filed a petition in this court asking for a modification of a judgment rendered by this court on the 5th day of October, 1920 (193 Pac. 598), which judgment ordered the suspension of the petitioner from his office as an attorney for the period of one year. On the same date he prepared a notice of motion directed to "Perry Evans, Esq., Attorney for Accusant," and caused said papers to be served on said attorney on the same day. The notice stated that the motion would be made on the 21st day of June, 1921, etc. The petition was not verified. No citation was issued or applied for. On the 21st day of June, 1921, at the time and place stated in the notice, the petitioner made his motion through his attorney and the attorney made an informal statement to the court regarding the matter, and offered to read a letter from the district attorney of San Francisco. At this point the court suggested that counsel was proceeding very informally and that the matter should be continued until the 11th day of July, 1921, and that the matter should, at that time, be presented in accordance with settled rules of law. Thereafter the matter came on regularly for hearing on the day to which it had been continued. The bar association did not appear or make any answer and did not offer to participate. The petitioner thereupon called witnesses and tendered some testimony.

The proceedings for removal or suspension of an attorney at law are provided in the Code of Civil Procedure, § 289 et seq. The difference between a judgment of disbarment and one of suspension is a difference of degree only. The procedure is the same. To obtain a judgment, when the accusation is based on the information of a person or persons other than the court, the petition should be verified. Code Civ. Proc. § 290; In the Matter of Hotchkiss, 58 Cal. 39, 41. When a petition has been filed a citation should be taken out. Code Civ. Proc. § 292. Whether the judgment is a judgment of disbarment or a judgment of suspension the court has the right at any future time to modify the judgment and to grant to the accused such relief as he is entitled to. In the case of In re

Burris, 147 Cal. 370, 81 Pac. 1077, the court decided that relief could be extended to an attorney who had been disbarred. In the case of *In re Tyler*, 71 Cal. 353, 374, 12 Pac. 289, 13 Pac. 169, the court had before it a petition for disbarment. It entered a judgment of suspension. Such a judgment was logical because it is an axiom of the law that "the greater (disbarment) includes the less (suspension)." Civ. Code, § 3536. The foregoing rules apply to the initial proceeding of disbarment. To obtain a modification of such judgment the same formal procedure should be followed. In *re Newton*, 27 Mont. 182, 70 Pac. 510, 982. The application should show a history of the case including appropriate recitals as to what was done in court and also what new facts have occurred which render it appropriate that the judgment of disbarment or suspension should be modified. In *re Newton*, 27 Mont. 182, 70 Pac. 510, 982; 6 C. J. 615, § 98. The provisions of our Code of Civil Procedure on the subject in hand were copied by North Dakota (Rev. Codes, p. 106, § 506), and by Montana (Rev. Codes, vol. 2, p. 52, § 6410 et seq.). The decisions of those states are therefore quite helpful on any question that has not been passed on by the courts of last resort in California. In the case of *In re Simpson*, 11 N. D. 526, 93 N. W. 918, an informal application was made to the Supreme Court of North Dakota. On page 526 of 11 N. D., and on pages 918 and 919 of 93 N. W., that court said:

"On the 1st day of the September, 1902, term of this court, a motion was made by Hon. Tracy R. Bangs and Hon. John M. Cochrane for the reinstatement of Leslie A. Simpson, who was disbarred for unprofessional conduct by an order of this court dated July 12, 1900. The disbarment proceedings are reported in 9 N. D. 379, 83 N. W. 541. A similar motion for reinstatement was made at the September, 1901, term of court, and was denied. On the former motion no proof which we could judicially consider was offered, either to contradict or to excuse the unprofessional acts upon which the order of disbarment was based, or to show that the applicant for reinstatement had so altered in character, as a result of the discipline to which he had been subjected, as to render him fit to be intrusted with the privileges pertaining to the office of attorney and counselor at law of this state. The court, however, while denying the motion, at the same term, in a communication from Chief Justice Wallin, directed to Hon. Seth Newman, president of the State Bar Association, referred the application to said association, and requested that body to conduct an investigation, through its proper officers, touching the present character and fitness of Mr. Simpson to be reinstated, and to report to this court upon the following matters of fact: '(1) To what extent, if at all, has Mr. Simpson engaged in the practice of the law since the entry of the judgment of disbarment? (2) Is there any tangible evidence that the

severe discipline to which Mr. Simpson has been subjected has had the effect of producing a change of his character, in such a way that he would, if readmitted to the practice of law, conduct himself hereafter with reference to proper ethical and professional standards of conduct? (3) Has Mr. Simpson been so far humbled by the discipline of disbarment that he is willing, freely and without reservation, to admit upon the records of this court that he was guilty of the offenses charged against him, and that in disbarring him the court proceeded upon proper grounds and with proper motives? (4) Does Mr. Simpson sincerely regret his attitude and conduct towards the court and opposing counsel, as manifested during the progress of the disbarment proceedings? (5) Are there any financial obligations, growing out of the subject-matter of the charges against Mr. Simpson, which remain undischarged?"

The fourth element, as stated by Chief Justice Wallin of North Dakota, does not enter into the facts presented in this case. As to the other elements stated by Chief Justice Wallin, the petitioner has presented evidence which is responsive to each of the issues framed by that learned authority. The procedure of the petitioner in this case contained certain irregularities which we are not to be understood as approving. The irregularities referred to have not been presented to us and we have not been called upon to rule thereon. None of them is of such importance as to defeat the petitioner's right to relief. The evidence which he has submitted is sufficient in our judgment to entitle him to have the suspension set aside.

It is ordered, therefore, that the judgment of the 5th day of October, 1920, be and the same is hereby vacated.

We concur: LANGDON, P. J.; NOURSE, J.

54 Cal. App. 12

PEOPLE v. CAMERON. (Cr. 989.)

(District Court of Appeal, First District, Division 1, California. Aug. 13, 1921.)

1. Criminal law — 369(2)—Evidence of other offense incidental to proof of fact pertinent to charge on trial admissible.

Evidence of an offense other than the one for which defendant is on trial is generally inadmissible, but is admissible where the commission of such other offense is merely incidental to proof of a fact pertinent to the charge on trial.

2. Criminal law — 369(7)—Evidence that defendant obtained tool used in attempting burglary by burglarizing another store admissible.

In prosecution for attempting to commit burglary of a garage, testimony, that defendant obtained possession of a bar used to pry off the garage lock from a grocery store which had been burglarized by defendant and witness, held

admissible, though it included evidence as to commission of other crime.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

A. J. Cameron was convicted of an attempt to commit burglary, and from the judgment, and an order denying a new trial, he appeals. Judgment and order affirmed.

S. L. Mash, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rior-dan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of an attempt to commit burglary, and appeals from the judgment and an order denying him a new trial.

On the eighth day of January, 1921, at about 1:45 a. m., the defendant and one Fleming were seen standing at the front door of a garage on Seventh street in Richmond by two police officers. Apparently the defendant was trying to pry off the lock of the door. The officers approached the garage, whereupon the defendant and his companion walked away. The officers followed, and as they passed the garage they noticed that the door lock was missing. They continued to follow the couple, and while doing so observed Fleming in the act of discarding certain articles. Being overtaken by the officers, and failing to satisfactorily account for their presence in that locality at such a time, they were taken into custody. On the way to the jail the defendant attempted to escape, and upon his refusal to halt was fired upon and wounded by one of the officers, and recaptured. Subsequently a flashlight was found in the neighborhood, also two tire tools and a box-opener or claw-tool. A brass Yale padlock of the garage had been pried off, and was picked up in the path of the retreat of the defendant, and a pair of pliers was found in the pocket of the defendant.

Fleming was called as a witness for the prosecution, and he corroborated the testimony of the police officers, and said that the defendant had told him that he intended to break into the Richmond garage. He also testified that the defendant had used a tire-tool and a box-opener to open the lock; that one of the tools used to open the lock had been obtained from a grocery store in Richmond burglarized that evening by the defendant and himself. It was also shown by marks on the door that one of the tools used to pry off the lock was of the size of that taken from the grocery store.

No claim is made by the defendant that the evidence is insufficient to sustain the verdict, but he contends that the court erred in admitting over his objection the evidence tending to prove him guilty of robbing the

grocery store, and that the judgment should be reversed for this reason.

[1, 2] It is true that the general rule is that evidence of an offense other than the one for which the defendant is on trial is inadmissible; but where the commission of such offense appears merely incidentally in proving a fact pertinent to the charge on trial, such proof is not held to violate the general rule referred to. In the case at bar it was proper to prove the possession by the defendant of an appliance used in the commission of the offense with which he was charged; and the defendant was not entitled to exclude such proof, although in making it his possession of the instrument appeared to have been unlawfully obtained. Russell, in his work on Crimes (volume 3, p. 406), cites two cases sustaining the ruling of the trial court. In one of them the defendant had committed three burglaries in one night. He stole from one of the places entered a shirt, which he left at another of them. Being tried upon one charge, it was held that the three burglaries were all so connected that it was proper for the prosecution to disclose all of them. In the second of the cases cited, two burglaries were committed in the same town, one at Keeling's and the other at Blandon's between the hours of 12 midnight and 3 o'clock a. m. At the latter place a crowbar was found which fitted some of the marks on a chest broken open at the former, and which was proved to have been in the possession of the defendant previous to the night in question. Evidence of the finding of the crowbar at Blandon's was held to be competent upon the trial of the Keeling burglary, as also of the finding in the possession of defendants of goods stolen the same night from the Blandon place; such evidence tending to show that the prisoners had been at Blandon's and might have left the crowbar there.

In the case of *People v. Nakis* (Sup.) 193 Pac. 92, it was held that where it had been proved that .38 and .41 bullets were found in the body of the deceased and that a pistol capable of discharging bullets of both calibers was found in the cabin where the defendant was arrested, the testimony of a witness that he had owned the pistol in question for over 30 years and that it had been taken from him about a month before the murder at a time when he and others had been robbed by a number of men, among whom was the defendant, was competent as tending to prove the defendant possessed such pistol at the time of the murder.

It results that this contention of the appellant is untenable.

Judgment and order affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

53 Cal. App. 605

ROSS v. TABOR. (Civ. 3545.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1921.)

1. Trial ⚡165—Motion for nonsuit based on the evidence presents pure question of law.

Motion for nonsuit, based on claims as to what is and what is not shown by the evidence, presents a pure question of law, only the evidence favorable to plaintiff, taking it as true and adopting the inferences most favorable to plaintiff, being considered.

2. Animals ⚡22—Question of abandonment of contract for caring for bees on shares held, under evidence, for the jury.

Relative to the question of which party breached the contract under which defendant was for three years to take care of bees furnished by plaintiff, and to make therefrom additional colonies, plaintiff to furnish a house and an automobile, to be used in the work, and the parties to share in the honey and wax, held, under the evidence, that the question of plaintiff's being justified in believing from defendant's conduct that he had withdrawn from the contract, and therefore justified in taking away the automobile, which, with the house, defendant had abandoned, was for the jury.

3. Animals ⚡22—An automobile held an "appliance," within contract for caring for bees.

An automobile, furnished by plaintiff for defendant's use, under a contract for caring by defendant for bees furnished by plaintiff, was an "appliance," within a requirement that defendant keep all tools and appliances in repair.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appliance.]

4. Animals ⚡22—Party held entitled to recover for breach of contract to care for bees.

Where on abandonment by defendant of contract, whereby he was for three years to take care of bees furnished by plaintiff, and therefrom produce a certain number of additional colonies each year, plaintiff retook the automobile furnished by him for defendant's use, and assumed the sole care of the bees, he did not thereby deprive himself of remedy for defendant's subsequent failure to produce the additional colonies.

5. Contracts ⚡267—Cannot be rescinded by party first in fault.

A party to a contract first in fault cannot rescind it.

6. Limitation of actions ⚡46(1)—When statute begins to run for defaults subsequent to anticipatory breach of continuing executory contract, stated.

Where defendant's contract with plaintiff, to take care for three years of bees furnished by plaintiff, and therefrom to make a certain number of new colonies each year, was abandoned by defendant shortly after he made it, without plaintiff's consent, the four years limitation prescribed by Code Civ. Proc. § 337, subd. 1, for action on contract, obligation, or liability founded on a written instrument did not com-

mence to run as regards right to recover for failure to make additional colonies, at least till the end of the first year, plaintiff not having elected to rescind, and the contract being a continuing executory contract, anticipatory breach of which merely permitted plaintiff, at his option, to sue at the time of such breach.

7. Contracts ⚡256 — Mutual abandonment must be unequivocal.

Acts and conduct of the parties to a contract must, to constitute mutual abandonment of the contract, be positive, unequivocal, and inconsistent with the existence of a contract.

8. Appeal and error ⚡241 — Trial ⚡163 — Nonsuit cannot be sustained on ground not specified in motion.

A motion for nonsuit should specify the grounds on which it is made, and a ground not so specified cannot be urged on appeal to uphold a judgment of nonsuit.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. Edgar Ross against R. W. Tabor. From a judgment of nonsuit, plaintiff appeals. Reversed.

Emmet H. Wilson, of Los Angeles, for appellant.

Hickcox & Crenshaw and Frederick J. Trude, all of El Centro, for respondent.

FINLAYSON, P. J. This is an action to recover damages for the alleged breach of a contract. At the trial defendant's motion for a nonsuit was granted and a judgment of nonsuit entered. From that judgment plaintiff appeals.

The evidence introduced by plaintiff discloses the following: By the terms of their contract, which was in writing and executed December 26, 1914, plaintiff agreed to furnish 500 or more colonies of bees, which defendant agreed to care for in a workmanlike manner for a period of three years from the date of the agreement. Defendant further agreed to make from the bees thus to be furnished by plaintiff 500 additional colonies during the year 1915, 1,000 additional colonies during the year 1916, and during the year 1917 a number sufficient to bring the total to 2,000 colonies on the expiration of the three-year term of the contract. The contract further provided that plaintiff would furnish defendant with a tenthouse, or other suitable dwelling place, free of rent; and that he likewise would furnish defendant with an automobile to be used by the latter in his work of caring for the different colonies of bees, which, it seems, were scattered over a number of locations covering a wide area in the Imperial valley. Plaintiff also agreed to furnish defendant with an extracting outfit with which to extract the honey and wax. Defendant, among other things, agreed to keep

all tools and "appliances" in good repair, at his own expense, and, during the term of the contract, not to engage in any occupation or vocation other than the care of plaintiff's bees, without the latter's consent. The contract provided that plaintiff and defendant should receive, respectively, 60 and 40 per cent. of all the honey and wax produced by the bees during the three years that the contract was to run.

Immediately after the execution of the contract, defendant took charge of the bees. Plaintiff furnished him with a house to live in and likewise with an automobile, as he had agreed. Indeed, plaintiff furnished defendant with everything that he had agreed to supply, excepting only the extracting outfit, which, it was testified, would not become necessary until the following June or July. Defendant's counsel expressly stipulated that no question was raised on the failure to supply the extracting outfit prior to the time when its use would become necessary, in June or July of 1915.

In the latter part of March or the first of April, 1915, defendant moved into the house that plaintiff had provided for his use during the three-year term of the contract. On May 15th following defendant left the house and moved off of plaintiff's land into a house about an eighth of a mile away. On the same day, after using it for the removal of his personal effects, defendant took the automobile that plaintiff had supplied him for the care of the bees back to the house that plaintiff had supplied for his use, and left it there.

Some time between the 25th and 30th of May, 1915, plaintiff called at the house that he had provided for defendant's use and found it vacant. He also found the automobile standing in the yard without any oil or gasoline in it, exposed to the heat of the sun and the elements. From these circumstances plaintiff seems to have assumed that defendant had abandoned his contract. Thereupon plaintiff removed the automobile to his own home, some distance away, and took possession of the colonies of bees, thereafter caring for them himself.

Called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, defendant testified that he quit taking care of the bees when plaintiff removed the machine to his own home; that when he found the machine was gone he walked to Brawley; that he was told that plaintiff had the machine; that he went to plaintiff's house and saw the machine in his yard; that he did not see plaintiff and did not go on his premises at all; that he turned around and went back; that he did not make any inquiry where plaintiff was, because he was told that plaintiff had said that he (defendant) "had skipped out of the valley"; that he did not explain to plaintiff that he "had not skipped

out"; that after that he saw plaintiff several times passing the house where he was then staying, about an eighth of a mile south of plaintiff's ranch; that plaintiff never stopped, and that he (defendant) never talked to him; that he never went to see plaintiff to ascertain whether the latter had taken the machine; that he never made any effort to find plaintiff or to have a talk with him to ascertain whether he took the machine, or to explain that he (defendant) had not run away.

Plaintiff testified that some time between the 25th and 30th of May he went to the ranch where defendant had been living in the house that he had supplied for defendant's use; that he went to the ranch intending to irrigate, and found the car standing beside the house, which was empty; that he took the car home; that the car was in good condition, but that there was neither gasoline nor lubricating oil in it; that he tried to start it, but could not; that an automobile man who was with him supplied him with oil and gasoline, and that he then drove home with the car; that this occurred at about 8 or 9 o'clock in the morning; that he was at the ranch between an hour and two hours before he went away with the machine; that there was nothing in the house abandoned by defendant except a desk which the latter had made while he was living on plaintiff's place in Brawley; that he never thereafter saw defendant until late in the fall, and that defendant did not do any work thereafter under the contract.

Defendant's answer, in addition to denying a breach of the contract on his part, pleaded the statute of limitations, alleging that plaintiff's cause of action is barred by subdivision 1 of section 337 of the Code of Civil Procedure, whereby it is provided that "an action upon any contract, obligation, or liability founded upon an instrument in writing executed within this state" must be commenced within four years after the accrual of the cause of action.

At the close of plaintiff's evidence defendant moved for a nonsuit upon two grounds: (1) That the evidence did not show any breach of the contract on defendant's part, but did show that it had been breached by plaintiff, and that that was the reason why defendant ceased work; (2) that the cause of action, if any, is barred by the above-mentioned Code section.

[1] It may be that had the case, upon the close of appellant's evidence, been submitted to the trial court for a decision on the merits, the evidence would have warranted a decision on the facts in respondent's favor. In that case the court would have been called upon to decide questions of fact only, and would have been free to deduce from all the evidence any reasonable inferences, whether

favorable or unfavorable, to appellant, and regardless of whether opposing inferences might reasonably have been drawn from all the evidence. By moving for a nonsuit, however, respondent presented to the court a pure question of law. It is too well established to require the citation of authority that, on such a motion, not only must all the evidence in favor of the plaintiff be taken as true, and contradictory evidence, if any there be, be disregarded, but, if the evidence will reasonably permit of two or more inferences, those inferences only which are most favorable to the plaintiff must be adopted by the court. If any authority were needed to support this well-established principle, reference might be made to *Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426, and the long list of cases there cited. In view of the rule that thus requires the court, on a motion for a nonsuit, to resolve all reasonable inferences in favor of the plaintiff, we think that it was error to grant the motion, and that the judgment, therefore, must be reversed.

[2] Coming now to a consideration of the evidence and the inferences favorable to appellant that are reasonably deducible therefrom: Unless the removal of the automobile by appellant warranted an abandonment of the contract by respondent, the latter breached the contract. For it is admitted that at no time since appellant took the automobile in the latter part of May, 1915, has respondent done anything under his contract. He did not make from the 500 colonies of bees furnished him by appellant an additional 500 in 1915, or an additional 1,000 in 1916, or, in 1917, a number sufficient to bring the total to 2,000 colonies at the termination of the three years during which he was to work for appellant in the care of the bees. So that the pivotal question in the case is, Was respondent justified in abandoning the contract merely because appellant removed the automobile to his own home for suitable care, upon discovering that the house which he had furnished for respondent's use was vacated and abandoned, and that his automobile, without lubricating oil or gasoline, had been left standing in the intense heat and burning sun of Imperial Valley, apparently abandoned to the destructive effects of the elements? To properly answer this question we should give consideration to respondent's conduct shortly prior to the time when appellant so removed the automobile to his own home. That is, we must consider appellant's conduct in the light of respondent's previous conduct in moving off of appellant's land and in deserting the machine that appellant had furnished for his use. The inferences that might be drawn from respondent's conduct in thus moving away from the house that had been furnished for his use, and in leaving the automobile neglected and exposed to the

destructive effects of the sun and heat, are such that reasonable men might differ in their judgments thereon. This being so, there was presented, not a question of law such as arises on a motion for nonsuit, but a question of fact—such a question of fact as would have required its submission to the jury had the case been tried before a jury. From respondent's conduct during the interval of five or ten days intermediate his removal from the house that had been supplied for his use by appellant and the day when the latter found the deserted automobile and took it to his own home for safe-keeping, a reasonable man might well infer that respondent intended to abandon, and that he had abandoned, his contract, and that appellant honestly believed that respondent's conduct evidenced a determination on his part to withdraw from the contract. Particularly might this inference be warranted if respondent's conduct at that time be considered in the light of his subsequent studied evasion of appellant at all times after the latter retook the abandoned machine.

If, in consequence of his own conduct immediately prior to the appellant's retaking of the automobile for suitable protection, respondent believed that appellant was acting in the honest belief that he (respondent) had withdrawn from the contract, then, if he did intend going on with the contract, good faith required that he should have so informed appellant. Having failed to do so, and having permitted appellant to act on the belief that he had withdrawn from his contractual obligations, respondent cannot be permitted to claim that he was ready to perform, or that the contract was mutually rescinded, or that he was justified in abandoning it by reason of appellant's conduct. "If one party to an executory contract induces the other to believe that he has withdrawn from the contract, the other [contracting] party need not wait until the day of performance before making new arrangements, nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency." *Chamber of Commerce v. Sollitt*, 43 Ill. 523. See, also, subdivision 3 of section 1511 of the Civ. Code.

[3] The written contract specifically imposes upon respondent the duty "to keep all tools and appliances in good repair at his own expense." The word "appliances" is very broad, and includes anything that is used as a means to an end. *Cook v. Mining Co.*, 249 Ill. 41, 94 N. E. 90. The automobile furnished by appellant for respondent's use was an "appliance," within the meaning of the contract. It was a thing supplied by appellant to be used by respondent as a means of caring for the bees while traveling from location to location. It is not an unreasonable inference that by leaving the automobile on the

abandoned premises, exposed to the burning sun, respondent thereby failed to keep that "appliance" in good repair, pursuant to the requirements of his agreement, thereby breaching his contract. Furthermore, by his contract respondent agreed "not to engage in any occupation or vocation other than the care of said bees without the consent of the said J. Edgar Ross." The condition in which appellant found the abandoned premises that he had furnished for respondent to live in while caring for the bees might well justify the inference that respondent, if he had not moved away to take up some other occupation or vocation, was at least not caring for the bees "in a workmanlike manner and to the best of his ability," as required by the terms of his contract, thus breaching the contract in a vital and important particular. In short, the inference that respondent was the first to breach the contract is not an unreasonable inference, but one which reasonable men might be warranted in deducing from all the evidence in the case.

[4, 5] If respondent was the first to breach the contract, then he is liable in this action for damages even if, after such breach by him, appellant did take the automobile to his own home and assume the sole care of the bees. The fact that appellant removed the automobile from the premises that respondent had abandoned, and placed it where it would not be subjected to the destructive effects of the sun's rays, and the further fact that appellant cared for the bees that respondent seemingly had abandoned, instead of depriving appellant of all claim for damages, might justly be regarded as an effort on his part to reduce the damages sustained by him. Nor was it incumbent upon appellant to hunt up respondent and offer to return to him the automobile, or ask him to go back to the house that he had supplied for respondent's use. The contract was a continuing executory contract, requiring of respondent continuous service over a three-year period. And if, as might be inferred from his conduct in leaving the house and the automobile, respondent had abandoned his contract, thereby breaching it, appellant was under no obligation to demand that respondent continue to perform his contract. Respondent cannot escape liability because appellant did nothing other than to take steps to prevent a further loss and an increase of damages. The rule is that a party to a contract cannot take advantage of his own omission to observe the requirements of his contract. If he breaches the contract he cannot interpose the breach as a defense to an action on the contract. "The rule is general, that the right to rescind a contract rests only with the party who is without default. One party cannot * * * violate the contract himself, and then seek a rescission on the ground that the other party has followed his example." State

v. McCauley, 15 Cal. 458. See, also, *California Sugar, etc., Agency v. Penoyar*, 167 Cal. 274, 280, 139 Pac. 671. For these reasons we are satisfied that the evidence afforded no basis for the first ground of the motion for a nonsuit.

[6] Nor was the court justified in granting the motion on the second ground, namely, that the action was barred by subdivision 1 of section 337 of the Code of Civil Procedure. The action was commenced within four years after the time within which respondent was to make the first of the additional colonies of bees; that is, it was commenced within four years after December 25, 1915.

Appellant, if he and respondent did not mutually abandon the contract, could wait until the time arrived for a complete performance of the contract on respondent's part, and then bring an action thereon for damages. *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244, Ann. Cas. 1918A, 907; *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922. As we have stated, the contract was a continuing, executory contract. Respondent, when he ceased caring for the bees, did not breach the contract in its entirety. It still had more than two and a half years to run, during which respondent was to render services in caring for the bees. At any time during that period, if appellant did not elect to rescind or abandon the contract, respondent might have returned and resumed his work. Appellant is suing to recover, not for injury done to his bees by reason of neglect in their care, but for damage resulting from respondent's failure to perform that part of his contract whereby he obligated himself to make from the original colonies of bees furnished by appellant 500 additional colonies by the end of the first year of the contract, i. e., on or before December 25, 1915; 1,000 additional colonies by the end of the second year; and by the end of the third year a number sufficient to bring the total to 2,000 colonies. Though the contract was partially executed, the breach here complained of resulted from a failure to perform the unexecuted parts of the contract, and the case, therefore, comes squarely within the doctrine as announced by the New York Court of Appeals in *Ga Nun v. Palmer*, supra, where it is said:

"It is quite true that there is a distinction made in the authorities with reference to contracts which still are wholly executory and are to be performed in the future; but the distinction pertains to that which would constitute a breach of such contracts. Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie; whereas, by a partially executed contract, the breach may result from

a failure to perform some of the provisions of the contract. But in either case, after a breach by one party, the rights of the other party and his remedies are the same as to the *unexecuted* provisions of the contract." (Italics ours.)

There is an abundance of authority for the position that appellant, if he did not elect to abandon or rescind the contract when respondent ceased caring for the bees, could wait until the expiration of the time when respondent was to complete his contract, and then bring his action, meanwhile holding the contract as prospectively binding for the exercise of his right to bring suit at the end of the term of service contemplated by the contract. Thus in *Hochster v. De la Tour*, 2 El. & Bl. 678, the defendant, on April 12th, had agreed to employ the plaintiff in the capacity of a courier for a period of three months from the 1st day of June. But subsequently, and before the 1st day of June, the defendant gave the plaintiff notice that he would not require his services. Lord Campbell, after discussing the authorities, states, as a part of his conclusions, the following:

"The man who wrongfully renounces a contract into which he had deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

And in *Ga Nun v. Palmer*, *supra*, the court says:

"* * * The general rule is that a right of action does not accrue upon a contract until it is executed, or payment thereunder becomes due by its terms, and the statute of limitations does not commence to run until that event happens. The right to bring an action previous to that event is exceptional, and is only permitted in cases of a breach of a contract by one of the parties which permits the aggrieved party, *at his option*, to maintain an action for such breach and recover the damages he has suffered on account thereof." (Italics ours.)

See, also, 13 C. J. p. 653.

There never was any attempt formally to rescind the contract in this case, and it only remains to consider whether the testimony definitely showed a mutual abandonment, evidenced by the conduct of both parties. For if appellant did not elect to rescind or abandon the contract when he discovered that respondent apparently had ceased to do the things required of him by his agreement, then, as we have seen, his cause of action accrued on the expiration of the time pro-

vided by the contract within which respondent was to make the additional colonies of bees, i. e., on the expiration of the three-year term of the contract, which was less than four years prior to the commencement of this action, and, consequently, within the period prescribed by the statute of limitations. Meanwhile appellant could hold onto the contract as prospectively binding on both parties for the exercise of his optional right to bring his action at the expiration of the time within which complete performance by respondent became due by the terms of his agreement.

[7] Does the evidence necessitate the conclusion that there was a mutual abandonment of the contract more than four years before the action was commenced? As to whether a contract has been abandoned presents a mixed question of law and fact. *McCurry v. Purgason*, *supra*. And though the parties to a contract may abandon it by matter in pais, still the acts and conduct which may be relied on to constitute the abandonment must "be clearly proved, and they must be positive, unequivocal, and inconsistent with the existence of a contract." *May v. Getty*, 140 N. C. 310, 53 S. E. 75. There is no unequivocal evidence of any abandonment of the contract on the part of appellant. His conduct in removing the automobile for safekeeping and in caring for his bees after respondent apparently had deserted the house and the automobile furnished for his use, is not so unequivocal that it necessarily evidences an intention on appellant's part to relinquish all rights under the contract. In order to hold onto the contract as prospectively binding upon both parties, so that a right of action for damages might accrue to him on the expiration of the time for complete performance by respondent, it was not necessary that appellant should permit his property—his automobile and his bees—to continue abandoned and deprived of all suitable care.

For the foregoing reasons we are satisfied that the nonsuit was not warranted by the second ground upon which the motion was made.

[8] Respondent claims that the evidence introduced by appellant to prove his damages was wholly insufficient for that purpose. This was not specified as one of the grounds of the motion for a nonsuit, and therefore it may not now be urged in an effort to uphold the judgment. It is the settled doctrine that a motion for a nonsuit should specify the grounds upon which it is made, and the general rule is that a ground which is not stated cannot be considered.

The judgment is reversed.

We concur: MYERS, Justice pro tem.; WORKS, J.

53 Cal. App. 771

TIBBITS-PAC. CO. v. FIRTH. (Civ. 3454.)

(District Court of Appeal, First District, Division 2, California. Aug. 8, 1921.)

1. Municipal corporations ☞514(1)—Court, in setting assessment aside because of irregularity, may order new assessment made.

Under Vrooman Act, § 12¼, added by St. 1913, p. 409, requiring a court, which has set aside an assessment not entirely without the power of the city to issue, for omission, irregularity, illegality, informality, or noncompliance with the statute, to order a new assessment to be made, where the work has been done in good faith under the contract, an appeal to the city council under section 11, in the event of irregularities, is not the exclusive remedy, but the court is authorized to review alleged errors and to order a new assessment, notwithstanding the irregularity, if the city, but for such irregularity, has the power to make the assessment, and if the work was done in good faith under the contract.

2. Municipal corporations ☞514(1) — Court, having set aside assessment for irregularity, properly ordered new assessment.

Under Vrooman Act, § 12¼, added by St. 1913, p. 409, requiring a court, which has set aside an assessment not entirely without the power of the city to issue, for omission, irregularity, illegality, informality, or noncompliance with the statute, to order a new assessment to be made, where the work has been done in good faith under the contract, the court, in setting aside assessment because an extension of the time for completion of the improvements was made two days after the time given by a previous extension had elapsed, properly ordered new assessment made, where the work had been done in good faith under the contract.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Tibbits-Pacific Company against Emil Firth. Judgment for plaintiff, and defendant appeals. Affirmed.

R. T. Lightfoot, of Los Angeles, for appellant.

Arthur M. Ellis, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to foreclose a lien for street improvements under proceedings in accordance with the Vrooman Act (Stats. 1885, p. 147). The assessment which was the basis of the action was made by the board of public works of the city of Los Angeles on September 4, 1915. The trial court, acting under the provisions of section 12¼ of the act (added in 1913 by Stats. 1913, p. 409), held that the assessment was unenforceable, because an extension of the time for completion of the improvements was made two days after the time given by a previous extension had elapsed. The court found that the work was actually done

in good faith under a valid contract, that the proceedings were within the power of the city, and that the only informality in the proceedings was that regarding the extension of time for completion. It thereupon ordered that a reassessment be made in accordance with section 12¼. This was done and notice was duly given. No objections were made to the reassessment, and it was accordingly approved, confirmed and recorded on July 23, 1917. The defendant refused to pay the reassessment, and this suit was then commenced to collect the sum found due thereon. From the judgment in favor of plaintiff, defendant prosecutes this appeal.

The only point involved is the construction of section 12¼. Appellant concedes that the Legislature had constitutional power to enact it. Its provisions were strictly followed in the present litigation. Briefly, the section provides that—

“Whenever any assessment made and issued under the provisions of this act * * * [has] been set aside by any court of competent jurisdiction * * * then the superintendent of streets shall cause a new assessment to be made for the same purpose. * * * It is hereby made the duty of any court of competent jurisdiction in rendering its judgment holding invalid any assessment * * * to make a finding as to whether or not the issuing of such assessment was entirely without the power of the said city to issue, and if not, then what omission, irregularity, illegality, informality, or noncompliance with the requirements of the statute * * * has occurred. * * * In the event that the court shall find that the work * * * was done in good faith under the contract * * * it shall be the duty of the said court to order the making of a new assessment.”

The section then provides that the city council may without such order set aside an assessment which is irregular, and order a new assessment to be made. Such assessment, whether made after decree of court or pursuant to a resolution of the council, shall be based upon the special benefit of the improvement to the respective lots assessed, and shall become a charge upon the property, notwithstanding the previous irregularity, informality or defect. The purpose and intent of the section is declared to be to make the cost and expense of all local improvements payable by the real estate benefited by the improvements actually made, though the proceedings may not have been in full technical accord with the statutory requirements. Upon the filing of the new assessment the city clerk is required to advertise the facts, stating the time set for hearing objections. After hearing had, the council may revise, correct, and modify the assessment and shall thereupon pass a resolution approving and confirming the same.

"Such decision shall be a final determination of all matters relating to the actual benefits derived from the improvement by the respective lots."

The obvious effect of the section is to relieve a contractor from the rule of the early decisions interpreting the Vrooman Act, to the effect that any irregularity or informality in street improvement proceedings rendered the assessment void and defeated recovery. Recent decisions involving proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730), and similar acts containing curative sections, have held that the courts are prohibited from wholly invalidating such proceedings solely upon the grounds of irregularity and informality not directly affecting the jurisdiction of the municipal authorities. *Oakland Paving Co. v. Whittell Realty Co.* (Sup.) 195 Pac. 1058; *City Street Imp. Co. v. Watson*, 195 Pac. 967; *Federal Const. Co. v. Newhouse*, 199 Pac. 519.

[1] In the first two cases just cited it was held that the failure of a contractor doing street work under the 1911 act to procure an extension of time until one or two days after the contract period had expired was a mere informality which was cured by section 26 of the act. Because section 11 of the Vrooman Act, providing that no assessment should be held invalid for mere informalities, contained the expression "except upon appeal to the city council," it was held that the section did not cure any defects which the city council could not have cured upon such an appeal. *Manning v. Den*, 90 Cal. 610, 616, 27 Pac. 435. Thus, in the absence of section 12 $\frac{1}{4}$, if section 11 of the Vrooman Act read as section 26 of the 1911 act, the court would be without power to declare an assessment void for mere irregularities in procuring an extension of time for completion of the contract. *Oakland Paving Co. v. Whittell Realty Co.*, *supra*; *City Street Imp. Co. v. Watson*, *supra*. Therefore, by the provisions of section 12 $\frac{1}{4}$, the court is given a limited jurisdiction, not to deny recovery altogether, but to order a new assessment based upon the benefits derived from the improvement. The effect of the enactment is that, instead of making the appeal to the city council the exclusive remedy in such cases, the court is authorized to review the alleged errors and to order a new assessment, if it finds that the conditions of the statute have been met.

[2] As the statute was in full force when the proceedings were taken, it was notice to all parties interested. As the Legislature could have authorized extensions of time after the expiration of the contract period, it could also waive the informality of the lapse. This could be done either by legislation such as is found in section 26 of

the 1911 Improvement Act, or by the method provided in section 12 $\frac{1}{4}$ of the Vrooman Act. The proceedings here were in full accord with the requirements of the Vrooman Act. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

53 Cal. App. 788

BROWN v. PACIFIC COAST AGENCY et al.
(Civ. 3793.)

(District Court of Appeal, First District, Division 2, California. Aug. 9, 1921. Hearing Denied by Supreme Court Oct. 6, 1921.)

1. Release ⇨28(4)—A qualified release to one of two or more joint debtors held not a release to the others.

Civ. Code, § 1543, providing that a release of one of two or more joint debtors does not extinguish the obligation of any of the others, unless they are mere guarantors, has reference to a general release, and does not change the common-law rule that a release of one joint debtor with a reservation of the right to proceed against the others will not discharge the latter, and hence it is immaterial that joint debtors, two of whom are given a qualified release on partial payment by them, were guarantors; this construction being consistent with section 2819, specifying the manner in which guarantors may be discharged.

2. Execution ⇨74—Affidavit setting up fact of unsatisfied judgment is sufficient showing for order directing issuance of writ of execution.

It is sufficient that the affidavit on which an order directing the issuance of execution is made set out affirmatively that the balance of the judgment is unpaid; such affidavit not having to stand the test of a complaint.

3. Execution ⇨102—Once issued, set aside on legal grounds only.

The right to have execution issue is statutory, and, any discretion given a court having been exercised, the order so made can be set aside on legal grounds only.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by A. M. Brown against the Pacific Coast Agency and others. Judgment for plaintiff. From an order setting aside an order for execution, plaintiff appeals. Reversed.

G. E. Weaver, of San Francisco, for appellant.

Sterling Carr, of San Francisco, and John J. Coghlan, of Madera, for respondents.

NOURSE, J. This is an appeal from an order setting aside an order directing that execution issue. Plaintiff, on September 20, 1911, obtained a judgment against Jacobi,

Rothchild, Conant, and Muller, joint guarantors on a promissory note. The judgment called for \$9,231.57, \$1,000 attorney's fees, and costs of suit. On December 29, 1911, the defendants Rothchild and Conant paid on said judgment \$8,500, taking a satisfaction of judgment to that extent, and a release, which contained the express reservation that it should "not operate to release said I. L. Jacobi and said Otto Muller from the payment of the balance of said judgment." On October 7, 1920, the balance of the judgment being still unpaid, plaintiff obtained an order directing that execution issue and the judgment be enforced. Thereafter, on motion of defendant Muller, this order was set aside on the ground that the partial satisfaction of December, 1911, released Muller also under the provisions of section 1543, Civil Code, because he was a mere guarantor. From the order granting Muller's motion, plaintiff brings this appeal.

[1] The order is attacked upon two grounds: (1) That the reservation in the release protected plaintiff's rights against Muller; and (2) that he was not a "mere guarantor," under section 1543, Civil Code. This section of the Code was enacted in 1872, being copied verbatim from section 743 of Field's draft of the New York Civil Code. It reads:

"A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him."

By the English common law a general release of one of two or more joint debtors released as to all. But a qualified release, expressly providing that the joint debtors not mentioned in the release were not discharged, was recognized in the English courts and in New York by statute as early as 1838. Laws N. Y. 1838, c. 257. Section 1543 of our Civil Code gives the same effect to a release in general terms as was given to the qualified release by the English courts. *Northern Ins. Co. v. Potter*, 63 Cal. 157, 158. The statute was a distinct departure from the common-law rule as to the effect of a general release, but did not alter the rule as to the effect of a qualified release. Being based upon the New York Civil Code of 1865, which in turn was drafted while the statute authorizing a qualified release was in full force, the contemporaneous interpretation by the New York courts will assist in arriving at the meaning of the Code section. Without any deviation, the decisions of the New York courts have held that a reservation in a release of one of two or more joint debtors will not result in a discharge of the debtors not mentioned. *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Cat-skill Bank v. Messenger*, 9 Cow. (N. Y.) 37; *Irvine v. Millbank*, 56 N. Y. 635; *Murray v.*

Fox, 104 N. Y. 382, 390, 10 N. E. 864; *Hood v. Hayward*, 124 N. Y. 1, 26 N. E. 331; *Whittemore v. J. L. & S. O. Co.*, 124 N. Y. 565, 574, 27 N. E. 244, 21 Am. St. Rep. 708; *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623. To the same effect is *Northern Ins. Co. v. Potter*, 63 Cal. 157, 158, where the court said:

"Independent of the code the release of Jacobs and Easton would not have discharged the defendant, because it was expressly provided by the parties to it that it should not have that effect."

In the same case the court recognized the English rule that a release of a joint debtor might be qualified so as not to discharge a codebtor. *Thompson v. Lack*, 3 Com. B. 551; *North v. Wakefield*, 13 Q. B. 541.

Thus, independent of the Code section, the release must be given the effect intended by the parties. If the defendants were mere guarantors and a general release of one would discharge all, then the qualified release must follow one of two courses to the same result. (1) If the proviso is to be given full effect, Muller is not discharged; (2) if it is not to be given full effect, so that a discharge would result by operation of law, then the condition of the paper having failed, Rothchild and Conant were not released. Hence there was no discharge of any one, but merely a part payment on account of the judgment. *Barnum v. Cochrane*, 139 Cal. 494, 73 Pac. 242.

As the order must be reversed for the reasons given, it is not necessary to determine the status of these four defendants, which seems to be a mixed relation of guarantor and surety. But it may be said that the proper construction of section 1543 would seem to be that a release of one of two or more joint debtors does not extinguish the obligations of the others, unless they (the others not included in the release) are mere guarantors. Such construction would treat the section in harmony with section 2819, Civil Code, which specifies the manner in which a guarantor may be released. There is no reason why two or more joint guarantors (whose relation among themselves is in the nature of cosureties), should be discharged by the release of one from a joint judgment on the guaranty. But if the principal on the original obligation is released by the creditor, then under the section the guarantor is discharged.

[2] In support of the order respondent urges that the affidavit upon which the order directing issuance of execution was made does not sufficiently allege that the debt is not paid. The point is that the affidavit alleges that the balance of the judgment is unpaid and respondent argues that some one may have paid the balance of the note and the attorney's fees and costs without paying it on the judgment. Such an affidavit does

not have to stand the test of a complaint, and if any part of the debt has been paid other than that for which satisfaction has been given, respondent has had ample opportunity to make that showing.

[3] It is also argued that the granting of the motion directing execution is within the discretion of the court; hence that the court could set aside the order at will. The right to have execution issue is statutory. Whatever discretion the court is given by the statute was exercised when the order for the enforcement of the judgment was made. An order so made can be set aside on legal grounds only. The only ground assigned in respondent's motion was that he was discharged by the release of his codebtors under section 1543.

The judgment is reversed, with directions to the trial court to set aside the order appealed from and to restore the order of October 7, 1920.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 1

HASBROUCK v. CAVILL. (Civ. 3791.)

(District Court of Appeal, First District, Division 1, California. Aug. 10, 1921. Hearing Denied by Supreme Court Oct. 6, 1921.)

1. Navigable waters §39(5)—Maintenance of ark interfering with riparian owner's access to water a private nuisance.

The maintenance of an ark in a navigable creek, so as to interfere with riparian owner's access to the water, is a private nuisance, which the riparian owner could maintain an action to abate.

2. Navigable waters §37(4)—Land conveyed by tideland commissioners held to extend merely to established canal line, and not to creek as it existed naturally.

Where tide land lots were conveyed by tideland commissioners under St. 1869-1870, pp. 541, 542, § 3, in accordance with tide land map prepared and filed under section 2, showing the land to be bounded by Corte Madera Canal, and were described in deed as bounded by the line of such canal, the land extended merely to the canal line as established by such commission, and not to the Corte Madera creek as it existed naturally and as declared navigable under St. 1861, p. 469.

3. Navigable waters §37(4)—Tide land map controls over description in tide land commissioners' deed.

Under Code Civ. Proc. § 2077, subd. 6, tide land map, prepared and filed by tide land commissioners under St. 1869-1870, p. 541, § 2, would control over description in tide land commissioners' deed conveying lots under section 3 in accordance with such map, where description does not accord with the lot as shown by map.

4. Navigable waters §26(2)—One not riparian owner could not abate maintenance of ark as a nuisance.

Owner whose land was not riparian to creek could not abate the maintenance of an ark in the creek, on theory that ark interfered with her access to the water, since she had no other right than that enjoyed by the public.

5. Nuisance §71 — Private person cannot abate public nuisance.

A private person, who has no other right than that enjoyed by the public, cannot abate a public nuisance.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Anginette Hasbrouck against Sid Cavill. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. Clark Sargent, of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by plaintiff to have an ark belonging to defendant declared a private nuisance as to her and abated. She claims no special damage, but alleges her riparian rights on Corte Madera creek (due to the location of her land on said creek) entitles her to access to said creek, and that the ark prevents access at the point where it is located.

The ark Frolic, owned by defendant, is moored in Corte Madera creek on the west side in such a way that it floats at high tide, but at low tide the landward side rests on the bank. It is moored to the shore by chains. The defendant has no license from the state to moor his ark in Corte Madera creek, which is tidewater. Plaintiff claims that defendant, in addition to maintaining a public nuisance, maintains a private nuisance with respect to her—this claim depending on her land being riparian to the creek. The lower court gave judgment for defendant for his costs, finding that plaintiff's land was not bounded by the creek; that defendant had not entered upon nor moored a houseboat to plaintiff's land, nor to state land immediately to the north or east of her land; that the houseboat does not cut off plaintiff's access; and that plaintiff is not deprived of use of her waterfront at point where moored, as plaintiff's land has no water front.

[1] If plaintiff's land is riparian to Corte Madera creek, the maintenance of an ark immediately to the north or east of her land would constitute a private nuisance, and she could maintain an action for the abatement of it. Her title to the land is derived from a patent from the tide land commissioners, made in 1873. In 1861 Corte Madera creek was declared navigable as follows:

"The creeks situated in Marin county, known as Guaymas creek, San Rafael creek, Corte Madera creek, and Saucelito creek, are hereby declared navigable from their mouths as far as tide flows. * * * Stats. 1861, p. 469.

In 1870 the tide land commissioners of California were given jurisdiction over the tide lands of Marin county as follows:

"Sec. 2. Said commissioners shall have the said lands lying outside the boundary lines of said county [San Francisco] and within five miles thereof, as aforesaid, surveyed to a depth of nine feet of water at the lowest stage of the tide, and subdivided into lots of not more than twenty acres or into lots of not less than fifty feet front by one hundred feet deep, as in the judgment of said tide land commissioners, approved by the state board, may seem fit for the best interests of the state; * * * said commissioners shall have power to locate and establish canals and basins upon the marsh and tide lands lying outside of the exterior boundaries of the county of San Francisco, * * * whenever they deem them necessary for the purposes of drainage, navigation and the wants of commerce; and shall cause to be prepared the necessary maps, exhibiting the property as surveyed, the number, area and location of each subdivision or lot, and all other matters proper and necessary to be shown thereon. The commissioners shall file certified copies of said maps with the surveyor general of the state and with the recorder of the city and county of San Francisco, retaining the original field notes and maps of said survey in their office at San Francisco.

"Sec. 3. After the commissioners shall have complied with the provisions of section 2, they shall proceed to sell at public auction, to the highest bidder * * * such sale shall be by lots, in accordance with the maps provided for in section 2 of this act. * * *

Stats. 1869-79, pp. 541, 542.

In pursuance of this authority the tide land commissioners on April 3, 1871, passed the following resolution:

"That open canals for the purpose of navigation, drainage, and the wants of commerce, be fixed and established * * * on and along Corte Madera creek, * * * to be called Corte Madera Canal; * * * the routes and widths of said canals to conform as near as practicable to the present meanderings and widths of the respective creeks upon which they are located."

On May 10, 1871, the commissioners approved tide land map No. 2, prepared after the establishing of Corte Madera Canal, showing the canal line and the location of lots of marsh land to be sold. The deed of the tide land commissioners to Justice Uhler Haley, dated March 8, 1873, conveyed two lots, lot 24½ and lot 26. The eastern boundary of lot 26 is the boundary line in question. The call reads:

"North 5.81 chains to the southerly line of Corte Madera Canal; thence along the same S. 61¾° E. 2.51 chains."

Tide land map No. 2 shows Corte Madera canal as established by the commissioners as running in a generally similar line to Corte Madera creek (the natural creek); but it is almost never identical. Along the line mentioned in the call in question there is a space of about 175 feet between the canal line and the natural creek, which is marsh land.

Plaintiff claims her line carries to the creek and that she thereby is riparian to the creek; that the tide land commission did not intend to alter the line of the creek, but merely to rename the creek Corte Madera Canal, and that they probably did not observe the variation of their engineer's map from the creek, and that the calls in her deed are lines of measurement, not boundaries; that, if the commissioners did intend to alter the line of the creek, they had not the power to do so, as the Legislature had declared Corte Madera creek a navigable stream, and only the Legislature could alter the stream line; that 50 years have passed since the map was made, and that the state has done nothing toward making Corte Madera creek correspond with the canal line as established; that the deed to Justice Haley intended to convey riparian rights to the canal, and that plaintiff has riparian rights on the actual creek until the canal is constructed.

Plaintiff places great reliance on the case of City of Los Angeles v. San Pedro, Los Angeles & Salt Lake Railroad Co., 182 Cal. 652, 189 Pac. 449, to support her position that meanders are lines of measurement and not boundaries. In the syllabus to the opinion of the Supreme Court of the United States in Jefferies v. East Omaha Land Co., 134 U. S. 178-198, 10 Sup. Ct. 518, 523 (33 L. Ed. 872), (quoted in City of Los Angeles v. San Pedro, etc., Co., supra), the law on that point is stated as follows:

"Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the water course, and not the meander line, as actually run on the land is the boundary."

In these cases, the descriptions of land—carrying to water—were not in fact correct, and it fell to the courts to determine that the intent of the grantor that the land should extend to the water should prevail, and not the actual calls. The intent of the grantor is the test, and it is to be derived from the whole deed, and not from the calls alone.

[2] In the instant case it is necessary to determine whether the tide land commission auctioned the land to the canal as established by them, or to the creek as it existed naturally. Tide land map No. 2 contains on its face a chart of the calls of the canal as established. The canal very clearly is not

coincident with the natural creek, and we find no reason to believe the tide land commission intended otherwise than its documents indicate. The tracts of marsh land as divided up without exception follow the line of the canal, sometimes extending into the actual creek and sometimes leaving tracts of land untouched, depending on the line of the canal. Furthermore, the description of the land as conveyed is correct, and corresponds absolutely with the map by which it was sold; the north and east boundary is the "southerly line of Corte Madera Canal," etc. It is the manifest intent of the tide land commissioners that lot 26 extend only to the canal line as established by them.

[3] Were the description at variance with the lot as evidenced by the map by which it was sold, the map would control. Section 2077, subd. 6, Code Civ. Proc. But no such condition exists here. Since we conclude that the intent was to convey to Corte Madera Canal, the rule of construction invoked in *City of Los Angeles v. San Pedro, etc., Co.*, supra, is not necessary, because the commission accomplished what it intended to do; there is no variance between geographical fact and the calls of the deed.

With regard to plaintiff's contention that this commission had no power to alter the shores of a stream declared navigable by statute, the language of the statute creating the tide land commission, "Said commissioners shall have power to *locate and establish* canals * * * upon the *marsh and tide lands*, * * *" would seem to give them authority to do what the resolution in pursuance thereof, "that open canals * * * be fixed and established * * * on and along Corte Madera creek, * * * the routes and widths of said canals to conform *as near as practicable* to the present meanderings and widths of the respective creeks upon which they are located," caused to be done; i. e., to survey and establish a canal along Corte Madera creek to conform as near as practicable to the present creek, and to lay out lots on the marsh lands and to auction off the same.

However, it is not necessary here to determine whether the tide land commissioners had or had not power to alter the present line of a stream; they had power to divide up the marsh land (subject to the approval of the state board) and to sell it *by map*; the map showed very clearly the boundaries of the lots and showed that lot 26 was bounded by the artificial canal line—not by the creek line. It is difficult to imagine how the tide land commissioners can be presumed to have intended to convey four acres more of land than they embodied in a description which corresponds with the course of the canal they established.

[4, 5] We believe this is conclusive of plaintiff's case, as her other contentions have no support in law. The title to the land between plaintiff's eastern boundary and the actual creek remains in the state; since plaintiff's land is not riparian to Corte Madera creek, she has no other right than that enjoyed by the public, of access to the creek; therefore the maintenance of an ark on the creek is not a private nuisance as to her, and a private person cannot abate a public nuisance.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

187 Cal. 116

(200 P.)

LAKE v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 9770.)(Supreme Court of California. Sept. 19, 1921.
Rehearing Denied Oct. 17, 1921.)**1. Appeal and error ⇨1194(1)—Decision on appeal must be read in connection with issues and parties.**

Where only a portion of defendants appeared from a judgment against them, the decision of the appellate court, "Judgment reversed," will be confined to the issues arising on the appeal and the parties.

2. Appeal and error ⇨1173(2)—Appellate court may direct retrial as to appealing defendants only.

In suit to quiet title, in which defendants appeared separately and by separate answers, and filed cross-complaints setting up their respective undivided interests, although the appealing defendants served notice of appeal on their codefendants, who did not appeal and whose interests were not adverse to the appellants, the appellate court has no jurisdiction to direct a retrial as to them.

3. Appeal and error ⇨863—Appeal from judgment by some of defendants is in effect an appeal from a portion of the judgment.

An appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is an appeal only from that portion of the judgment which injuriously affects appellants, unless the reversal or modification of the whole judgment is essential to protect their interests.

4. Appeal and error ⇨863—On appeal from portion of judgment, appellate court has jurisdiction to review only part appealed from.

On appeal from a portion of the judgment only, the appellate court has no jurisdiction to review any part of the judgment, except the part to which the appeal is directed, and an order of reversal, though general in terms, will be construed to apply only to the part brought up for review.

In Bank.

Application for a writ of prohibition by Fred W. Lake, against the Superior Court of the State of California in and for the City and County of San Francisco, and Hon. Daniel C. Deasy, Judge, to prevent the trial of a certain cause. Writ granted.

R. P. Henshall, of San Francisco, for petitioner.

Daniel C. Deasy, of San Francisco, for respondents.

Fabius M. Clarke, of San Francisco, for Hugh E. Springer and A. L. Wiel, administrators, etc.

WILBUR, J. This is an application for a writ of prohibition to prevent the defendant from proceeding with the trial of the case of Lake v. Sterling Development Company and others as to certain defendants, upon the

ground that the court is precluded from trying the issues between plaintiff and such defendants by reason of a previous adjudication of those rights from which the defendants referred to failed to appeal. The other defendants took an appeal, and on such appeal a judgment was rendered reversing the judgment. The question is as to the effect of the judgment of reversal upon the rights of the defendants who failed to take an appeal.

The order of the appellate court, "Judgment reversed," taken literally, reversed the entire judgment and sent the case back for a new trial. 2 Hayne on New Trial and Appeal, § 299, subds. 2 and 4. This the respondent claims is the effect of the judgment. The suit was one brought by Lake to quiet his title to certain land described in the complaint. The plaintiff's title was based upon a school land certificate issued to one Brackett, and referred to as the Brackett certificate, while the title claimed by all the defendants, who were tenants in common, was deemed from a certificate issued to one Phillips, whose heirs and successors are the defendants in the case. The controversy between the parties was as to the validity of the respective certificates upon which their respective claims of title depended. The lower court held the Brackett certificate valid and gave judgment in favor of the plaintiff. Upon the appeal this certificate was declared void, from which it followed that the judgment was erroneous, not only as to the defendants who appealed, but also as to those who failed to appeal. Under these circumstances, if the appellate court had jurisdiction to render a judgment reversing the case and sending it back for a trial of the issues between all the parties thereto, it is clear that such an order was made and would be in furtherance of justice. The terms of the judgment rendered, unless limited by the nature of the questions presented, or because of a lack of jurisdiction, was a direct decision that the entire judgment be reversed, and an implied order for the retrial of the entire case. There is nothing in the nature of the case to justify the conclusion that it was the intention of the appellate court to limit the reversal to the five-twelfths of the property owned by the defendants who served notice of appeal. That it was the intention of the District Court of Appeal to reverse the entire judgment is further manifested by the fact that in the briefs in the District Court of Appeal and in the petition for a transfer to this court the respondent, the petitioner herein, particularly called attention to the fact that some of the defendants had not appealed, and asked that the judgment on appeal be rendered in such form that as to the nonappealing defendants the plaintiff's judgment would be affirmed. The request was not granted.

[1, 2] The question, then, is whether or not the appellate court had the power under the circumstances of this case to direct a retrial of the issues as to all the defendants. In considering this question of jurisdiction, it should be stated that the defendants not only appeared separately by separate answers, but also filed cross-complaints setting up their respective undivided interests. The cross-complaints were ignored in the findings and judgment, for the reason that the judgment adjudicating the validity of the plaintiff's title was in effect a denial of the prayer of the cross-complaint. The appealing defendants served notice of appeal upon the plaintiff and upon their codefendants. If the nonappealing codefendants were in any sense adverse parties to the appealing codefendants, it may be that the appellate court had jurisdiction over the entire judgment. While it is true that the rights of the nonappealing defendants would be affected by a lawful reversal of the entire judgment, their interests were in no sense adverse to the appellants. Their rights would be in no sense affected by a reversal of the judgment as to the appealing defendants. Code Civ. Proc. § 940; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719. The rights of the several defendants, although cotenants, were as distinct as though each owned a separate and distinct piece of property within the limits of the certificate upon which the plaintiff based his right of recovery. The judgment having declared that the several defendants were without right or title in or to the particular property claimed by them, they could not be injuriously affected by any judgment rendered on an appeal, where the only remedy sought by the appealing defendants was a reversal of the judgment. The only difficulty in the case here is that the defendants who are now seeking a retrial of the issues as to them are seeking to reap where they have not sown.

[3, 4] So far as the retrial of the case is concerned, there is no reason why that trial cannot be had with relation to the undivided interest claimed by the appealing defendants without in any wise affecting the rights of the plaintiff and nonappealing defendants as determined by the previous judgment. The broad expression "the judgment is reversed" will be confined to the issues arising upon the appeal and the parties appealing. *Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904, Ann. Cas. 1913E, 1319.

An appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from a portion of the judgment; that is to say, the portion of the judgment adverse to their interests, unless the reversal or mod-

ification of the whole judgment is essential to protect the interests of the appealing defendants. It is well settled that upon an appeal from a portion of the judgment only the appellate court has no jurisdiction to review any part of the judgment except the part to which the appeal is directed and that an order of reversal, although general in terms, will be construed to apply only to the part brought up for review. *Ganahl Lumber Co. v. Weinsveig*, 163 Cal. 664, 143 Pac. 1025. It is true that in the case just cited there were a number of consolidated mechanics' liens, so that, although there was only one judgment, there were a number of separate cases consolidated, and that the case is therefore readily distinguishable from the one at bar. But in principle, as has been stated, an appeal by only a portion of the defendants, however broad in terms the notice of appeal may be, is in legal effect an appeal only from a portion of the judgment affecting them, and gives jurisdiction to the appellate court to reverse or modify the judgment only in so far as it affects the interests of the appellants. The effect of a reversal of the judgment where only a portion of the defendants appeal is discussed in the following cases, and the conclusions therein arrived at conform to the views we have here expressed: *Title & Trust Co. v. California Development Co.*, 164 Cal. 58, 127 Pac. 502; *Mercantile Trust Co. v. Superior Court*, 178 Cal. 512, 174 Pac. 51.

It is ordered that a writ of prohibition be granted as prayed for.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; LENNON, J.; LAW-LOR, J.

187 Cal. 121

BRECHEEN v. RILEY, Real Estate Com'r, et al. (S. F. 9782.)

(Supreme Court of California. Sept. 19, 1921.)

1. Constitutional law — 275(1)—Person pursuing any lawful business cannot be deprived thereof without due process of law.

It is the right of any person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and such right is valuable and must be protected and secured and cannot be taken from those who possess it without "due process of law."

2. Constitutional law — 80(2)—Statute permitting revocation of broker's license not unconstitutional.

That portion of the Real Estate Act conferring upon real estate commissioner authority to hear and determine proceedings to revoke a broker's license issued pursuant to its terms

is not in violation of Const. art. 6, § 1, providing where the judicial power of the state shall rest.

3. Brokers — Real estate commissioner held to have jurisdiction of proceeding to revoke broker's license; "dishonest dealing."

In a proceeding before the real estate commissioner under St. 1919, p. 1252, to revoke license of a real estate broker, the commissioner was authorized to determine as to whether or not broker was guilty of acts involving embezzlement, false representations, and gross moral turpitude, which certainly constituted "dishonest dealing" within the meaning of the statute and presented an issue which the commissioner was clearly authorized to hear and had jurisdiction to determine.

In Bank.

Application by T. L. Brecheen for certiorari to review an order of Ray L. Riley, Real Estate Commissioner, and an order of Honorable George Samuels, Judge of the Superior Court, sustaining commissioner's finding. Writ denied.

A. A. Montague, of San Francisco, for petitioner.

U. S. Webb, Robert W. Harrison, and R. L. Chamberlain, all of San Francisco, for respondents.

SHURTLEFF, J. This is an application for the issuance of a writ of review. The petition alleges that at all the times in it mentioned petitioner was a licensed real estate broker, doing business in the county of Alameda, this state; that he was duly served with a complaint filed in a proceeding before the real estate commissioner of the state of California asking the revocation of his license theretofore issued to him as such broker pursuant to the provisions of an act commonly known as the "Real Estate Act" (Stats. 1919, p. 1252); that petitioner answered such complaint denying in effect the allegations thereof; that a hearing was had before the commissioner, at which the petitioner was represented by his attorneys; that, preliminary to such hearing, petitioner objected to proceeding with the same on the ground "that the main question involved * * * was the determination of a judicial fact as to whether or not * * * petitioner was guilty of the commission of acts involving embezzlement, false representations and gross moral turpitude," which the commissioner had no right to determine because not legally vested with judicial powers, which objection the commissioner overruled, and proceeded with the hearing; that thereafter petitioner was served with a copy of the findings and conclusions of the commissioner, pursuant to which he revoked petitioner's "license and right to act as agent, broker and representative in the sale or exchange of real property, thus depriving him of a means

of livelihood"; that thereafter petitioner, as the act gives him the right to do, appealed from the determination of the commissioner to the superior court of the county of Alameda; that petitioner was not accorded a hearing by said last-mentioned court, but said court "merely reviewed the transcript of the evidence before the commissioner and sustained the latter's findings." The petition also contains specific allegations touching the illegal deprivation of property and property rights of petitioner and concludes with the following:

"That the commissioner is not a judicial officer nor clothed with judicial powers; that he has no power as a branch of our judiciary under the Constitution of the state of California or of the United States. That he has no power to deprive your petitioner of a property right or to impose any penalty or forfeiture upon your petitioner without due process of law. * * * That your petitioner has no speedy and adequate remedy at law."

To this petition respondents demur, alleging that it "does not state facts sufficient to constitute a cause of action or to entitle said petitioner to the relief prayed for in said petition," and it is the disposition of this demurrer that is before the court.

It is conceded there is no appeal from said order of the superior court.

The act provides that "it shall be unlawful for any person * * * to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor"; for the creation of a "state real estate department," the chief officer of which department shall be the "real estate commissioner"; that applications for a license as real estate broker shall be made in writing to the commissioner, who may grant the same; that he "may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person * * * engaged in the business or acting in the capacity of a real estate broker, or a real estate salesman, within this state," and shall have the power to temporarily suspend or permanently revoke licenses issued under its provisions, at any time and in cases where the holder thereof, in performing, or attempting to perform, any of the things mentioned in section 2 of the act, of which acting as a real estate broker is one, is guilty of any act "which constitutes dishonest dealing"; that, before suspending or revoking the license, the commissioner "shall notify, in writing, the holder of such license of the charges against him and afford an opportunity to be heard * * * in reference thereto"; that the decision of the commissioner shall be subject to review in accordance with specified provisions of the Code of Civil Procedure. The act fur-

ther provides for an appeal from the decision of the commissioner to the superior court of the county in which the person affected by the decision resides, or has his place of business, and indicates the procedure to be followed in perfecting such appeal, and that upon the hearing thereof the court shall receive and consider any pertinent evidence, oral or documentary, concerning the action of the commissioner, but is "limited to a consideration and determination of the question whether there has been an abuse of discretion on the part of the commissioner in making such decision." Stats. 1919, p. 1252.

The Code declares that to grant a writ of review, it must appear that an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its or his jurisdiction; that there is no appeal from the judgment sought to be reviewed, nor, in the judgment of the court to which the application for the writ is made, any plain, speedy, and adequate remedy (Code Civ. Proc. § 1068), and that the review upon such writ cannot be extended further than to determine whether the inferior tribunal, board, or officer had regularly pursued its or his authority (Code Civ. Proc. § 1074).

Petitioner confines his attack upon the act to the single point that the portion thereof conferring upon the commissioner authority to hear and determine proceedings to revoke a license issued pursuant to its terms is in violation of our state Constitution, which declares that—

"The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county." Article 6, § 1.

[1] It is firmly established that it is the right of every person to pursue any lawful business or vocation he may select, subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety of society, and that such right is valuable and must be protected and secured, and cannot be taken from those who possess it, without "due process of law." *Hewitt v. Board of Medical Examiners*, 148 Cal. 592, 84 Pac. 40, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965.

[2] The act in question violates none of these fundamental principles, but is in harmony with them, in that it is a measure looking to the protection of the public, and provides a method of procedure in all respects ample to protect the rights of the licensee, which was followed in the instant case, and must be followed in order that the license can be legally revoked by the commissioner.

It is apparent that the commissioner is

acting in a quasi judicial capacity when passing upon applications for a license, and when hearing petitions to revoke, and revoking, a license issued under the act, for he is deciding property rights and determining what shall be decreed in the matters before him, all of which is the exercise of a "judicial function"; but, as said by this court in *Suckow v. Alderson*, 182 Cal. 247, 250, 187 Pac. 965, 966:

"It is now well established in this state that tribunals such as the board of medical examiners or other boards empowered to revoke licenses which they have previously granted, for cause defined by the law, are not courts in the strict sense; they are not exercising 'the judicial power of the state' as that phrase is used in the Constitution conferring judicial power upon courts, and that statutes creating such boards and conferring upon them such powers are constitutional."

To the same effect is the following, taken from *Ex parte Whitley*, 144 Cal. 167, 179, 77 Pac. 879, 884 (1 Ann. Cas. 13):

"It is not at all uncommon for inferior boards or officers to be invested with power which calls for the determination of facts and the exercise of discretion in the discharge of the duties of their office. This power, it is true, is in a sense judicial, but it cannot be said that it is an exercise of 'judicial power' as that term is used in the Constitution in conferring judicial power upon courts. The question is, however, not an open one in this state, and seems to have been settled adversely to petitioner's contention in *County of Los Angeles v. Spencer*, 126 Cal. 670."

[3] As we have stated the petition herein recites that the "main" question involved in the proceeding before the commissioner "was the determination * * * as to whether or not * * * petitioner was guilty of the commission of acts involving embezzlement, false representations and gross moral turpitude," which charges, if true, and in the absence from the record filed here of a copy of the findings of the commissioner we must assume they were found to be true, certainly constituted "dishonest dealing" within the meaning of the phrase used in the act, and presented an issue which the commissioner was clearly authorized to hear, and hence had jurisdiction to determine.

For the foregoing reasons we conclude that the act in question is constitutional; that the commissioner did not exceed his jurisdiction, and in all respects "regularly pursued his authority"; and, having so determined, it is not necessary to consider the contention of respondents that petitioner has a plain, speedy and adequate remedy.

The demurrer is sustained, and the application for the issuance of a writ of review denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.

187 Cal. 111

FLICKINGER v. HECK et al. (L. A. 6154.)

(Supreme Court of California. Sept. 17, 1921.
Rehearing Denied Oct. 17, 1921.)

1. Contracts ⇨172—"Option" embodies offer obligating optioner to perform when offer is accepted.

An option contract embodies an offer, the optioner becoming obligated to perform when the optionee accepts in accordance with the terms of the option.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Option.]

2. Contracts ⇨172—Option contract may itself control as to what constitutes election.

An option may specify the particular act or acts which constitute an election to accept the offer embodied in the option, in which case the contract itself controls as to what constitutes an election.

3. Corporations ⇨120—Notice of intention to require sellers to repurchase stock held sufficient exercise of option without tender of the stock.

Where contract of sale of corporate stock required sellers to repurchase within one year on notice from buyer of his intention to exercise the option ten days before expiration of the year, buyer having given timely notice was not required to tender the stock within the year, in absence of provision in contract as to time of performance; tender and demand within a reasonable time after expiration of the year being sufficient.

4. Limitation of actions ⇨66(15)—Demand where condition precedent to right of action for recovery of money must be made within a reasonable time.

Where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable.

5. Limitation of actions ⇨68—Statute does not run against action for breach of contract until tender, where obligation to perform does not commence until tender.

Where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time.

6. Limitation of actions ⇨68—Action for breach of contract to repurchase stock held not barred by limitations.

Action by purchaser of stock for sellers' breach of contract to repurchase, on exercise of option to resell by purchaser within one year from date of purchase, brought within four years from tender of stock by purchaser to sellers two years from expiration of such

year, held not barred by limitations under Code Civ. Proc. § 337; the sellers not being in default until such tender, and the tender being within a reasonable time.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by M. P. Flickinger against O. O. Heck and others. Judgment for defendants, and plaintiff appeals. Reversed.

W. W. Kaye and Alfred Siemon, both of Bakersfield, for appellant.

George E. Whitaker, of Bakersfield, for respondents.

LENNON, J. This is an appeal by plaintiff, M. P. Flickinger, from a judgment for the defendants in an action to recover the purchase price of certain corporate stock.

On March 1, 1910, J. C. Flickinger purchased 25 shares of corporate stock from the defendants and paid therefor the sum of \$2,500. In part consideration for this purchase and other acts on the part of J. C. Flickinger, defendants entered into a written agreement with said Flickinger whereby they undertook to repurchase the said stock for \$2,500 at Flickinger's option at the expiration of one year from March 1, 1910. It was provided that Flickinger was to give ten days' notice before the expiration of the year of his intention to exercise the option. On February 17, 1911, Flickinger gave the ten days' notice of his intention to require a repurchase of the stock by defendants and thereafter, in September, 1911, brought suit against defendants to recover the purchase price of the stock. Although Flickinger served the ten days' notice upon defendants, he had not, at the commencement of his action, followed up the notice with a technical tender of the stock to and demand of the purchase price from defendants. For this reason he was nonsuited and on appeal the nonsuit was upheld by this court. *Flickinger v. Wrenn Investment Co.*, 172 Cal. 132, 155 Pac. 627. Thereafter, having made a tender of the stock to defendants and demanded the purchase price on November 29, 1912, J. C. Flickinger assigned his rights to M. P. Flickinger, plaintiff herein, who instituted the present proceedings.

The complaint sets forth four causes of action. The trial court sustained a demurrer to the first cause of action upon the ground that it was barred by subdivision 1 of section 337 of the Code of Civil Procedure, and, upon the other causes of action, made findings to the effect that the option in question was not exercised at the expiration of one year from the date of the contract and that all three causes of action were barred by subdivision one of section 337 of the Code of Civil Procedure. Plaintiff appeals upon the

grounds that the court erred in finding that the option was not exercised at the expiration of a year from the date of the contract and holding that the action was barred by the statute of limitations.

The controversy over these two points resolves itself into the issue whether it was essential to an exercise of the option that the stock be tendered to defendants and a repurchase demanded at the expiration of one year from the date of the contract, to wit, on the 1st day of March, 1911. If such be the case, then the option was never exercised, for the tender was not made by plaintiff's assignor until November 29, 1912, and, moreover, even if a tender had been made on March 1, 1911, an action for the refusal to comply with the terms of the option would be barred by March 1, 1915, whereas the present complaint was filed in May, 1916. The question upon which the rights of the parties depend is, therefore, whether an effective tender and demand might be made after March 1, 1911. This question was not passed upon in *Flickinger v. Wrenn Investment Co.*, supra. In that case it was decided that an action was not maintainable in the absence of any tender of the stock or demand of the purchase price, and plaintiff's assignor was nonsuited upon the ground that—

"This tender and demand he had never made, and the evidence showed that he had never made it."

Therefore, in the present case, it is necessary to proceed upon the premise that a tender and demand are essential to put defendants in default and prerequisite to the maintenance of the present suit. To that extent only does the previous decision operate as *res adjudicata*, the question as to the precise time within which a valid tender and demand may be made coming before this court for the first time on this appeal.

[1, 2] An option contract may be regarded as embodying an offer. When the optionee, or person to whom the offer is made, signifies his desire to accept in accordance with the terms of the option, the optionor, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called "election," and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. *Penn. Min. Co. v. Smith*, 207 Pa. 210, 56 Atl. 426. "The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be made." *James, Law of Option Contracts*, §§ 801, 817. The language of the contract itself controls as to what act or acts constitute an election. Under the terms of one option, election may consist of a tender of the property to be sold or purchase price to be paid; under the

terms of another option, it may consist of a mere notice of election to purchase or sell, leaving payment of the price and delivery of the property as subsequent matters in performance of the executory contract raised by the election. *Breen v. Mayne*, 141 Iowa, 399, 118 N. W. 441; *Byers v. Denver Circle R. Co.*, 13 Colo. 552, 22 Pac. 951; *James, Law of Election Contracts*, § 817. If the tender of property or purchase price constitutes an "election," it must be performed in order to turn the offer contained in the option contract into a contractual obligation and, if not performed as provided in the option contract, no subsequent contractual liability arises; if the tender is merely in performance of the contract created by a notice of election, it is controlled by the terms of that contract and "in the absence of anything in the contract itself the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property. * * *" *Cates v. McNeil*, 169 Cal. 697, 147 Pac. 944.

[3-6] The option clause in the instant case reads as follows:

"The said first parties [defendants] will at the option of the party of the second part, at the expiration of one year from the date hereof purchase from the said second party the said twenty-five shares of the capital stock of the said corporation for said sum of \$2,500 gold coin of the United States to be paid by the said parties of the first part to said second party at the exercise of said option provided that said second party may give ten days' notice before the expiration of said year of his intention to exercise said option."

In other words, if the second party, plaintiff's assignor, desired the defendants to repurchase the stock, he was to give notice, ten days before the expiration of one year from the date of the contract, of his acceptance of defendants' offer. This notice, which was given as required, gave rise to a binding bilateral contract for the repurchase of the stock. There is nothing in the option clause which requires a tender or demand in order to constitute an election to accept the option. The tender of the stock to defendants was an act in performance of the contract created by the election and, while necessary to put defendants in default under this subsequent bilateral contract, it was a step in pursuance of the contract, not in its creation. *Cates v. McNeil*, supra. The time for performance is not specified by the parties. If plaintiff's assignor elected to accept the option, defendants' obligation to repurchase arose "at the expiration" of the year, March 1, 1911; but there is no requirement that the terms of the contract must be performed on the day upon which the obligation arises. In other words, the contract does not provide that the stock must be tendered or delivered or payment made on the day upon which defendants'

duty to repurchase comes into existence. Consequently, all that was required was that, after due notice of election, plaintiff's assignor offer to perform, by tender and demand, on or within a reasonable time after March 1, 1911, the date upon which defendants' obligation to perform arose. *Cates v. McNeil*, supra; *Breen v. Mayne*, supra; *Penn. Minn. Co. v. Smith*, supra. "The general rule is that where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations will be deemed reasonable." *Vickrey v. Maier*, 164 Cal. 384, 389, 129 Pac. 273, 275. The demand in the instant case was made within less than two years after the right to make it arose. "Where a party may call for the performance of the agreement upon the part of another only by a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other, and the statute will not begin to run until that time." 25 Cyc. 1210; *Vickrey v. Maier*, supra. A right of action arose against defendants, therefore, in November, 1912, upon their refusal to accept the tender and comply with the demand, and the present action having been brought within less than four years thereafter, it is not barred by subdivision 1 of section 337 of the Code of Civil Procedure. The judgment is reversed.

We concur: SLOANE, J.; SHAW, J.; SHURTLEFF, J.; WILBUR, J.; LAW-LOR, J.

187 Cal. 134

HOLLY SUGAR CORPORATION et al. v. LEONARDT. (L. A. 6228.)

(Supreme Court of California. Sept. 23, 1921.
Rehearing Denied Oct. 20, 1921.)

1. Warehousemen $\hookrightarrow$ 34(7)—Evidence held to establish contract to store sugar received in fireproof warehouse.

In an action to recover the value of sugar burned while in a shed or upon a platform, evidence consisting of letters held to establish a contract on the part of the defendant to store the sugar in a fireproof warehouse.

2. Warehousemen $\hookrightarrow$ 24(3)—Entitled to reasonable time for transferring sugar from cars to fireproof warehouse.

One who contracted to store all sugar shipped in a fireproof warehouse was entitled to a reasonable time and to the use of reasonable

and ordinary methods for making transfer of the sugar from the cars to the warehouse.

3. Warehousemen $\hookrightarrow$ 34(7) — Finding that reasonable care was exercised in removing sugar from cars to fireproof warehouse sustained.

In an action to recover the value of sugar burned in a shed or upon a platform in the course of removal from cars to fireproof warehouse, where defendant had contracted to store it, evidence held to sustain a finding that there was no lack of reasonable care and diligence in allowing the sugar in question to accumulate in the temporary quarters on the platform where it was burned, and plaintiff did not break his contract to store such sugar in a fireproof warehouse.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Holly Sugar Corporation and others against C. Leonardt. Judgment for defendant, and plaintiffs appeal. Affirmed.

O'Melveny, Stevens & Millikin, of Los Angeles, and George K. Ford and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for appellants.

Sheldon Borden, of Los Angeles, for respondent.

SLOANE, J. This action was brought to recover for the loss by fire of 14,526 bags of sugar which the plaintiff Holly Sugar Company had delivered to the defendant for storage in his concrete fireproof warehouse.

The sugar, in the process of transfer from the cars in which it was delivered to the storage warehouse, had been stacked for several days upon the concrete unloading platform between the warehouse and railroad track. The part of the platform where the sugar was stacked was covered by a wooden roof, and for the further protection of the sugar from the elements a temporary inclosure on the sides and ends was constructed of boards lined with tar paper. While thus temporarily stored the sugar was destroyed by the accidental burning of this platform structure.

The Aetna Insurance Company, Phoenix Insurance Company of Hartford, Orient Insurance Company, and North British & Mercantile Insurance Company had issued policies of insurance to the owner upon the sugar, and, having paid this loss, claimed the right of recovery against defendant by subrogation, and are joined as plaintiffs in the action.

Plaintiffs allege in their complaint two causes of action—one for breach of contract to store the sugar in a fireproof building, and the other for negligence in the care and handling of the sugar.

Judgment was for the defendant. Plaintiffs appeal, and rely upon the alleged breach

of contract for fireproof storage for a reversal.

The findings of the trial court covering the issues involved in the appeal are in substance as follows:

That the defendant was not at any time engaged in the business of conducting a warehouse, but that he was the owner of the platform building referred to and certain contiguous warehouses, one of which, designated as No. 1, was entirely of concrete construction and practically fireproof. Another, designated as No. 3, was of concrete excepting the roof, which was of wood. That pursuant to special and several arrangements made during each of the years 1913 and 1914 between defendant and Holly Sugar Company and the American Beet Sugar Company he accepted from them for storage certain shipments of sugar. "That the shipments so accepted during the year 1913 were stored in warehouse No. 1, and of the shipments so accepted in the year 1914, the greater part thereof was stored in warehouse No. 1 and the remainder, excepting the quantity of approximately 14,000 bags hereinafter mentioned, was stored in warehouse No. 3, and that in the year 1914 he accepted for storage in said warehouse from the American Beet Sugar Company certain barley seed; that, with said exceptions, the defendant at no time received or solicited goods or other commodities for storage in said warehouses, or either of them, and no other person or persons actually did, at any time, store or deposit for storage with the defendant, goods or commodities to be deposited in the said warehouses, or either of them.

"That on or about August 7, 1914, the defendant and said Holly Sugar Company made an agreement whereby said Holly Sugar Company agreed to deliver unto defendant approximately 20,000 bags of sugar out of its production during the season of 1914, and defendant agreed to store said sugar in said warehouse No. 1, storage thereon to be charged and paid at the rate of 20 cents per ton per month; that thereafter and prior to the 9th day of November, 1914, said Holly Sugar Company delivered unto defendant, in cars upon the aforesaid spur track, approximately 50,000 bags of sugar, which said sugar was unloaded from said cars by the defendant and stored in said warehouses Nos. 1 and 3; that the portion of said deliveries in excess of the 20,000 bags covered by said arrangement of August 7, 1914, were tendered by Holly Sugar Company and accepted by the defendant without the making of any supplemental or additional express arrangement applicable thereto; that on or about the first week in November, 1914, said Holly Sugar Company requested defendant to store an additional quantity of sugar estimated at from 15,000 to 25,000 bags, to which request defendant agreed; that thereafter and between November 9 and November 25, 1914, said Holly Sugar Company delivered to defendant in railroad cars upon the aforesaid spur track, additional sugar, amounting to not less than 20,000 bags; that said additional sugar was delivered faster and in larger quantities than the deliveries previously made and under circumstances and conditions which required the re-

moval of said sugar from the railroad cars with such rapidity that defendant was unable, in the exercise of ordinary care, to pile and store said sugar in said warehouses as fast as the same was removed from said railroad cars; that defendant employed as many men as could be reasonably and conveniently used in the unloading and handling of said sugar and in the course of transferring same from the said railroad cars into said warehouse No. 1, a large quantity of said sugar, to wit, upwards of 14,000 bags thereof, was temporarily deposited and accumulated on said unloading platform; that Holly Sugar Company had no knowledge or notice prior to the happening of said fire that any of its sugar had been deposited or placed on said unloading platform, nor did it have any knowledge or notice that defendant was experiencing or had experienced any unusual inconvenience or difficulty in receiving or handling any of the sugar theretofore shipped by said Holly Sugar Company, either by reason of the rapidity or rate of said shipments, or for any reason; it is not true that defendant stored said sugar or any part thereof in or upon said platform or in any shed or platform, or that the same was negligently or carelessly placed upon said unloading platform; that on or about November 16th, 1914, on account of the approaching rainy season, defendant, for the purpose of protecting said sugar on said platform against damage from rain or storm, constructed temporary outside walls on the three sides of said unloading platform which had been theretofore uninclosed; that said temporary walls were constructed of wood and lined with tar paper for the purpose of rendering the same water tight and protecting said sugar on said platform against the weather until the same could be removed and piled in said warehouse No. 1; that the allegations of the complaint in this action relating to the construction, character, and purpose of the said unloading platform, which are at variance with this finding, are untrue; it is not true that defendant at all or any of the times stated in said complaint carelessly or negligently failed or neglected or failed or neglected at all to supply the necessary apparatus for the extinguishing of any fire which might attack the said platform, or the said sugar deposited thereon, as hereinbefore found; that said platform was a reasonably safe place for the temporary deposit thereof of said sugar under the circumstances and conditions hereinbefore found, and was not an unsafe place for the temporary deposit of said sugar while the same was being transferred from the railroad cars into the said warehouse as aforesaid; that in so depositing said sugar on said unloading platform the defendant was not negligent or lacking in the exercise of ordinary or reasonable care and diligence for the protection and preservation of the said sugar so deposited on said unloading platform by the defendant.

"That late in the afternoon of November 25, 1914, and while said sugar, to an amount in excess of 14,000 bags, was deposited on said unloading platform, and while its removal into said warehouse No. 1 was going on, the same was partly injured and damaged by fire and by water used in the extinguishment of said fire;

that said fire was of unknown origin and was not due to or caused by any negligence or want of ordinary or reasonable care on the part of the defendant or to any failure on his part to exercise ordinary or reasonable care and diligence for the protection and preservation of the said sugar; that neither said warehouse No. 1 nor said warehouse No. 3 were damaged by said fire, nor were the contents of said warehouses or either thereof injured or damaged by said fire, with the exception that a small portion of the sugar theretofore deposited in said warehouse No. 1 was damaged by water used in the extinguishment of the said fire; that said last-mentioned damage was not due to or caused by any negligence on the part of the defendant, or any failure on his part to exercise ordinary or reasonable care and diligence for the protection and preservation of the said sugar."

The only material points of controversy on this appeal are: First, whether or not the evidence establishes a contract on the part of the defendant to store all the sugar received in a fireproof warehouse; and, second, whether, if such was the contract, the temporary storing of the sugar destroyed upon the loading platform was a breach of that contract.

[1] We are satisfied that the first proposition must be answered in the affirmative. The contract for storage of the 1913 consignments of sugar was expressly entered into between the parties by correspondence in which the defendant solicited the patronage of the sugar company and represented that he would be in a position to store at least 50,000 bags of sugar and probably more.

One of the defendant's letters to the sugar company contained the following passage:

"I believe you have seen my warehouse and know that it cannot be beaten for sugar storage or for any other purpose as I use only my reinforced warehouse for this purpose and it is absolutely moisture and vermin proof."

In another letter he refers to it as "Warehouse No. 1, which is the reinforced concrete fireproof building." Under these express representations the sugar company stored about 20,000 bags of sugar with defendant for the season of 1913.

In the summer of 1914 negotiations were again entered into for the storage of sugar for the approaching season of 1914, in which the sugar company proposed to furnish for storage approximately the same quantity of sugar that had been stored the previous year, some 20,000 bags, and on August 7th defendant's manager addressed the following letter to the sugar company:

"Manager Holly Sugar Company, Huntington Beach, California—My Dear Mr. Johnson: Since your telephone message of a few days ago to the effect that you expected to commence shipping me sugar for storage in my warehouse I have been expecting to hear further from you. I have cleaned out my warehouse No. 1 where I stored sugar last year and where I will

do the same this year and have removed the lime and other objectionable material so that the place is absolutely clean in every respect, and I will also cover your sacks with canvas. I will appreciate it very much if you will kindly advise me if you have as yet received the instructions you stated you expected from the East in reference to making shipments to me. I have everything arranged to receive your sugar and a day or two's notice while not absolutely necessary would be appreciated, especially if you are in position to inform me as to the approximate number of bags which you will ship me every day.

"I assure you I am in position to give you the same satisfactory service I know I rendered you on last year's shipments.

"Very truly yours, C. Leonardt,
"By Merrill."

In September, 1914, the sugar company began delivering sugar for storage pursuant to the terms, expressed and implied, in the foregoing letter. There can be no question that there was at least an implied agreement to accept at least 20,000 bags of sugar for storage under the same terms and conditions as of the previous year.

Under this arrangement the sugar company consigned and delivered for storage between September 1st and the early part of November not only the suggested amount of 20,000 bags, but some 25,000 or 35,000 bags in excess of this amount. All, or practically all, of this sugar was stored in warehouses Nos. 1 and 3 before the transactions relating to the consignments of sugar that were damaged by fire. Whether or not the storage of part of the sugar in warehouse No. 3 was in violation of the contract is not material on this appeal as none of the damage complained of resulted from such storage.

These latter deliveries were made under the following circumstances: On or about the 1st of November the representative of the sugar company called up the defendant by telephone and inquired if he could take care of from 15,000 to 25,000 additional bags of sugar. Defendant replied that they had already shipped him approximately twice the amount agreed upon and that he could not tell positively whether he could take it or not. But on the following day the sugar company was notified that defendant would receive the additional shipments.

Nothing was said and no inquiry was made as to how or where this extra quantity of sugar was to be stored.

We are satisfied, however, that there was implied in this transaction, in the absence of notice to the consignor to the contrary, an agreement for the same fireproof storage covered by the former agreements.

The court has not found explicitly on this point; but as the probative facts found would only justify such an ultimate conclusion, we will treat it as so found.

The remaining question is: Was there a breach of this contract? The answer depends

upon whether or not there was a failure on the part of the defendant to exercise reasonable care and diligence in transferring the sugar from the cars in which it was delivered at defendant's unloading platform, into the permanent storage warehouses.

[2] Clearly the defendant was entitled to a reasonable time and to the use of reasonable and ordinary methods for making such transfer. That the plaintiffs, the sugar company and the insurance companies, contemplated that there was likely to be some period in which the sugar would be exposed to possible risk upon the platform of defendant's warehouse, is indicated by the fact that the policies contained the following clause of insurance:

"On sugar and containers; all while contained in the one-story concrete building known as Leonardt's warehouse No. 1, and/or while on platforms adjoining, or in railroad cars on tracks within 300 feet thereof. * * *

It was a question of fact for the court whether or not the defendant used due skill and diligence in the process of handling this sugar in transit from the cars to the warehouse. To repeat the findings on this point it is declared by the court:

"That said additional sugar was delivered faster and in larger quantities than the deliveries previously made and under circumstances and conditions which required the removal of said sugar from the railroad cars with such rapidity that defendant was unable, in the exercise of ordinary care, to pile and store said sugar in said warehouses as fast as the same was removed from said railroad cars; that defendant employed as many men as could be reasonably and conveniently used in the unloading and handling of said sugar, and in the course of transferring same from the said railroad cars into said warehouse No. 1. * * * That said platform was a reasonably safe place for the temporary deposit thereon of said sugar under the circumstances and conditions hereinbefore found, and was not an unsafe place for the temporary deposit of said sugar while the same was being transferred from the railroad cars into the said warehouse as aforesaid; that in depositing said sugar on said unloading platform the defendant was not negligent or lacking in the exercise of ordinary or reasonable care and diligence for the protection and preservation of the said sugar so deposited on said unloading platform by the defendant. * * * That said fire was of unknown origin and was not due to or caused by any negligence or want of ordinary or reasonable care on the part of the defendant, or to any failure on his part to exercise ordinary or reasonable care and diligence for the protection and preservation of the said sugar."

Here, again, there is a lack of an explicit finding that it was reasonably necessary to store said sugar temporarily upon the platform and that it was left there no longer than in the exercise of reasonable care and diligence was necessary. But from the gen-

eral facts found there can be no doubt that such was the conclusion intended by the court.

There were several circumstances shown in evidence tending to support such an ultimate finding. The defendant without having previous notice had received twice as much sugar as had been contracted for prior to the arrangement for taking the last extra consignment of upwards of 20,000 bags. In order to make room for this last consignment, he had found it necessary to restack much of the sugar already stored. The sugar was delivered in larger and more frequent consignments of carload lots than previously, and as the warehouse became filled and the surplus had to be placed at higher elevations the work of storing was necessarily retarded and the work of storing was hampered.

[3] Under all these circumstances, we cannot say as a matter of law that there was lack of reasonable care and diligence in allowing this quantity of sugar to accumulate in the temporary quarters on the platform during the 10 or 15 days of this extra delivery. There is no significance in the fact that some of the sugar first delivered about the 9th of September was still on the platform when the fire occurred on the 25th. When practicable to do so without subjecting the cars to demurrage charges, the sugar was unloaded directly into the warehouse. It thus resulted that sugar received the day before the fire was safely stored in the warehouse, while sugar received the early part of the month was still stacked under the platform shelter. But it can make no difference in plaintiff's loss or defendant's liability whether the 14,000 sacks of sugar damaged were of the first or last deliveries. The question is: Did defendant keep the sugar moving into the warehouse as rapidly as he reasonably could?

The evidence is sufficient to indicate that the defendant was exercising reasonable diligence in prosecuting the work of storing the sugar in view of the congested condition of the warehouse and the unexpected increase in the quantities delivered.

There is one circumstance, however, which is strongly urged by appellant as reflecting against defendant's care and diligence. The evidence discloses, and the court finds, that defendant sent no notice to the sugar company that the shipments were coming in faster than they could be taken care of or that sugar was being left upon the unloading platform. On the other hand, the sugar company did know that they had sent in quantities of sugar largely in excess of the amount originally stipulated for; that when it had asked for storage of a further lot of 15,000 to 25,000 sacks, the defendant had expressed uncertainty as to whether or not he had room for it and no conditions were made as to how it was to be handled. It was perhaps incumbent upon the sugar company to make some

inquiry and investigation as to the facilities of the defendant for speedily receiving and storing this large excess of deliveries.

If this was a matter of first impression in this court the conclusion might be different. But as against the findings of the trial court we are not justified in reversing its judgment.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

187 Cal. 126

LOS ANGELES & ARIZONA LAND CO. v. MARR. (L. A. 6541.)

(Supreme Court of California. Sept. 21, 1921.)

1. Deeds ☞155—Building restriction held condition subsequent.

A clause in a deed that, "in the event of a violation of any of these conditions or reservations, this instrument shall become null and void, the grantee herein shall forfeit all right or title to said property, and all interest therein shall revert without notice to the grantor herein," held to render a building restriction clause in the deed a condition subsequent, the breach of which might defeat grantee's title.

2. Deeds ☞156—Claimant of reversion on breach of condition subsequent must show transfer from grantor.

A right to reconveyance of property, upon a breach of a condition subsequent that there would be a right in grantor to forfeit if grantee did not comply with building restrictions in the deed, is a contingent estate which may be transferred, but an actual transfer of the reversion or right of re-entry by succession, will, or assignment is essential, and, in order to successfully sue for and enforce a reconveyance of the property, it is incumbent upon plaintiff to prove allegation of his complaint, denied in the answer, to the effect that the right of re-entry reserved to defendant's grantor has passed to plaintiff.

3. Appeal and error ☞719(6)—Finding binding in absence of specification of insufficiency of evidence.

In the absence of a specification of insufficiency of evidence to sustain a finding, it must be considered as binding and as warranted by the evidence adduced at the trial.

4. Deeds ☞156—Instrument held not to convey right to reconveyance of lot excepted.

A deed by a land company of tract of land, expressly excepting defendant's lot and making no mention whatever of rights reserved under previous sales of lots or rights to enforce forfeitures of such lots, was no evidence of a conveyance of a right to the reconveyance of defendant's lot upon breach of a condition subsequent.

5. Corporations ☞617(2)—No conveyance of property after failure to pay license tax.

Where a corporation has failed to pay its license tax and a forfeiture of its charter has been declared, it thereupon ceases to be a corporation and has no right to dispose of its property.

6. Judgment ☞256(1)—Not supported by irreconcilable findings.

Where findings of material facts are at variance and irreconcilable, a judgment cannot be based thereon.

7. Deeds ☞166—Breach of condition subsequent waived by accepting payment.

Grantor, and those claiming under it, were estopped from seeking to enforce a forfeiture of title against grantee of a lot for breach of a condition subsequent concerning building restrictions, where grantor accepted grantee's final payment and delivered a deed to the lot with knowledge of grantee's breach of such condition, such acts constituting a waiver.

8. Deeds ☞166—Conditions subsequent may be waived.

A condition subsequent in a deed permitting forfeiture by grantor on breach of building restrictions, although valid, may be enforced only at the instance of one who has not waived his right to maintain such an action.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Los Angeles & Arizona Land Company against Winifred F. Marr. Judgment for plaintiff, and defendant appeals. Reversed.

Winifred F. Marr, in pro. per.

Goodrich & Martinson, of Los Angeles, for respondent.

LENNON, J. Defendant appeals from a judgment in favor of plaintiff in an action to enforce a forfeiture of title to real property in the county of Los Angeles.

On July 11, 1910, the Verdugo Canyon Land Company entered into a contract with the defendant, Winifred Marr, for the sale to the latter of a vacant lot which was situated in a tract owned by the said company designated as "Tract No. 250." Defendant at that time entered into possession of the land and on August 4, 1910, erected on the property a small cottage which she still maintains thereon. Upon completing payment of the purchase price, on July 29, 1911, defendant received a deed to the property from the said Verdugo Canyon Land Company. Both the deed and the contract of sale in pursuance of which the deed was executed contained the "express condition" that "no residence, hotel, church or schoolhouse shall be erected or maintained upon the property last above described of a less value than \$2,000.00," providing further that—

"In the event of a violation of any of these conditions or reservations, this instrument shall become null and void, the grantee herein shall forfeit all right or title to said property and all interest therein shall revert without notice to the grantor herein.

"And it is further understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties."

Plaintiff, Los Angeles & Arizona Land Company, claims, and the trial court found, that plaintiff became and now is the owner of the right to sue for and enforce forfeitures against those who purchased property in tract No. 250 from said Verdugo Canyon Land Company in the event that they violate the conditions of their respective deeds. The trial court also found that plaintiff became and now is the owner of various lots in the vicinity of defendant's lot and has sold and conveyed to various other purchasers divers and sundry other lots in said vicinity; that the restriction above quoted was imposed for the purpose of enhancing the value of those lots in the vicinity of defendant's lot which were owned by the Verdugo Canyon Land Company at the time of the deed to defendant; that the cost and value of the house on defendant's lot does not exceed the sum of \$225, and that the said building is a detriment to the surrounding property. Apparently no complaint was made on account of the maintenance of the cottage on defendant's lot until the month of April, 1913, when plaintiff informed defendant of its intention to enforce the condition as to the value of buildings maintained upon the property and requested her to remove the cottage from the lot or to move it in the rear in the position of an outhouse. Defendant having refused to comply with the notice, plaintiff instituted the present action wherein it sought and obtained a decree that all defendant's right, title, and interest in and to the land in question was forfeited to plaintiff and that the deed to defendant was set aside and canceled. From this decree defendant appeals.

[1] At the outset it must be conceded that the uncompromising language of the deed to defendant requires that the building restriction clause above quoted be construed as a condition subsequent, the breach of which may defeat defendant's title. *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; *Werner v. Graham*, 181 Cal. 174, 179, 183 Pac. 945. Whether the said restriction amounts also to a covenant and, if so, whether such covenant can be enforced by plaintiff or other owners of property in the vicinity of defendant's lot, is immaterial for the purposes of the present suit, for plaintiff is not attempting to enforce a covenant for the benefit of neighboring lands. Upon the happening of a subsequent contin-

gency, namely, the violation of the building restriction clause, defendant's interest in the land was to revert to the grantor, his heirs, successors, or assigns; plaintiff takes the position that the subsequent contingency has occurred and, as assignee of defendant's grantor, brings the present suit for forfeiture.

[2-4] It is settled in this state that a right to the reconveyance of property upon breach of a condition subsequent, such as that reserved to defendant's grantor, is a contingent estate which may be transferred. *Johnston v. City of Los Angeles*, 176 Cal. 479, 168 Pac. 1047. However, an actual transfer of the reversion or right of re-entry by succession, will, or assignment is essential, and, in order to successfully sue for and enforce a reconveyance of the property in the instant case, it is incumbent upon plaintiff to prove the allegation of the complaint, denied in the answer, to the effect that the right of re-entry reserved to the defendant's grantor has passed to plaintiff by assignment. *Werner v. Graham*, supra; *Hannah v. S. P. R. Co.* (App.) 192 Pac. 304. Upon this phase of the case the trial court found that—

"On or about December 8, 1911, the said Verdugo Canyon Land Company [defendant's grantor] sold and conveyed all its right, title, and interest in and to said tract 250 to the Fruit World Publishing Company, a corporation, together with its rights to enforce forfeiture for violation of the terms and conditions in said contracts and deeds made with its purchasers and that on or about July 29, 1912, the said Fruit World Publishing Company sold and conveyed all of its right, title, and interest in and to said tract No. 250 to the Verdugo Park Land & Water Company, a corporation, with like rights to enforce forfeiture."

This finding, in strict accordance with the allegations of the complaint, is not specified in the bill of exceptions as unsupported by the evidence, nor attacked in any manner on this appeal. In the absence of a specification of insufficiency of evidence to sustain the finding, it must be considered as binding and as warranted by the evidence adduced at the trial. *Estate of Heaton*, 135 Cal. 385, 388, 67 Pac. 321; *Realty & Rebuilding Co. v. Rea*, 194 Pac. 1024; *Robben v. Benson* (App.) 185 Pac. 200. The court then finds that—

"Said last-named corporation [Verdugo Park Land & Water Company] sold and conveyed all of its right, title, and interest in and to said Tract No. 250 to plaintiff, *with like rights to enforce forfeitures.*" (Italics ours.)

This finding is assailed in the bill of exceptions as unsupported by the evidence. The deed of said tract 250 from the Verdugo Park Land & Water Company to the plaintiff, which is the only evidence in the record on this question, expressly excepts defend-

ant's lot, together with other lots in the tract which had previously been sold to individuals, from the operation of the deed and makes no mention whatever of rights reserved under previous sales of these lots or rights to enforce forfeitures of such lots. There is therefore no evidence to support the finding that these rights were conveyed to plaintiff by the Verdugo Park Land & Water Company, and so far as appears from the record before us, the rights in question are still retained by the latter company. Necessarily it must be held that the finding to the effect that the Verdugo Park Land & Water Company transferred to plaintiff its right to sue for forfeiture of defendant's lot is wholly without support in the evidence.

[5, 6] But the plaintiff contends that, notwithstanding the insufficiency of the evidence to support this particular finding, nevertheless the trial court has made other findings of fact from which can be deduced the ultimate finding that plaintiff is the owner of the right to sue for and enforce a forfeiture against defendant. However, the remaining findings on this issue fail to sustain a judgment in plaintiff's favor. As previously stated, the trial court found that, on December 8, 1911, the Verdugo Canyon Land Company conveyed to the Fruit World Publishing Company all of the former's interest in and to the tract in question, including the right to enforce forfeitures. There is a subsequent finding that the Verdugo Canyon Land Company forfeited its charter for nonpayment of the annual license tax and has never been rehabilitated or revived (there being no finding of the date of forfeiture), that thereupon the directors of said corporation became its trustees with full power to settle its affairs, and that said trustees, by deed dated December 10, 1913, conveyed to plaintiff all the said company's right, title, and interest in and to tract 250, including lot 54 (defendant's lot), and in the sales of lots made by it to purchasers, together with its right to sue for and enforce forfeitures of said lots. The court's failure to find the date upon which the charter of the Verdugo Canyon Land Company was forfeited was evidently due to an oversight, for blank spaces are left for the insertion of the dates. Although there is no express finding of the date of the forfeiture of the charter, there is a necessary implication that the conveyance of December 8, 1911, to the Fruit World Publishing Company was executed by the Verdugo Canyon Land Company before it forfeited its charter, for, where a corporation has failed to pay its license tax and a forfeiture of the charter has been declared, it thereupon ceases to be a corporation, and has no right to dispose of its property. *Newhall v. Western Zinc*

Mining Co., 164 Cal. 380, 128 Pac. 1040; *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158. Consequently, any conveyance found to have been made by the Verdugo Canyon Land Company must have been executed prior to the forfeiture of its charter. This conclusion is confirmed by the fact that it appears from the certificate of the secretary of state and Governor's proclamation, set forth in the bill of exceptions, that the charter was forfeited in November, 1912. If the Verdugo Canyon Land Company conveyed the right to enforce forfeitures of lots in tract 250, including defendant's lot, to the Fruit World Publishing Company in December, 1911, no such right remained in the former company at the time its charter was forfeited, no such right passed to its directors as trustees, and therefore the deed of the trustees to plaintiff in December, 1913, could not convey the aforesaid right. Obviously, the finding that the right to sue for a reconveyance of defendant's property was conveyed to plaintiff by the trustees of the Verdugo Canyon Land Company after that corporation had ceased to exist is inconsistent with the finding that the Verdugo Canyon Land Company itself conveyed the said right to the Fruit World Publishing Company, which, in turn, transferred the right to the Verdugo Park Land and Water Company. If the latter finding is true, then it would appear that the Verdugo Park Land & Water Company is now the owner of the right, in view of the insufficiency of the evidence to support the further finding that the Verdugo Park Land and Water Company conveyed the right to plaintiff. The findings of material facts being thus at variance and irreconcilable, there is no showing that the facts found warrant or support the judgment rendered, and a reversal of the judgment is necessary. *Manly v. Howlett*, 55 Cal. 94; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Estep v. Armstrong*, 91 Cal. 659, 27 Pac. 1091; *Rand v. Columbian Realty Co.*, 13 Cal. App. 444, 110 Pac. 322.

[7] There is an additional reason for the reversal of the judgment. In her second amended answer defendant pleads that, in the month of July, 1911, the Verdugo Canyon Land Company, with knowledge of the existence of the building on defendant's lot, accepted defendant's final payment of \$1,350 and delivered to her a deed to the lot. These acts, defendant alleges, constitute a waiver and estop the said grantor, and those claiming under it, from seeking to enforce any forfeiture of title against defendant for the maintenance of the said building upon the lot. The conceded facts fully support this contention and justify defendant's claim that the evidence is insufficient to support the finding that defendant's lot is still subject

to the building restriction, in so far as the present building is concerned.

[8] While the validity of conditions of this kind is not questioned (*L. A. & Ariz. Land Co. v. Marr*, 178 Cal. 244, 173 Pac. 83), nevertheless such condition may be enforced only at the instance of one who has not waived his right to maintain such an action. In the case of *Union Realty Co. v. Best*, 160 Cal. 263, 265, 116 Pac. 737, 738, it is said:

"In so far as the covenant was made for the benefit of the grantor, who alone is complaining here, it might be waived, and the facts found establish a clear case of waiver. The argument of appellant that evidence of an oral understanding * * * cannot vary the terms of a written contract is not to the point. The facts pleaded in defense were not relied upon to prove that the agreement did not prohibit the construction of the building where located, but to establish a waiver of the covenant or an estoppel to rely upon it. Such waiver and estoppel may be shown by parol."

Waiver of such right is recognized as a valid defense to such an action. *Brown v. Wrightman*, 5 Cal. App. 391, 393, 90 Pac. 467; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.

The court found that the Verdugo Canyon Land Company consented to the erection of a temporary building by defendant upon the understanding that it should not remain upon the land for a longer period than six months. As pointed out by defendant, this finding is totally without support in the evidence. The uncontradicted evidence does show that the building remained on the lot without objection for nearly three years, and that in July, 1911, about a year after the building was erected, the Verdugo Canyon Land Company accepted payment of the purchase price and delivered the deed of the property to defendant, with knowledge of the existence of the building and without complaint concerning the same. This evidence clearly establishes a waiver of the grantor's right to enforce a forfeiture of defendant's lot because of the erection and maintenance of the building in question.

In the case of *L. A. & Ariz. Land Co. v. Marr*, supra, an earlier appeal in an action involving this same matter, the court merely interpreted the language of the restrictive clauses in defendant's deed and decided that plaintiff had made a prima facie showing of a violation of the building restriction clause by defendant, and therefore that a nonsuit was improper. However, upon that appeal the court did not have before it any evidence of waiver.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHURTLEFF, J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.

54 Cal. App. 45

PEOPLE v. CALPESTRI. (Cr. 975.)

(District Court of Appeal, First District, Division 2, California. Aug. 19, 1921.)

1. Criminal law $\S$ 1158(4)—Trial court's determination as to whether confession voluntary conclusive, where evidence conflicting.

Where the evidence is conflicting as to whether a confession was voluntary, the appellate court is bound by the trial court's determination.

2. Criminal law $\S$ 372(12)—Other checks admissible if forged in furtherance of general plot or conspiracy.

In a prosecution for forgery, where defendant was one of several employees, who, by so manipulating the pay checks as to cause the employer to pay certain ones in the belief the payee was in its employment, obtained the proceeds thereof, other forged checks than that described in the information were admissible in evidence, if such facts constituted a general plot or conspiracy.

3. Forgery $\S$ 44(1/2)—Evidence held sufficient to make prima facie case.

In a prosecution for forgery, the similarity of defendant's writing to that of the forged signature, together with testimony of the person whose name was forged that the writing was not his, and that he had never authorized defendant to write his signature for him, held sufficient to make a prima facie case.

4. Forgery $\S$ 35—One in possession of and cashing forged check not presumed guilty; "presumption."

Under Code Civ. Proc. $\S$ 1959, defining a "presumption" as a deduction which the law expressly directs to be made from particular facts, and sections 1962 and 1963, enumerating conclusive and disputable presumptions, instructions in a prosecution for forgery that, if defendant had in his possession and obtained money on a forged check, this raised a presumption of guilt, were erroneous, no such presumption being enumerated in the Code.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presumption.]

5. Criminal law $\S$ 759(1)—Instruction as to presumption of guilt from possession and cashing of forged check held erroneous, as telling jury it must infer guilt.

In a prosecution for forgery, instructions that, if defendant had in his possession and obtained money on a forged check, this raised a presumption of guilt, were erroneous, though "presumption" was synonymous with "inference," the jury being told that it must infer guilt, thus invading its province.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Elia Calpestri was convicted of forgery, and he appeals. Reversed.

John J. Greeley and Theodore A. Bell, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rior-dan, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of the crime of forgery, and he has appealed from the judgment and an order denying him a new trial. The information on which he went to trial pleaded in one count (1) the forging, and (2) the uttering of a check purporting to be indorsed by the payee therein named, G. Cerruti. A trial was had, and the jury brought in a general verdict of guilty as charged.

[1] In support of his appeal the defendant contends that the trial court erred in allowing evidence of the confession of the defendant, because it had not been shown that the confession was voluntary. As to whether the confession was voluntary or otherwise, a great deal of time was taken up during the trial of the case in the examination of each witness who was present at the time of the confession. The interview in which the defendant confessed was a long one, covering four hours or more. During that time much conversation was had, but it does not appear that anything occurred which can be said was in the nature of a threat or a promise. We are not inclined to say that the evidence on those subjects was even conflicting, but, conceding that it was, such is the broadest summary in favor of the defendant, and the conflict was for the trial court to determine, and this court is bound by that determination.

[2] For the purpose of showing that the forgery of the check described in the information was but a part of a larger plot and plan, the prosecution introduced other forged checks. It was the contention of the prosecution that the defendant Calpestri, together with one Sindici and one Rinaudo, were coworkers in one department of one of the plants of the California Packing Corporation; that they had such charge of the time books, checks, and payments, as to enable them to manipulate the pay checks in such manner as to be able to cause the employer to pay certain checks under the belief that the payee was in its employment, and that the proceeds of the forged checks were so obtained by the manipulators. If we call this a general plan and plot, the evidence was admissible. *People v. Frank*, 28 Cal. 507, 517-519; 1 Greenleaf on Evidence (16th Ed.) pp. 71-74 and note 73. Or, if the foregoing facts be said to be and to constitute a conspiracy, then, and in that event, the evidence was admissible. As tending to prove a conspiracy, some of the forged instruments, it was testified, were forged by the defendant, and some were forged by Sindici. Whether forged by the defendant or by Sindici, certain of the checks, after being forged, were pre-

sented for payment by the defendant, the individual whose duty it was ordinarily to go to the bank in the ordinary and proper transaction of the business of the employer.

[3] Much testimony of this kind was introduced before the prosecution called witnesses regarding the confession. The appellant calls to our attention the rule stated in *People v. Compton*, 123 Cal. 403, 56 Pac. 44. The court was there speaking of the force and effect of the uncorroborated testimony of an accomplice. In this case we are concerned with the confession of the defendant. The facts of this case do not throw it within the rule stated in the *Compton Case*. Nor is this case ruled by *People v. Baird*, 105 Cal. 126, 129, 38 Pac. 633. Aside from the confession there were such facts introduced in evidence that the prosecution might have gone to the jury without the introduction of the confession at all. It would serve no purpose to attempt to restate all the testimony that may be said to be independent of the confession. However, it may be stated that the exhibits have been certified up and are before this court. The check set forth in the information is before us. On the face of the check the same is made payable to G. Cerruti. It was indorsed (as one at first would be inclined to read it) "G. Cerrutie."

When, however, one picks up the exemplars of Calpestri's writing, and studies the signature of Calpestri, the fact stands out prominently that his name is Calpestri, and that he writes the same as though the spelling were "Calpestrie." The terminal letters in the forged signature, G. Cerruti, and in the ordinary writing of his own name by Calpestri, have such a strong peculiarity and resemblance that slight study of the writings demonstrates that the signature might just as well have been written "G. Cerruti by E. Calpestri." When the evidence stood in that form, and the prosecution took the next step and proved by G. Cerruti that the writing was not his, and that he had never authorized Calpestri to write the signature for him, a very strong prima facie case had been made out for the prosecution.

[4] On the request of the prosecution the court gave two instructions as to the effect of evidence showing possession of, or obtaining money on, a forged instrument. The appellant contends that those two instructions were prejudicially erroneous. *People v. Mitchell*, 55 Cal. 236, and *Davis v. Hearst*, 160 Cal. 143, 177, 116 Pac. 530. The instructions complained of are as follows:

"The court instructs the jury that where one is found in possession of a forged instrument and is endeavoring to obtain money or advances upon it, this raises the *presumption* that he either forged or consented to the forging of such instrument, and, nothing else appearing, the person will be *presumed* to be guilty.

"The court instructs the jury that, if you are satisfied beyond a reasonable doubt that the

indorsement upon the check in this case (People's Exhibit 4), is a forgery, and that the defendant had it in his possession and obtained money from the Bank of Italy upon it, then this raises a *presumption* of guilt and unless the defendant has rebutted it, you will find a verdict of guilty." (Italics ours.)

If there are any such presumptions in California the same must be printed somewhere in the Codes or other statutes, because section 1959 of the Code of Civil Procedure provides:

"A presumption is a deduction which the law expressly directs to be made from particular facts."

Conclusive presumptions are enumerated in section 1962 of the Code of Civil Procedure. No one claims that the presumption recited in the above instructions fall within that section. Section 1963 of the Code of Civil Procedure enumerates the most of the disputable presumptions. It is a long section. Read it from the beginning to the end and one finds no such presumption as the one that is recited in the instructions. Search the Codes and statutes and one fails to find such presumptions.

[5] In a long line of cases the Supreme Court of this state has uniformly pointed out the distinction between the word "presumption" and the word "inference." Many of those cases are collected in *Davis v. Hearst*, 160 Cal. 143, 177, 116 Pac. 530. However, if the above instructions are read as though the word "presumption" was used as being synonymous with the word "inference," still the instructions were prejudicially erroneous, because each instruction in effect told the jury that it must infer the guilt of the defendant. As the power to draw inferences rests with the jury, the trial court takes the case away from the jury when it tells the jury that it must infer. As the Supreme Court said in denying the application for a hearing in that court of the case entitled *People v. Stephens*, 29 Cal. App. 616, at page 622, 157 Pac. 572 at page 573:

"The existence of such intent was a matter to be proved by the prosecution, and while the jury were at liberty to infer such intent from such facts and circumstances as were stated in the instruction, it cannot be held to be a correct proposition of law to say substantially that they must so infer." (Italics the court's.)

In several of the common-law states like North Carolina and Missouri, there is a different classification, and they speak of presumptions of law and presumptions of fact. Instructions perfectly sound in those other states are not necessarily sound propositions of law in the state of California where we have different rules established by statute. It is patent that the two instructions complained of were erroneous, and that they

were prejudicial to the rights of the defendant.

The judgment of conviction and the order denying a new trial are both reversed.

We concur: LANGDON, P. J.; NOURSE, J.

54 Cal. App. 31

TRAYNOR v. MCGILVRAY. (Civ. 3857.)

(District Court of Appeal, First District, Division 1, California. Aug. 17, 1921. Hearing Denied by Supreme Court Oct. 13, 1921.)

1. Appeal and error ⇨970(2)—Question of remoteness of evidence in discretion of trial court.

The question of remoteness of evidence as to the actions and conduct of a party, particularly as to the rate of speed and method of driving an automobile just before a collision, rests largely in the discretion of the trial court, the ruling of which will not be disturbed except on a clear showing of an abuse of discretion.

2. Highways ⇨184(2)—Testimony as to speed and manner of operation of automobile shortly before collision held not too remote.

Testimony of witnesses as to the speed and manner of operation of an automobile within 500 or 600 feet of the point of collision with another car a few seconds later and near enough to hear the sound, though they did not see the impact, did not relate to conditions at prior times and other places, so as to bring it within the rule against remoteness.

3. Trial ⇨96—Motion to strike out whole of testimony part of which admissible properly denied.

In an action for injuries in an automobile collision, where defendant's witness, to rebut plaintiff's testimony that defendant offered her no help, testified that defendant asked her to inquire if he could help plaintiff, stating that he had already asked plaintiff but she would not answer, motion to strike all such witness' testimony on ground that plaintiff was not present at the time was properly refused; the testimony as to making witness an intermediary not being subject to such objection.

4. Trial ⇨240—Comment as to meaning of statute properly stricken from instruction as argumentative.

In an action for injuries in an automobile collision, a comment as to the meaning of a portion of the Motor Vehicle Act was properly stricken from an instruction, being unnecessary in view of the clear language of the act and argumentative and foreign to the extent of obscuring rather than clarifying it.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Gabrielle G. Traynor against J. D. McGilvray, Jr. Judgment for defendant, and plaintiff appeals. Affirmed.

Chas. F. Hanlon, of San Francisco, for appellant.

B. M. Aikins and McCutchen, Willard, Mannon & Greene, all of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment based upon a verdict in favor of the defendant in an action for damages for personal injuries received by the plaintiff as the result of a collision between the automobiles of the respective parties which occurred on the afternoon of January 18, 1917, upon the state highway, between Burlingame and Millbrae, in San Mateo county.

The defendant was driving his car, a sedan, southward from San Francisco on his way to San Jose. The plaintiff was driving her car, also a sedan, northward from Burlingame on the way to San Francisco. A short distance ahead of her was a wagon, and just behind it another car, a Metz; both proceeding northward. The Metz car turned outward toward or upon the center of the road in order to pass the wagon, and the plaintiff at or about the same moment attempted to pass both the wagon and the Metz car. The approaching defendant first observed the wagon and the cars behind it when about 500 feet away, and saw the Metz car turn outward in its attempt to pass the wagon; but, according to the defendant's assertion, did not observe the plaintiff's effort to pass both the Metz car and the wagon until so short a distance away as to render a collision between his own car and the car of the plaintiff inevitable. The testimony is quite conflicting as to the respective speeds and also as to the precise position of the automobiles of the respective parties at and immediately before the time of the collision; but the evidence is practically conclusive that at the precise moment of collision the plaintiff's car was upon the left side of the highway, and the defendant's car was well over toward the edge of that side of the highway and in the dust of that portion thereof which was unbituminized. The jury returned its verdict in favor of the defendant.

The appellant's first contention upon this appeal is that the trial court committed reversible error in its admission in evidence of the testimony of two witnesses, Mrs. Margaret Warner and her daughter, Miss. Elsie L. Warner, called by the defendant. The testimony of these two witnesses was to the effect that they were standing by the side of the highway a short distance north of Burlingame and about the distance of a city block away from the point of collision, which point, however, they were unable to see for the reason that there is a slight elevation in the road between their points of vision and the point of impact. They were near enough, however, to hear the sound of such impact, and their testimony to which the plaintiff's

objection went was to the effect that at the time the plaintiff passed the point where they were standing and went on up the incline in the road her car was driven very rapidly and, as the witnesses described it, "was running from one side of the road to the other, zigzagging across the road." The plaintiff objected to the defendant's offer to make this proof, and also objected to the witnesses' testimony when presented, upon the ground that it was too remote for the reason that it referred to the conduct of the plaintiff and the action of her car at a time prior to and at some considerable distance from the point of collision, which point was beyond the witnesses' visions.

[1] We think that this objection was not well taken. The question of the remoteness of evidence which is offered with relation to the actions and conduct of a party, particularly as to the rate of speed and method of driving an automobile just before a collision occurs, is one which rests so largely within the discretion of the trial court that no positive rule upon the subject can be laid down, and for that reason the ruling of the trial judge as to the admission or rejection of that sort of evidence will not be disturbed except upon a clear showing of an abuse of such discretion. 1 Wigmore on Evidence, 514 et seq.; Olsen v. Levy, 8 Cal. App. 487, 97 Pac. 76; Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931; Scragg v. Saltee, 24 Cal. App. 133, 140 Pac. 706; Dilger v. Whittier, 33 Cal. App. 15, 164 Pac. 49.

[2] We do not regard it as significant that these witnesses did not actually see the impact of the machines, since they were within 500 or 600 feet of the point of impact, which occurred within a few seconds after the existence of the conditions which they related, and near enough for the sound of the impact to reach their ears. Their testimony did not, therefore, relate to conditions at prior times and other places so as to bring it within the range of the cases which the appellant cites as supporting her contention.

[3] The appellant's next contention relates to certain further testimony given by one of these same witnesses, and which was offered to rebut the testimony of the plaintiff to the effect that the defendant did not offer her any assistance just after the collision, or, to use her own language, "never offered me one bit of help," and "his manner was very threatening." Miss Elsie Warner was called by the defendant, and testified that immediately after hearing the impact of the collision she and her mother got into their car and drove to the place of the accident, where they saw the plaintiff standing on the ground near her car, and the defendant standing near his car a short distance away; whereupon, to quote from the record, the witness testified:

"I went over to look at his (the defendant's) car, and he asked me to ask Mrs. Traynor if

there was anything in the world he could do for her, and he said he had offered to help her but she would not listen to him, and would not even speak to him.

"Mr. Hanlon: I move to strike that out."

A little later and before ruling upon this motion, Mr. Hanlon renewed it as follows:

"Mr. Hanlon: I move to strike out the conversation between Mr. McGilvray, our opponent, and this witness in our absence."

The court denied both motions, and its action in so doing is assailed as error.

We cannot give our assent to the appellants' contention in this regard. No ground of objection to this offered evidence was stated in either of said motions, except possibly that the conversation was objected to as in the absence of the plaintiff. This would not be a good objection to that portion of the witness' conversation with McGilvray wherein he asked her to be his intermediary in proffering his aid to the plaintiff; and as to what he said otherwise as to his own previous offer of aid to the plaintiff, the objection was not confined to this probably objectionable portion of the witness' testimony, but went to the whole statement of the witness, a portion of which was clearly admissible. It was not, therefore, error of the trial court to deny the plaintiff's motions to strike out the whole of this testimony in the form in which such motions were made. *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Lucy v. Davis*, 163 Cal. 611, 126 Pac. 490; *Est. of Huston*, 163 Cal. 166, 124 Pac. 852.

[4] The appellant makes several objections to alleged errors of the trial court in modifying one of her proposed instructions, and in refusing to give certain other instructions requested by her. As to the first of these objections relating to the court's modification of the plaintiff's proposed instruction, we find that such modification consisted in part in striking from said instruction an excerpt from the Motor Vehicle Act, which the court had already given to the jury in another portion of its instructions; and consisted further in striking from said requested instruction a comment which the plaintiff proposed as to the meaning of the portions of the Motor Vehicle Act which had been embodied in the offered instruction. This comment was unnecessary in the presence of the clear language of the act itself, and it was also argumentative in form to the extent of obscuring rather than clarifying the act. It was therefore properly stricken from the instruction.

As to the other instructions offered by the plaintiff and refused by the court, we do not deem it profitable to deal with these in detail, since we find that they were each and all subject to the vice of argumentativeness, and in each instance the questions of law to

which they related were amply and correctly covered by the very full and fair instructions of the court, which were given to the jury.

We find no error in this record.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 24

WILLIAMSON v. MARSHALL et al.
(Civ. 3863.)

(District Court of Appeal, First District, Division 1. California. Aug. 16, 1921. Hearing Denied by Supreme Court Oct. 13, 1921.)

1. Corporations ⇐82—Contract with intending purchaser of stock to buy it back on demand enforceable by purchaser.

An agreement of a corporation with an intending purchaser of stock to take back the stock on demand is enforceable by such purchaser.

2. Corporations ⇐82—Incorporators agreeing to pay reasonable value of stock on return thereof by purchaser must repay such sum on tender of return.

Under Civ. Code, § 3302, providing that the detriment caused by breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest, two incorporators, who, as an inducement to a third to engage in the enterprise, agreed that the latter, if dissatisfied, might return his stock and receive a sum equal to its reasonable value at the time of surrender, were obligated, on tender of the return of the stock, to repay such sum; their liability being measured by the rules of accountability as though the corporation itself were the obligor.

3. Corporations ⇐82—Plaintiff alleging promise to pay reasonable value on return of stock need not allege he was damaged in such sum.

Where a purchaser of stock, in an action to recover its value on a tender of the return thereof pursuant to an agreement to such effect, alleged that defendants had promised to pay the fair and reasonable value thereof, which was stated, and prayed judgment for such amount as determined by the court, it was unnecessary to allege that he had been damaged in such sum; there being but one form of action in California, and a complaint stating facts entitling plaintiff to relief, either legal or equitable, not being demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by G. N. Williamson against B. F. Marshall and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Francis V. Keesling and C. A. S. Frost, both of San Francisco, for appellant.

L. Seidenberg, of San Francisco, A. P. Crist, of Oakland, and Fabian H. Hillebrandt, of San Francisco, for respondents.

WASTE, P. J. The plaintiff appeals from a judgment entered in favor of the defendants, after demurrer sustained without leave to amend. While the demurrer attacks a number of alleged defects in the complaint, none of the special assignments would have justified it being sustained without leave to amend. Consequently the main question to be considered upon this appeal is the sufficiency of the complaint to state a cause of action.

Concisely stated, it is alleged that the plaintiff and the defendants entered into an agreement for the formation of a corporation to be known as the California Food Specialty Company, to take over the business and property of an insolvent firm of which defendant Marshall was at the time the liquidating partner. It was agreed that the corporation should have an authorized capital stock of \$30,000; that plaintiff should purchase one-third of such stock for the sum of \$10,000, at par; that defendant Palmer should sell and deliver to the corporation certain land which she would buy for that purpose from the insolvent firm, together with the buildings and equipment thereon, she to take in payment 200 shares of the stock of the corporation of the par value of \$20,000, the plan being that plaintiff and defendants would own and hold, upon the completion of the organization, its entire capital stock. As part of the transaction it was agreed that plaintiff should be a director and officer of the company, at a compensation of \$225 per month, and should, jointly with the defendant Marshall, have control and management of the executive affairs of the corporation. It was further agreed between the parties that if the plaintiff disagreed with the defendants about the conduct or management of the business, or should become dissatisfied with the acts of the defendant Marshall, or disagree with him concerning those matters, the defendants would at any time, upon demand of the plaintiff, purchase from him all of his 100 shares of the capital stock of the corporation at the fair value of said shares. This offer, which was not in writing, was accepted by the plaintiff, who, at the request of the defendants and in performance of his agreement, forthwith paid \$1,000 upon contracts for machinery for the use of the corporation with which to begin business.

The corporation was organized according to the agreement. Defendant Palmer purchased the real estate, buildings, and equipment from the insolvent copartnership of Post, Marshall & Post, and transferred the property to the California Food Specialty Company, receiving in exchange 200 shares of the stock of the corporation of the par

value of \$20,000. Plaintiff paid into the treasury of the company the balance of \$9,000, due on his part of the agreement, and received 100 shares of the capital stock of the par value of \$10,000. Defendant Palmer placed one share of her stock in the name of the defendant Marshall to qualify him, and the corporation was organized with plaintiff and the two defendants as directors. The board of directors elected Marshall president, and the plaintiff vice president, respectively, each with a salary of \$225 per month and by resolution made Marshall as president, and plaintiff as vice president, jointly the managers of the corporation, with all powers usual in such matters.

This arrangement continued for nearly a year, after which time the defendant Marshall ignored plaintiff entirely in the conduct of the business of the corporation. Plaintiff then for the first time became aware that the defendant Palmer had not transferred the property of the insolvent firm to the corporation at the price agreed. Shortly thereafter, by the votes of defendants Marshall and Palmer, over the protest and objection of plaintiff, defendant Marshall was made sole manager of the California Food Specialty Company, and the salary of plaintiff as vice president was reduced to \$25 per month. Being dissatisfied with this arrangement, the plaintiff notified the defendants of such fact, and demanded that they purchase from him the 100 shares of stock of the corporation standing in his name, at \$125 per share, which price, it is alleged in the complaint, was a fair and reasonable value of the stock at that time. The defendants refused this offer, admitting there was no question about the price for which the stock was offered, but giving as a reason that the business would need more money, which the defendants would have to furnish. It is alleged that plaintiff's stock is practically worthless in his hands without joint participation in the management and control of the business, which is a close corporation. All of the issued and outstanding shares of stock are owned by the parties to this litigation and no other persons can become interested without purchasing shares from either the plaintiff or defendants. None of the stock is or ever has been on the market, and it has no market value. The prayer is for a decree declaring the fair and reasonable value of the 100 shares of stock standing in the name of the plaintiff on the books of the corporation; that defendants jointly and severally pay plaintiff such sum as the court shall determine to be the fair and reasonable value of the stock, with interest at the rate of 7 per cent. per annum from the date of the demand for repurchase, upon receiving the certificates duly indorsed by plaintiff, transferable upon the books of the corporation to defendants, and for such other

and further relief as to the court may seem equitable, and for costs.

[1] In support of the action of the trial court in sustaining the demurrer, the respondents advance a number of reasons why the contract, as pleaded, should not be specifically performed; but we think the complaint contained a sufficient statement of facts to have warranted the court in overruling the demurrer. The great weight of authority supports the view that when a corporation enters into a contract with an intending purchaser of stock, by which it obligates itself to take back the stock under circumstances like those disclosed here, such an agreement is enforceable by the purchaser. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 468, 470, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013. In that case an agreement by a corporation obligating itself, at the election of the stockholders, to repurchase the stock at a stated price, was under consideration, and the court said:

"The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid, is not to be viewed as an undertaking arising after the plaintiff has assumed the relation of stockholder. It came into being coincidentally with the contract by which plaintiff became a stockholder."

[2] In this case it would be hard to disassociate the defendants from the corporation. They were, in fact, the corporation which they formed as a convenient method of taking over the property and affairs of the defunct partnership. As an inducement to the plaintiff to engage with them in the enterprise, the defendants agreed that the plaintiff, if dissatisfied, might return his stock and receive a sum equal to its reasonable value at the time of the surrender. Under the fact, we think the liability of the defendants should be measured by the rules of accountability as though the corporation itself were the defendant. The sole purpose of the present action, notwithstanding the form of the prayer of the complaint, is to recover from the defendants the sum of money agreed to be repaid, in accordance with the terms of the agreement. The tender of the return of the stock, if such tender was necessary, left nothing to be done by the plaintiff. The consideration had passed to the obligor, and the only duty imposed upon the defendants was the obligation to

repay the sum of money specified. *Dickinson v. Zubiata Mining Co.*, 11 Cal. App. 656, 662, 106 Pac. 123; *Hellings v. Heydenfeldt*, 107 Cal. 577, 40 Pac. 1026. The facts bring the case within the provision of section 3302 of the Civil Code, which provides that—

"The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

[3] We do not think it matters, as urged by the respondents, that the plaintiff has not followed the usual and ordinary form of alleging his damage. Under our Code there is but one form of action, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. *Whitehead v. Sweet*, 126 Cal. 67, 73, 58 Pac. 376. "When the plaintiff, as here, alleges facts to exist, which, if proved, would entitle him to recover the sum of money he demands from the defendant, he has shown, so far as the recitals of the complaint can, that he has sustained damages." *Bartlett v. Odd Fellows Savings Bank*, 79 Cal. 218, 223, 21 Pac. 743, 744 (12 Am. St. Rep. 139). Having alleged that the defendants had promised to pay the fair and reasonable value of the stock, which is stated, and for which, when determined by the court to be fair and reasonable, judgment is prayed, it was unnecessary to allege that plaintiff had been damaged in such sum. *Dickinson v. Zubiata Mining Co.*, *supra*, 11 Cal. App. 663, 106 Pac. 123.

The judgment is reversed. The cause is remanded to the lower court, with directions to overrule the demurrer and make such further order as may be proper.

We concur: KERRIGAN, J.; RICHARDS, J.

54 Cal. App. 36

PEOPLE v. CATALINE. (Cr. 1002.)

(District Court of Appeal, First District, Division 1, California. Aug. 18, 1921.)

1. Larceny $\S$ 64(7)—Evidence held to sustain conviction for larceny of automobile.

In a prosecution for grand larceny of automobile, evidence as to his recent possession of automobile, his false denials, and his conduct at and about the time of his apprehension, *held* sufficient to sustain conviction.

2. Larceny $\S$ 64(7)—Evidence that defendant was found in possession of recently stolen property sufficient with slight corroborative evidence.

When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

John Cataline was convicted of grand larceny, and from judgment of conviction and order denying new trial, he appeals. Affirmed.

B. M. Benson, of Fresno, for appellant.
U. S. Webb, Atty. Gen., and John H. Rior-
dan, Deputy Atty. Gen., for the People.

KERRIGAN, J. This is an appeal from a judgment of conviction of grand larceny and from an order denying defendant's motion for a new trial.

The only question presented for determination is the sufficiency of the evidence to sustain the verdict.

The evidence tended to show that the property forming the object of the larceny, a Chandler motorcar, belonged to one Grant Falkenstein. The defendant, upon his arrest in San Francisco, denied his identity, but when shown his picture and confronted by a detective from a neighboring city he admitted that his name was Cataline. He also denied that he had stolen the car in the city of Fresno, adding that he was unable to run a car of that make, or, indeed, of any other, and that he knew nothing whatever of such an automobile. The arresting officers, however, found in his possession a Chandler ignition key. In giving to the officers details about himself, he stated to them that he was living in the outskirts of San Francisco with a friend, whose address he did not know, but who met him evenings at Eighth and Market streets and escorted him to his home. The officers found the stolen car at the "Senate" garage. The defendant denied that he had ever been in that establishment, but upon being taken there he was identified by the night watchman as the person who had left the car in the garage on certain dates.

The defendant took the witness stand in his own behalf, and denied that he had stolen the car or had left it in the Senate garage, or that he had ever been in that place. He admitted his former conviction of felony, and complained that he had been grossly mistreated physically by police officers in an endeavor to make him confess that he was guilty of the offense charged.

[1, 2] We think it clear that the evidence abundantly supports the verdict of the jury. The recent possession by the defendant of the stolen car, together with his false denials and his conduct at and about the time of his apprehension, are sufficient to sustain the verdict of conviction. When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. People v.

Vidal, 121 Cal. 221, 53 Pac. 558; People v. Gibson, 16 Cal. App. 347, 116 Pac. 987.
Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

54 Cal. App. 38

CALISTOGA JOINT UNION HIGH SCHOOL DIST. v. WEBBER. (Civ. 2357.)

(District Court of Appeal, Third District, California. Aug. 19, 1921.)

Schools and school districts §97(4)—**Election in favor of bonds not rendered invalid because of disfranchised electors whose votes could not have changed the result.**

Submission of bond issue to electors of high school district at polling place in one county was not rendered invalid, under Const. art. 2, § 1, and Pol. Code, §§ 1083, 1598, 1600, because electors residing in an adjoining county were denied the right to vote, where votes in favor of bonds were sufficient without them, and their votes could not have changed the result.

Application for writ of mandate by Calistoga Joint Union High School District against S. J. Webber, as Chairman of the Board of Supervisors of Napa County. Writ granted.

Clarence N. Riggins, Dist. Atty., and Wallace Rutherford, Deputy Dist. Atty., both of Napa, for petitioner.

FINCH, P. J. This is an application for a writ of mandamus to compel the respondent to sign an issue of bonds voted by the people of the high school district. The high school district is composed of eight elementary school districts. One of these, named Oat Hill, is a joint district, the larger part thereof being in Napa county and a small portion in Lake. It is shown without contradiction that but two electors, at the time of the bond election, resided in that part of Oat Hill district lying within Lake county, and that neither of them voted at the election. The polling place in that district was in Napa county. The only objection made by respondent to signing the bonds is that, under the provisions of section 1, art. 2, of the Constitution, and sections 1083, 1598, and 1600 of the Political Code, the electors of Oat Hill district residing in Lake county could not legally vote at the polling place of the district in Napa county, and that therefore they were deprived of their right to vote upon the question of issuing the bonds. Whether these electors could have legally voted at such polling place need not be determined, for the reason that their votes could not have changed the result. A total of 600 votes were cast at the bond election in the high school district. Of this number 419 votes were cast in favor of issuing the bonds, and

177 were cast against the issuance thereof. Where, after counting all of the votes of the disfranchised electors against the proposition for which the returns show a majority, that proposition still has a majority, such disfranchisement cannot be considered as materially changing the result. 20 C. J. 183.

It is ordered that a peremptory writ of mandamus be issued by the clerk of this court directed to the respondent above named, requiring and directing him as such chairman of the board of supervisors of Napa county to sign the bonds of the said Calistoga joint union high school district, in accordance with the order and resolution of the board of supervisors of Napa county, made on the 12th day of April, 1921.

We concur: BURNETT, J.; HART, J.

54 Cal. App. 40

PEOPLE v. BRACKLIS. (Cr. 568.)

(District Court of Appeal, Third District, California. Aug. 19, 1921.)

1. Criminal law ☞814(3)—Instruction inapplicable to evidence properly refused.

An instruction inapplicable to the evidence, though stating a correct proposition of law, is properly refused.

2. Criminal law ☞720½—Prosecuting attorney's statement of belief of defendant's guilt based on evidence does not require reversal.

While, as matter of ethics, an attorney should not in argument assert his belief in the justice of his cause, a prosecuting attorney's statement of his belief of defendant's guilt, it fairly appearing therefrom that the belief is based on the evidence, is not misconduct requiring a reversal.

3. Criminal law ☞729—In view of withdrawal and request to disregard, improbable that jury was influenced by prosecutor's remark as to reputation.

It is improbable that any juror was influenced by the prosecutor's remark, in effect, that he would show the reputation of state's witness is far higher than defendant's, prosecutor on objection promptly withdrawing the remark, and requesting the jury to disregard it.

4. Criminal law ☞720(7)—Argument from physical appearance of paper proper.

Relative to the disputed question in an embezzlement prosecution, whether the name of the purchaser was written in a sales slip, which was otherwise written and signed by defendant, before or after defendant delivered the paper, it was proper for the prosecuting attorney to argue from the physical appearance of the paper that there was taken a carbon copy of it, by which the truth of the matter in dispute could be shown.

5. Criminal law ☞721(2)—Where defendant testifies, his failure to testify on certain points subject to comment.

Where defendant testifies, his failure to testify on certain matters can be commented on in argument, as can like failure of any other witness.

6. Criminal law ☞730(8)—Prejudice from remark of prosecutor prevented by court's admonition to jury.

If it was improper for the prosecutor to state in argument that defendant had a carbon copy of a paper in evidence executed by him, prompt admonition of the court that the jury disregard the statement must be held to have prevented any prejudice therefrom.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

A. P. Bracklis was convicted of embezzlement, denied a new trial, and appeals. Affirmed.

See, also, 198 Pac. 659.

A. B. Reynolds and Charles B. Harris, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the embezzlement of 150 sacks of potatoes alleged to belong to E. C. Armstrong, the prosecuting witness in the action, and this appeal is from the judgment of conviction and from the order denying the defendant's motion for a new trial. Appellant admits that the evidence is technically sufficient to support the verdict of guilty, but it is argued that such evidence is so weak and unsatisfactory that the alleged errors hereinafter considered were especially prejudicial to his rights.

The people's case depends largely upon the testimony of Armstrong, who was a salesman in the employ of Gale Bros., wholesale produce merchants of San Francisco. Armstrong testified that he purchased 150 sacks of potatoes from the appellant, and paid \$500 in cash therefor; that he left the potatoes in the appellant's possession, with directions to hold them until called for; and that the appellant appropriated them to his own use.

Appellant testified that he ordered 200 sacks of potatoes from Gale Bros. through Armstrong; that when the potatoes arrived he discovered that the shipment contained 300 sacks; that he informed Armstrong that he could not use all of the potatoes, and that Armstrong thereupon instructed appellant to place 150 sacks of the potatoes in the latter's place of business, and said to him, "Sell the potatoes just as soon as you can, and send the money to the company, or I call here for it;" and that appellant sold the potatoes pursuant to such instructions.

The price of the 300 sacks of potatoes was \$1,009, and appellant paid Gale Bros. a total

of \$500 on account of potatoes purchased. Armstrong and appellant contradict each other in their respective accounts of what occurred.

[1] Counsel for appellant correctly state, if appellant's testimony be true, that—

"Armstrong was the agent of Gale Bros. & Co., who had sold defendant some of the potatoes, and as such had the authority to authorize defendant to sell the other portion of said car of potatoes which Armstrong had induced him to place in his store."

Based on the facts so stated, the defendant requested and the court refused the following instruction:

"Upon an indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable."

The defendant did not claim the right to appropriate the property to his own use. If his testimony be true, and the inference of his counsel therefrom correct, then appellant was a bailee for Gale Bros., with authority to sell, and under obligation to account for the proceeds. Embezzlement of the proceeds of such sale might constitute a different crime from that charged, but not an appropriation under a claim of title preferred in good faith. While the proposed instruction states a correct proposition of law, it is not applicable to the evidence. Even if there had been evidence upon which to base the proposed instruction, the jury could not have convicted the defendant, if his testimony was given credence, under other instructions given. Of its own motion the court instructed the jury that in order to convict the defendant it must first appear from the evidence, to a moral certainty and beyond a reasonable doubt—

"that the said personal property then and there belonged to said E. C. Armstrong and had been purchased by said Armstrong from said Bracklis."

[2] It is urged that the deputy district attorney was guilty of misconduct in his argument to the jury. In his opening argument he addressed the jury as follows:

"I am glad to tell you, and I say it with all sincerity, that not once during the time which you sat here as jurors have I ever asked of you a verdict that I did not absolutely believe in, * * * and so, when I arise to ask you at this time, with all the sincerity that is within me, for a verdict of guilty in this case, I do it conscientiously, knowing that I am asking for the correct verdict. * * * Now, I ask at your hands a verdict of guilty in this case; I am convinced that this man is guilty, and I shall argue his guilt to you and I shall not go one jot from the evidence in this case."

From the concluding sentence it fairly appears that the prosecutor was basing his opinion of the defendant's guilt upon the evi-

dence. Such expression of opinion was not misconduct requiring a reversal. It was long ago stated, as a rule of ethics, that an attorney ought not to add the weight of his personal opinion to the evidence in support of his cause. This rule is expressed in the Code of Ethics adopted by the American Bar Association, as follows:

"It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause."

Strict compliance with this rule by attorneys who defend, as well as by those who prosecute, would tend to a higher respect for the profession. It may be further said that in this case the statement of which complaint is made was not assigned as misconduct, nor was any request made that the court instruct the jury to disregard it.

[3] The prosecutor, evidently referring to the defendant, said:

"Now, pay attention to these things; when I get to them I will show you that Armstrong's reputation is far, far higher than that man; it towers above him—"

He was here interrupted by counsel for the defendant, who assigned the statement as misconduct. Thereupon the prosecutor said:

"I will withdraw that. * * * I ask the jury to disregard it."

In view of the prompt withdrawal of the objectionable statement and the request that the jury disregard the remarks, it is improbable that any juror was influenced thereby.

[4-6] There was introduced in evidence by the prosecution and marked Exhibit A, what appears to be an ordinary sales slip in the handwriting of defendant, reciting, in effect, that the defendant had sold to Armstrong 150 sacks of potatoes for \$500, marked "paid" and signed by the defendant. Armstrong testified that the name "E. C. Armstrong" appearing therein was written prior to the delivery of the paper to him. The defendant testified that the name "E. C. Armstrong" was not written by him, and did not appear upon the paper at the time of its delivery; that it was written on a sales tab of the California Fruit Market which the defendant was using temporarily while having some of his own printed; that when he received his own tabs from the printer he threw away the remaining pages of the California Fruit Market tab, or maybe used them for scratch paper. The reverse side of the paper in evidence seems to have been a carbon surface for the purpose of making a copy. Production of the carbon copy would have been almost conclusive proof as to whether the name "E. C. Armstrong" was originally written into the paper in controversy. In the closing argument for the prosecution the following occurred:

"Mr. Farrell: The clinching thing in this case as to that, and that is this, that the same pencil wrote it. Imagine that. How could Armstrong get the pencil away from him? And if it wasn't the same pencil, how in God's name, I will ask you as sensible men and women, that Armstrong could take a pencil the graphite of which was identical with the one Bracklis had down in that store.

"Mr. Harris: That question was asked specifically; he couldn't tell about the matter.

"Mr. Farrell: Well, I am afraid we won't get through if I am going to be continually interrupted.

"Mr. Harris: It is a false statement. He couldn't tell that graphite in each and every letter was the same.

"The Court: Yes, that is a question for the jury to determine. * * *

"Mr. Farrell: Now, let me call your attention to this, and bear this well in mind: Look at the back of it (referring to People's Exhibit A); there is a carbon or two of it some place; there is a carbon. Who has got the carbon? Where is it? He has got it. That could not be written without a carbon copy. Where is it?

"Mr. Reynolds: We assign that as misconduct on the part of the district attorney; no evidence in this case that there was a carbon copy.

"The Court: You can't make that as a statement of fact. He can argue it. The jury will disregard the statement.

"Mr. Reynolds: The evidence in the case wasn't to that effect. The evidence was that Bracklis' store was attached and everything taken by the constable. * * *

"Mr. Farrell: I say to you again, the clinching feature in this case is, where is the carbon copy? Dismiss the handwriting from your minds—

"Mr. Reynolds: I again cite that as error on the part of the district attorney.

"The Court: There is no evidence of that. The jury will disregard it.

"Mr. Reynolds: Misconduct of the grossest kind.

"Mr. Farrell: I argue from the physical appearance of the carbon back. That could not be written unless there was a carbon—or a carbon was made."

It was not misconduct for the prosecutor to draw any logical inference from the physical appearance of the exhibit. Since it is usual for the maker to retain the carbon copy in such transactions, it was not wandering far afield to argue that the copy must have been in the possession of the defendant. While the defendant is not required to take the stand, and the illogical rule prevails that no unfavorable inference is to be drawn from his failure to do so, yet, when he does testify, his testimony is to be weighed by the same standards and subjected to the same tests as that of other witnesses. In the case of *People v. Mead*, 145 Cal. 500, 78 Pac. 1047, the defendant was convicted of the crime of conniving at, consenting to, and permitting his wife to be placed in a house of prostitution. The defendant had taken the stand in his

own behalf. It was claimed that the district attorney was guilty of misconduct in commenting upon the failure of the defendant to deny that the woman was his wife, a vital issue in the case. The court said:

"There was no impropriety in the district attorney commenting upon the fact that he had made no express denial of the fact."

If it was improper for the prosecutor to state as a fact that the defendant had the carbon copy, the prompt admonition of the court to the jury to disregard the statement must be held to have prevented any prejudice therefrom.

The judgment and order appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

54 Cal. App. 69

RAYBURN v. RAYBURN. (Civ. 2336.)

(District Court of Appeal, Third District, California. Aug. 23, 1921.)

1. Husband and wife — 266—Understanding that wife's earnings should be her separate property held inferable from husband's statement and conduct.

Conduct of the husband in exercising no control over his wife's earnings after marriage, and his statement, prior to purchase of land by her and her mother, that he had no money to put into the place, but had advised his wife and her mother to purchase it, and that his wife would put up her half if her mother would put up her half, afforded sufficient ground for the inference that it was understood that the wife's earnings should be her separate property.

2. Husband and wife — 264 — Finding that property deeded to wife was her separate property warranted.

Evidence, including presumption under Civ. Code, § 164, held sufficient to support finding that property deeded to a married woman was her separate property.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Florence A. Rayburn against Charles Rayburn. From judgment for plaintiff, defendant appeals. Affirmed.

E. Fitzgerald, of Placerville, and Robt. H. Schwab, of Sacramento, for appellant.

C. A. Bliss and Downey & Downey, all of Sacramento, for respondent.

FINCH, P. J. In this action both parties alleged grounds for divorce, and asked the court to adjudicate their property rights. Neither was granted a divorce, but the decree entered determines their respective rights in the property described in their pleadings.

The record title of an undivided half of what is known as the "Rayburn Orchard" is in the name of the plaintiff, and that of the other half in the name of the defendant. The court adjudged the undivided half standing of record in the defendant's name to be community property, and that the other half was the separate property of the plaintiff. From that part of the judgment relative to the plaintiff's separate estate the defendant appeals.

[1, 2] The land in dispute was conveyed to plaintiff and her mother, Mrs. Marks, March 1, 1910, each taking an undivided half interest therein. Mrs. Marks conveyed her half interest to the defendant January 31, 1911. At the time of the purchase of the property \$400 was paid thereon by Mrs. Marks and \$400 on account of the half interest therein conveyed to the plaintiff. The plaintiff and Mrs. Marks joined in the execution of a mortgage to secure the remainder of the purchase price, \$1,825. The plaintiff claims to have paid the whole of the \$400 initial payment for her half interest. The defendant testified that the plaintiff paid but \$80 thereof, and that he paid \$320. The evidence shows without conflict that on March 1, 1910, there was a balance to the credit of the plaintiff's bank account of \$300.09, and that she drew it all out on that day. Appellant contends that the greater part of the money on deposit in the plaintiff's name consisted of her earnings since the marriage of the parties, and therefore was community property. The parties were married January 14, 1909. Prior and subsequent to the marriage both were employed by the Earl Fruit Company, the plaintiff working under the direction of the defendant. Her employment continued throughout the summer of 1909. She seems to have received her salary and to have deposited the same to the credit of her personal bank account after her marriage in the same manner as prior thereto. Apparently the defendant exercised no control over his wife's earnings or her bank account. From his testimony it appears that he had a bank account of his own. Some of the plaintiff's witnesses testified that when the purchase of the land was under consideration the defendant stated that he had no money to put into the place, and advised the plaintiff and her mother to purchase it. Worthy Marks testified that the defendant "told me he had talked to Florence, and Florence would put up her half if we could convince our mother and get her to put up her half." The defendant denies making the statements attributed to him. The statements, if made, and the defendant's conduct relative to his wife earnings, indicate that he did not regard such earnings as community property, but rather as the separate prop-

erty of his wife. There was no direct evidence as to whether or not the parties considered the wife's earnings to be her separate property. In the absence of more certain proof, such statements and conduct of the defendant afford sufficient grounds for the inference that it was understood between them that the wife's earnings should be her separate property. *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272; *Smith v. Smith*, 191 Pac. 60. These facts, considered in connection with the presumption arising from the conveyance to the wife, as provided by section 164 of the Civil Code, sufficiently support the finding that the property standing of record in the plaintiff's name is her separate property. There was evidence enough favorable to the defendant to support a contrary finding, but the weight of such evidence was for the determination of the trial court. The judgment appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

54 Cal. App. 7

STRASSBURGER v. SANTA FÉ LAND IMPROVEMENT CO. et al. (Civ. 3875.)

(District Court of Appeal, First District, Division 1, California. Aug. 12, 1921. Hearing Denied by Supreme Court Oct. 10, 1921.)

1. Corporations — 503(4)—Right to sue corporation in county where liability arose not waived.

The right under Const. art. 12, § 16, to sue a corporation in the county in which the liability arose was not waived by joining with such corporation individuals residing in another county, notwithstanding Code Civ. Proc. § 395, entitling defendants in actions other than those enumerated to be tried in the county of their residence; the effect thereof being merely to entitle the individual defendants to have the action tried to the county of their residence.

2. Venue — 41—Individual defendant entitled to be sued in county of his residence though joined with corporation defendant.

An individual defendant is entitled to be sued in the county of his residence under Code Civ. Proc. § 395, though a corporation is joined with him as a defendant, notwithstanding Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or the county where the principal business of such corporation is situated, but the right to have the action transferred to the county in which the individual defendants reside must be asserted by such defendants, and is not available to the corporation.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Isaac Strassburger against the Santa Fé Land Improvement Company, the Chanslor-Canfield Midway Oil Company, and others. From an order denying their motion for change of venue, the named defendants appeal. Affirmed.

U. T. Clotfelter, Robert Brennan, and M. W. Reed, all of Los Angeles, for appellants.

Henry Ach and J. D. Lederman, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order denying an application for a change of the place of trial.

The plaintiff commenced this action in the city and county of San Francisco against the defendants to recover damages for alleged false representations and fraudulent concealments whereby the plaintiff was induced to part with an undivided one-fourth interest in certain lands described in the complaint for a sum greatly less than their value. The two defendants sued under the fictitious names of John Doe and Richard Roe, have not been served with a summons, nor have they appeared in the action. The corporate defendants appeared by demurrer, and at the same time filed and served a demand in writing for a change of the place of trial from the city and county of San Francisco to the county of Los Angeles. They also filed an affidavit of merits, and an affidavit showing substantially that at the time of the filing of the complaint the two corporate defendants were residents of, and their principal place of business was and is, the county of Los Angeles. It is also averred in said affidavit, but upon information and belief only, that neither of the defendants sued under fictitious names resides in the city and county of San Francisco.

According to the allegations of the complaints, the liability of the defendants forming the basis of the action arose in the city and county of San Francisco; and plaintiff's position is that, so far as any right is given by law to a defendant corporation in relation to the place of trial of an action of the character here involved, he is entitled to have the present action tried in the city and county of San Francisco by virtue of the provisions of section 16 of article 12 of the Constitution of this state. That section reads as follows:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

It is contended by the appellants, however, that by joining John Doe and Richard Roe

as defendants (whom they assume to be individuals, and not corporations) the plaintiff waived his right to commence his action in the county in which the alleged liability arose, if such county was not the residence of the defendants or any of them, and that accordingly it was the duty of the trial court to grant the motion of the defendant corporation to change the place of trial to the county of their residence or principal place of business upon showing by affidavit that none of the defendants, corporate or individual, resided within the city and county of San Francisco.

[1] With this contention we cannot agree. Granting, for the sake of argument, that John Doe and Richard Roe are not corporations or associations, but individuals residing without the city and county of San Francisco, nevertheless we cannot see that such facts confer upon the defendant corporations any right to have the place of trial changed upon that ground. With the exception of actions concerning title to and possession of real property, and enforcement of liens thereon, actions may be commenced in any county in the state subject to the power of the court to change the place of trial as provided in the Code of Civil Procedure, which in section 395 provides that all actions other than those thus enumerated must be tried in the county in which the defendants or some of them reside. The rule thus laid down antedates the adoption of section 16 of article 12 of the Constitution above set forth, and is necessarily modified by it to the extent that corporations and associations are now permitted to be sued in the county where the alleged liability arose or breach of contract occurred. Construing this new provision of the Constitution, the Supreme Court, in the case of *Fresno National Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157, said:

"Without leading to any conflict, this section has the effect to permit a corporation to be sued in certain counties other than that of its residence or principal place of business, at the option of the plaintiff, and to deny to corporations the absolute right of a change of venue when sued in such other counties. This effected an important change in the law as it existed before the adoption of the present Constitution, in so far as it denies the absolute right of the corporation to a change of venue to the county of its principal place of business, when sued in any one of the other counties named in the section; and this seems to be the only effect intended."

[2] It is, however, clear that it was not the intention of the framers of the constitutional provision in question to deprive an individual defendant of his right to have an action against him tried in the county of his residence, and he is not deprived of this right

because a corporation is joined with him as a defendant. *Griffin & Skelly Co. v. Magnolia Co.*, 107 Cal. 378, 380, 40 Pac. 495. In the case at bar John Doe and Richard Roe have made no demand for a change of the place of trial. They may or may not exercise that right, but in any event it is no concern of a codefendant corporation. We can conceive of no reason why, because a plaintiff's right of action is against both a corporation and an individual, he is deprived ipso facto of a right given by the Constitution to commence his action in a particular county. It is true that that right may become ineffective by the exercise of the right of an individual defendant to have the action removed to the place of his residence; but, in the absence of the exercise of that right, the right given to the plaintiff remains intact.

These views are not in conflict with any case relied upon by the appellants. In *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 Pac. 918, the *Times-Mirror Co.*, a corporation, was the only defendant, and its motion was denied.

In the cases of *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209, *Griffin & Skelly Co. v. Magnolia Co.*, 107 Cal. 378, 40 Pac. 495, and *Nelson v. East Side Grocery Co.*, 26 Cal. App. 344, 146 Pac. 1055, all the individual defendants had appeared and moved for a change of the place of trial, either alone, as in the first-named case, or in conjunction with their corporation codefendants, as in the other two cases. In speaking in those cases of a "waiver" by the plaintiff of his right as against the corporation defendant to have the cause tried in the county in which the liability arose, through the joining of individual defendants resident in another county, the term cannot be construed in any technical sense. Clearly what was meant is that the right given to the plaintiff as against a corporation defendant could be rendered ineffective by the absolute right of the individual defendants to have the cause tried in the county of their residence. If a plaintiff's right of action is joint as against a corporation and an individual, if he desires to pursue the individual, he is bound to join him as a defendant. This necessity confers no additional right upon the corporation defendant; and if the plaintiff brings his action where the liability arose, it is not for the corporation to set up the right of a codefendant for its own advantage. In none of the cases cited by the appellants was the motion made by the corporation alone, and consequently they do not sustain the principle for which the appellants here contend.

Order affirmed.

We concur: WASTE, P. J., RICHARDS, J.

CALIFORNIA REPORTER

201 PACIFIC REPORTER

Geo. D. Squires, of Redwood City, and Archie D. Mitchell, of Ontario, for appellant.

McNabb & Hodge, of San Bernardino, for respondent.

LAWLOR, J. This is an appeal by the contestant from a judgment in favor of the petitioner, on a petition to have a publication declared to be a newspaper of general circulation, as that term is defined in section 4460 of the Political Code.

The petitioner, D. D. McDonald, was the editor and publisher of the Ontario Weekly Herald. In accordance with the provisions of section 4462 of the Political Code, he petitioned the superior court of San Bernardino county to have the said publication declared a newspaper of general circulation, and entitled to print publications, notices by publication, official advertising, or public or legal notices. Section 4462 provides:

"Whenever a newspaper shall desire to have its standing as a newspaper of general circulation, as that term is defined in section four thousand four hundred and sixty, ascertained and established, it may * * * file a verified petition in the superior court of the county, or city and county, in which it is established, printed and published, setting forth the facts which justify such action. * * *"

Section 4460 of the Political Code is as follows:

"A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement."

The material allegations of the petition were to the effect that the Herald was a newspaper published for the dissemination of local and telegraphic news; that it had a bona fide subscription list; that it was established July 18, 1918; that it was published at Ontario, Cal., every Thursday for more than one year preceding the filing of the petition; and that it was not devoted to or published in the interests of any particular class or group. The petition was contested by the California Press Association; the only objection to its sufficiency being that it did not allege that the paper was "printed" at Ontario.

Upon the trial, petitioner, who was the only person examined, testified that the physical printing of the paper was not done at Ontario, but at Colton, Cal., but that the office was at Ontario, which was the princi-

187 Cal. 158

In re McDONALD. (L. A. 6527.)

(Supreme Court of California. Sept. 30, 1921.)

Newspapers — 3(3)—Held "printed and published" in a town, within statute defining "newspaper of general circulation."

Where a newspaper is published and circulated in a particular town, and where the publisher has its office and pays the tax for conducting the business in such town, the newspaper is a "newspaper of general circulation," within Pol. Code, §§ 4460, 4462, defining such newspaper and requiring it to be "printed and published," in the town in which the publication, notice by publication, or official advertising is given or made, though the mere setting up of the type and making the impressions on the paper is done in another town; the words "printed and published" in a town not requiring the physical act of printing to be done therein.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Newspaper of General Circulation; Printed and Published.]

In Bank.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

In the matter of the application of D. D. McDonald, publisher, to have the standing of the Ontario Weekly Herald, of Ontario, Cal., as a newspaper of general circulation, as defined in section 4460 of the Political Code, ascertained and established, contested by the California Press Association. Judgment for petitioner, and contestant appeals. Affirmed.

pal place of circulation, and that a city license to conduct the business of a newspaper was paid to the city of Ontario. Judgment was rendered for petitioner, and the contestant appeals.

The only question to be decided is whether the fact that the physical printing of the paper is done in one town, and the publication and circulation in another, prevents it from being a newspaper of general circulation within the meaning of the statute. Appellant contends:

"The point in this case is that the Legislature has undertaken to define a newspaper of general circulation, a term often used by it in the Codes and statutes of the state, for the evident purpose of securing publicity for public or official advertising and preventing the abuses in public affairs which would result from its concealment in newspapers devoid of standing, character and circulation."

And it insists it is—

"not unreasonable to assume that the Legislature, when it defined a newspaper of general circulation, meant all that it said in section 4460, and that all of the words therein used are to be given force and effect. * * * The petition in this case at bar assiduously eschews all reference to the place where said paper is printed."

It was said in the case of *In re Le Favor*, 35 Cal. App. 146, 169 Pac. 413:

"From these findings made by the trial judge, it is very apparent that the only ground upon which the denial of the petition was made was because seven issues of the newspaper were not actually 'printed' in the city of Watts. The newspaper was circulated there and was a paper local to that community. We think to construe the statute in such a close and literal sense is to narrow its meaning more than was intended by the Legislature. The object to be accomplished was to define newspapers in which public notices might be made and which would fairly express such notices to the particular community intended to be reached. * * * The case of *Bayer v. Hoboken*, 44 N. J. L. 131, is directly in point. There a statute required the printing of a notice in a newspaper 'printed and published' within the limits of a municipality. The newspaper in which the publication was made was printed altogether on presses in the city of New York, but was distributed in Hoboken. The court held that such a newspaper was 'printed and published' as required by the statute."

In *Stanwood v. Carson*, 169 Cal. 640, 647, 147 Pac. 562, 565, it was said that—

"The vital consideration being notice by publication, such publication is the publication contemplated by law, with little or no regard paid to the mere place of printing, even when the word 'printing' coupled with publication is embraced in the statutory requirement. *State v. Hoboken*, 44 N. J. L. 131; *Ricketts v. Hyde Park*, 85 Ill. 111; *Brown's Estate v. West Seattle*, 43 Wash. 26, 85 Pac. 854; *Hinchman*

v. Barnes, 21 Mich. 558; *Greenlee v. Marks*, 62 Ind. 420; *Hart v. Smith*, 44 Wis. 229."

In *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410, 72 N. W. 357, in considering a statute which required a notice to be published in a paper "printed" in a county, the court said:

"We do not think that the word 'print' was by the Legislature used in the specific and somewhat technical sense of designating the purely mechanical act of impressing the characters upon the paper. The object of the statute was to give notice, and, if the Legislature had the distinction at all in view, it would not, for that purpose, have selected the place of printing, instead of that of publication. 'Print' is familiarly used in the sense of 'publish,' and in that sense the word receives recognition in many, if not all, of the dictionaries, and in that sense we are satisfied the Legislature used it."

The Standard Dictionary gives one definition of "print" as follows:

"To put in print, or cause to be put in print or issued from the press; carry or send forth in print; publish; as, the newspaper *printed* the story."

The Century Dictionary defines it thus:

"To cause to be printed; obtain the printing or publication of; publish."

And in Webster's Dictionary this definition is given:

"To publish a book, article, music, or the like."

To give a reasonable construction to the language of the statute, and keeping in view the object sought to be served by the legislation—that of having an effective medium of publicity for legal notices in the community—it must be held that by the conjunctive "and" it was not intended to require that the physical act of printing was to be done in the place of publication, but merely that the paper be printed and circulated there. We think it clear from this fact and the authorities cited that the word "printed" was used in the statute in the sense of the definitions we have given.

In this case the office of the paper is at Ontario, where it is established, and the tax for conducting the business is paid there. The paper is caused to be printed in Ontario; the printing matter is obtained in, it is published in, and it is circulated at, Ontario. In the production of the publication, everything is done at Ontario, save the setting up of the type and making the impressions on the paper. It would be giving too narrow a meaning to the word "printed" to hold that these acts alone were contemplated by its use in the statute. The only reasonable construction that can be given to "printed and published" is that the paper must be

produced in the community where it is aimed to have it recognized as a legal advertising medium.

Appellant cites numerous authorities to the well-recognized principle that—

"Some effect is to be given to every word in the statute, without rejecting any word as redundant or treating it as merely synonymous with some other word or words."

But in arriving at our conclusion we have not failed to give effect to the word "printed." Appellant also cites *Application of Devlin & Judah*, 12 Cal. App. 403, 107 Pac. 583, but that case is not in point for the reason that another statutory qualification was involved—the necessary period the publication must have been established.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

187 Cal. 150

In re FREES' ESTATE. (L. A. 6784.)

(Supreme Court of California. Sept. 30, 1921.)

1. Statutes $\S$ 270—Provision of Civil Code that no part is retroactive unless expressly so declared applicable to amendments.

Civ. Code, $\S$ 3, providing that no part of the Civil Code is retroactive unless expressly so declared, is applicable to amendments to the Civil Code.

2. Statutes $\S$ 263—Not construed retrospectively, unless legislative intent is clear.

Statutes should not be construed retrospectively, unless it is clear that such was the legislative intention.

3. Husband and wife $\S$ 247—Amendment to statute defining community property not retroactive.

Civ. Code, $\S$ 164, as amended by St. 1917, p. 827, defining "personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state" as community property, held inapplicable to personal property acquired prior to enactment of the amendment in view of section 3.

4. Taxation $\S$ 866—Property passing to wife held husband's separate property, and as such subject to inheritance tax.

Personal property acquired by husband in other state before becoming domiciled in California, prior to the taking effect of St. 1917, p. 827, amending Civ. Code, $\S$ 164, making such property, though acquired while domiciled elsewhere, community property, held subject to tax under Inheritance Tax Act of 1917, notwithstanding section 1, subs. 1, 2, making the act inapplicable to community property which goes to surviving wife under Civ. Code,

$\S$ 1402, since such property, having been acquired by the husband prior to the amendment of section 164, was not community property, but was the separate property of the husband.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of Benjamin M. Frees. From an order fixing inheritance taxes, the Controller of the State appeals. Reversed, with instructions.

John W. Carrigan and Karl R. Levy, both of Los Angeles, for appellant.

Allen E. Rogers, of San Diego (James L. Atteridge, of Sacramento, of counsel), for respondent.

WILBUR, J. This is an appeal by the controller of the state from an order fixing inheritance taxes. The question involved is as to the exemption of the wife's interest in community property under the Inheritance Tax Act of 1917 (Stats. 1917, p. 880), in effect at the time of the death of the decedent, which occurred May 28, 1920.

The deceased left property appraised by the inheritance tax appraiser at \$1,526,858.76. The inheritance tax appraiser in his report had fixed a tax upon the widow's interest of \$91,506.18, said amount being estimated upon \$933,301.47, appraised as follows: Bequest, \$100,000; residuary legacy, \$833,301.47. This report was objected to by the widow, Ella R. Frees, the respondent, who claimed a deduction from the appraised value of the property bequeathed to her of an amount equal to one-half the value of the entire community property, to wit, of \$677,706.82. The court sustained the widow's contention and made the deduction claimed from the value of the estate bequeathed to the widow (\$933,301.47), leaving a balance of \$255,594.65 upon which the tax was estimated, after allowing a \$25,000 exemption. The amount of the tax thus fixed was \$15,069.47. The appellant claims that the order fixing the tax was erroneous because of the deduction of \$677,706.83.

Ella R. Frees, the respondent, was married to Benjamin M. Frees April 10, 1867, in the state of Wisconsin. At the time of their marriage the husband had property valued at \$20,000. It was admitted by the respondent that this amount, together with 5 per cent. interest per annum, aggregating \$23,000, was separate property. The deceased and his wife, the respondent, went to Chicago, Ill., immediately after their marriage, and remained as residents thereof until November, 1910, at which time they came to California, and resided here from that time until the death of the husband. At the time the amendment of 1917 of section 164, Civil Code, went into effect, there had been accumulated

as rents, issues, and profits of the property brought to California by the decedent \$300,000, and thereafter up to the time of his death from the same sources the estate was increased \$200,000. The balance of the property, about \$1,000,000, was personal property accumulated in the state of Illinois. The decedent left a will wherein a legacy of \$100,000. was made to his wife, and she was also made the residuary legatee. The latter bequest is appraised at \$833,301.47. No question is raised as to the value of the estate given to the wife or as to the proper interpretation of the will. The only question presented is as to the proper interpretation of the Inheritance Tax Act of 1917, with relation to community property, and as incidental thereto the question of the effect of the new definition of community property contained in the amendment to section 164, Civil Code (Stats. 1917, p. 827), which was approved May 23, 1917, and went into effect July 27, 1917, on the same days that the Inheritance Tax Act of 1917 was approved and took effect.

Section 1, subdivisions 1 and 2, of the Inheritance Tax Act of 1917, is as follows:

"Section 1. (1) This act shall be known as the 'inheritance tax act.' (2) The words 'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees, heir, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state; provided, that *for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act;* provided, further, that in case of a transfer of community property from the husband to the wife, within the meaning of subdivisions (3) or (5) of section two of this act, one-half of the community property so transferred shall not be subject to the provisions of this act; and provided, further, that the presumption that property acquired by either husband or wife after marriage is community property, shall not obtain for the purpose of this act as against any claim by the state for the tax hereby imposed; but the burden of proving such property to be community property shall rest upon the person claiming the same to be community property." (Italics ours.)

Section 1402, Civil Code, referred to in the above-quoted section provides that—

"Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his de-

scendants, equally. * * * In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

For a definition of community property we must look to section 164, Civil Code, above referred to. As amended in 1917, that section reads as follows:

"164. What is community property. All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and *personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property;* * * *" (Italics ours.)

The property involved in this litigation is all personal property, and it is conceded that under the provisions of section 164, Civil Code, it would be community property if that section is retroactive and constitutional. Sections 172, 172a, Civil Code, were amended on the same day as section 164, Civil Code. Previous to the amendment, section 172, Civil Code, gave the husband the management and control of all the community property with like power of disposition other than testamentary as he has of his separate estate, except that he could not give it away without consideration or sell the household furniture or wearing apparel without the written consent of the wife. By the amendment his absolute power was confined to personal property (section 172, Civ. Code; Stats. 1917, p. 829), and as to community real property the husband was given the management and control thereof, subject to the requirement that the wife must join in any conveyance or incumbrance thereof except a lease for a year or less.

Two rules have uniformly been adhered to in the interpretation of section 164, Civil Code, and its amendments: First, that the law has been construed as applying only to property acquired in California, or by persons domiciled here; second, that amendments are not to be construed as retroactive, unless the language thereof compels such a construction. Thus, notwithstanding that the definition of community property has in terms included all property acquired by the husband or wife after marriage, other than that acquired by gift, bequest, devise, or descent, it has uniformly been held that property acquired in other states by persons domiciled therein, and subsequently brought to California by them at the time of establishing residence in this state, retained the status that it had in the state where it was acquired, regardless of our definition of community property. As in most of the states property acquired after marriage was the separate property of the husband, it re-

mained such, when brought to this state by the husband. *Kraemer v. Kraemer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488; *Estate of Nicolls*, 164 Cal. 368, 129 Pac. 278; *Estate of Warner*, 167 Cal. 691, 140 Pac. 583; *Estate of Boselly*, 178 Cal. 715, 175 Pac. 4; *Estate of Arms*, 199 Pac. 1053. Under the law of the state of Illinois the personal property acquired by the decedent during his marriage and while domiciled in the state of Illinois would constitute his separate property. *Estate of Arms*, supra; *Kraemer v. Kraemer*, supra. It was so stipulated on the hearing of the report of the inheritance tax appraiser. Thus section 164, Civil Code, as originally enacted, was construed to have no extraterritorial force, but the amendment of 1917 to section 164, Civil Code, expressly applies extraterritorially to "personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state," and the decision in this case hangs upon the proper application of this section to the facts. The Inheritance Tax Act of 1917 exempts from taxation the portion of the community property to which the wife succeeds under section 1402 of the Civil Code. The determination of that question in turn depends upon the definition of community property. We must therefore determine the rights of the wife as successor or heir to the community property in order to determine the proper deduction from her bequests.

The appellant advances two propositions with reference to the proper construction of these sections: First, that section 164, Civil Code, is unconstitutional in so far as it seeks to convert the separate property of the husband or wife theretofore recognized as such by the laws of California into community property; and, second, that the statutes of 1917 should not be given a retroactive effect. In support of the first proposition, the appellant relies upon the decision in *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. If however, the statute cannot be given any retroactive effect, we need go no further in this case for all the property acquired in the state of Illinois by the spouses was acquired and brought into the state before section 164, Civil Code, was amended.

[1,2] The Civil Code expressly provides that "no part of it is retroactive unless expressly so declared" (Civ. Code, sec. 3), and this rule applies to the amendments to the Civil Code as well (*Sharp v. Blankenship*, 59 Cal. 288; *Central Pacific Railroad Co. v. Shackelford*, 63 Cal. 261; *Bank of Ukiah v. Moore*, 106 Cal. 673, 680, 39 Pac. 1071; *Estate of Richards*, 133 Cal. 524, 527, 65 Pac. 1034). It is also a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention. *Bascomb*

v. Davis, 56 Cal. 152. In *Cooley on Constitutional Limitations*, it is said:

"* * * it is a sound rule of construction that a statute shall have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." 7th Ed., p. 529.

In *Endlich on the Interpretation of Statutes* (page 362), it is said:

"* * * Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention."

See, also, *Greer v. Blanchar*, 40 Cal. 194, 197; *Gates v. Salmon*, 28 Cal. 320, 321; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Willcox v. Edwards*, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913C, 1392; *Cyc.* 1205.

[3] The clause of section 164, Civil Code, as amended, now under consideration, construed prospectively and not retrospectively, as required by our Code (Civ. Code, sec. 3) and by our decisions, should be read as follows:

"Personal property wherever situated [hereafter] acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property."

So construed, all of the personal property owned by the decedent at the time he removed to the state of California would be his separate property, in accordance with the laws in force at the time of the transfer (1910), and would be unaffected by the amended definition of community property. Section 1402, Civil Code, providing for the succession to the community property of deceased, would have no application to such separate property, and section 1 of the Inheritance Tax Act of 1917, which refers only to the community property to which the wife would succeed under section 1402, Civil Code, would have no application to such separate property. If this is the proper construction of section 164, Civil Code, we are not concerned with the question of whether or not the Legislature could exempt such separate property so acquired from inheritance or succession taxes, or could provide that the wife should succeed to one-half thereof. Conceding such power, it was not exercised in the passage of the laws in question.

[4] From this conclusion it results, not only that the million dollars or thereabouts

brought to the state of California by the decedent, but also the \$200,000 rents, issues, and profits thereafter accumulated in this state before 1917, and that the \$300,000 rents, issues, and profits thereto accruing subsequent to the enactment of the amendment of 1917 to section 164, Civil Code, was the separate property of the decedent. Although the \$300,000 was the product of property acquired elsewhere, which property would have been community property if acquired in this state, it is not acquired in another state, nor the product of such property acquired in another state after the enactment of the law of 1917, because from and after 1917 the \$1,300,000 principal was in contemplation of law within the state, and the rents, issues and profits were therefore the separate property of the husband. Civ. Code, § 163.

Judgment reversed, with instructions to the trial court to fix the inheritance tax payable by the widow, upon the valuations already determined and in accordance with this opinion.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

187 Cal. 168

FRY v. TITLE INS. & TRUST CO.
(L. A. 6553.)

(Supreme Court of California. Oct. 5, 1921.)

Libel and slander — 130—Vendor cannot recover as damages for slander of title amount paid to secure release of judgment as condition precedent to issuance of title guaranty.

In a vendor's action against a title insurance company for slander of title, where defendant represented to purchaser that property was subject to a judgment lien, plaintiff, though he tendered a registrar's certificate of title issued under Land Registration Act, § 91, providing that no judgment shall be a lien until a certified copy is filed and a memorial entered, cannot recover amount paid to secure release of such judgment as a condition to issuance of a guaranty of title, whether or not law was invalid or defendant so believed, plaintiff's loss being due, not to defendant's interference, but to his own voluntary payment.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Lawrence Armstrong Fry against the Title Insurance & Trust Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. W. Bell, of Los Angeles, for appellant.
Chas. H. Brock and J. N. Hastings, both of Los Angeles, for respondent.

WILBUR, J. This is an action to recover \$1,000 damages for slander of title. The defendant interposed a general demurrer to the complaint, which was sustained and judgment entered accordingly, from which plaintiff appeals. The main question thus presented for our consideration is as to whether or not the complaint states facts sufficient to state a cause of action. The slander complained of is alleged as follows:

"That on the 30th day of December, 1919, * * * the defendant maliciously and without cause spoke in the presence of Jacob Bosma and others of and concerning the plaintiff and his property as follows: 'That said property was subject to the lien of a judgment for \$5,479.65 plus costs and attorneys' fees, and that said title could not be transferred free and clear until the release of said judgment lien,' and 'that the said statement was false, which defendant then and there knew.'"

The other allegations of the complaint may be summarized as follows:

"The defendant is engaged in the business of searching titles. The plaintiff and one Jacob Bosma entered into a written contract whereby plaintiff agreed to sell to Bosma a certain piece of real estate for the consideration of \$4,500, and to furnish in connection with such sale a certificate of title from the defendant showing said property to be free and clear of all incumbrances. The plaintiff was the owner of the fee-simple title 'subject only to' a mortgage of \$14,000 and certain street proceedings. 'That plaintiff's title was evidenced by registrar's original and owner's duplicate certificates of title No. 7926, dated November 29, 1919, issued pursuant to the provisions and requirements of the law enacted by the people of the state of California on the 3d day of November, 1914, under the reserved legislative power, known as the initiative, entitled 'An act to amend an act entitled "An act for the certification of land titles and the simplification of the transfer of real estate," approved March 17, 1917,' and brought under first registration by certificate No. C-4318 on the first day of May, 1918.' That the plaintiff deposited with the defendant his owner's duplicate of title, No. 7926, together with a deed to Bosma and releases of the incumbrances "and instructed defendant to deliver an owner's duplicate certificate to the said Bosma, together with its certificate showing the said title to be vested in him free and clear of all incumbrances, and thereupon to turn over to plaintiff the balance of said purchase price, and the said Bosma joined in said instruction." That the said defendant, with the consent of plaintiff, retained the sum of \$1,000 out of the money so deposited as aforesaid for the purpose of procuring a release of said property from the said alleged judgment lien, and plaintiff consented thereto solely on the representation of the defendant that there was such a lien and on the further representation of the defendant that it would not issue its said certificate showing said property free and clear of incumbrances unless a release of said

alleged judgment lien be procured, and that it could and would procure such release for the sum of \$1,000. That thereupon the plaintiff sought to obtain from the said Bosma a rescission of said contract, but the said Bosma refused to consent to a rescission thereof, and notified plaintiff that he would insist upon a specific performance of all its terms and conditions and of the issuance of the said certificate by defendant title company showing said property to be vested in him free and clear of all incumbrances, including said alleged judgment lien, and also at the same time notified plaintiff that any unusual delay in completing said transaction would cause him loss and damage in excess of \$1,000. That plaintiff thereupon sought legal advice, and, after stating all the facts and circumstances fairly and fully to his attorney, was advised that said contract could be specifically enforced by the said Bosma. That solely by reason of the facts and circumstances as herein alleged, plaintiff yielded to the demand of the defendant and authorized it to retain the sum of \$1,000 out of the purchase price of said property and to close the transaction in accordance with instructions theretofore given. That the defendant during all the times mentioned in the complaint "maliciously represented that the said registration law under which plaintiff's title for said property was registered was invalid and unsafe, and that the defendant would not and did not recognize said law nor attach any force and effect thereto in its business of making reports and issuing contracts of guaranty of title."

It is not alleged that there was no judgment for the amount of \$5,479.65 of record in the county recorder's office, or in the office of the county clerk, except as such fact may be inferred from the plaintiff's allegation that the statement of the defendant, "That the property was subject to the lien of a judgment," etc., was "false, which the defendant then and there well knew." Taking the complaint as a whole, it is apparent that the plaintiff was claiming, as he now does, that the real property was not subject to any liens not shown on the registrar's certificate, and that the defendant "maliciously" claimed that the certificate was not conclusive because the law for its issuance was invalid. The plaintiff's allegation that defendant's statement as to the judgment lien is false evidently takes issue with the defendant upon the validity of the lien, rather than upon the existence of the judgment. That this is the proper construction of the complaint is made manifest by the statements of the attorney who drew it, made in his brief on behalf of appellant in this court, wherein he states as follows:

"The amended complaint alleges that there was no judgment lien as claimed by defendant, and that the defendant 'maliciously represented that said registration law under which plaintiff's title to said property was registered was invalid,' etc. In view of the decisions of this court in *Robinson v. Kerrigan*, 151 Cal. 42, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas.

829, and in the *Application of Scott*, 182 Cal. 83, 187 Pac. 9, and of the appellate court, Second division, in the *Application of Julius Seick* (Civ. No. 2559) decided February 26, 1920, 189 Pac. 314, we believe that the defendant merits the charge of malice. Section 91 of the Land Registration Act (Stats. 1915, p. 1932) provides: 'No judgment, or decree, or order of any court shall be a lien on or in any wise affect registered land, or any estate or interest therein, until a certified copy of such judgment, decree, or order, under the hand and official seal of the clerk of the court in which the same is of record, is filed in the office of the registrar, and a memorial of the same is entered upon the register of the last certificate of the title to be affected.'

"In the *Application of Seick*, supra, the court, in construing section 77 of the same act, requiring notice of tax sale to be filed with the registrar within five days, the contention being that the statute is directory, and not mandatory, says: 'We cannot accede to this construction of the plain and unambiguous language of the act.' And again the court says in the same opinion: 'The prime purpose of the Torrens Law is that there shall be in the registrar's office in the book known as the "register of titles" a leaf or folium to which any person dealing with any particular piece of land that has been brought under the act may look in order to ascertain the exact condition of the title before purchasing, leasing or loaning money secured by mortgage.'

"All of the allegations of the amended complaint for the purpose of the demurrer are to be taken as true. It is clear, therefore that the amended complaint states a cause of action for slander of title, and if the proof sustains the allegations plaintiff is entitled to recover."

It is apparent from a reference to the cases cited by appellant in this paragraph of his brief, and from the brief itself, that the allegation of the plaintiff that the statement of the defendant was "maliciously false" was made in the complaint, because the Torrens Land Law is plain in its terms, and has been upheld by the courts in the cases cited, and that therefore the statement by the defendant of the condition of the title could not have been an honest expression of opinion. In short, the situation disclosed by the complaint is as follows: The plaintiff presented to his vendee a duplicate certificate of title issued by the registrar under the Torrens Land Law; the purchaser demanded as additional assurance of title a guaranty of the defendant, and this the plaintiff agreed to furnish; the defendant declined to furnish such a guaranty of title unless a judgment of \$5,479.65 of record was specifically released; the plaintiff agreed to secure such release, and paid \$1,000 for such purpose to the defendant; thereupon the defendant wrote its guaranty of the title to the purchaser, and the plaintiff secured the purchase money; he now seeks to recover the \$1,000, which the defendant required him to pay as a con-

dition of entering into a guaranty with a third person, plaintiff's vendee, leaving the defendant obligated by its guaranty; if the defendant had retained the \$1,000 as a consideration for its outstanding guaranty, could the plaintiff recover it and his purchaser retain the guaranty secured by the payment of the \$1,000? Obviously not. If not, it is even more clear that, where the \$1,000 was paid out to so perfect the title that the purchaser would accept it, and the defendant guarantee it, the plaintiff, having consented to this transaction and enjoyed the benefit of it, ought not be allowed to recover the money he paid out in order to get the benefit.

The question as to whether the Torrens Land Law was valid or invalid, or whether the defendant honestly so believed, is entirely beside the question. The plaintiff knew all about his title; the purchaser did also. Both knew of the registrar's certificate, and they differed as to its effect, the purchaser being unwilling to accept the certificate alone. Plaintiff contracted to buy for his purchaser a guaranty issued by the defendant. The defendant sold to plaintiff the required guaranty, for its usual fees, plus \$1,000, to be paid to a lien claimant. Plaintiff agreed to pay this amount after securing the advice of an attorney and with full knowledge of the facts solely because he felt bound to his purchaser to do so, and being fully aware that defendant's contention was based upon a "maliciously" wrong and "false" view as to the effect of a statute. It is therefore clear that the loss or damage to the plaintiff was due, not to the interference by the defendant with the contractual rights and obligations of the parties to the contract, nor to the prevention of any sale, but to the defendant's insistence that it would not furnish a certificate of title unless the plaintiff conformed to its demand for the satisfaction of the judgment lien.

The defendant had a right to fix the terms upon which it would enter into the contract of guaranty. *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249; *Taggart v. Graham*, 39 Cal. App. 621, 179 Pac. 688. The damages alleged by plaintiff did not result from a slander of title. In the case of *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, an agreement of sale had been entered into between the plaintiff and his vendee. The vendee, because of the alleged slander of title, declined to carry out his agreement. It was held that the plaintiff could not recover. This court there stated the rule as follows:

"In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that, whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement."

The court held that, if the purchaser was released by the vendor on account of the slander, such release was his own voluntary act, and the vendor could not recover. 90 Cal. 541, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151. If not, that he had not been damaged. Here the plaintiff with less justice is complaining, not that he lost a sale, but that he was forced to complete one. It is clear in any view of the case that the statement of the defendant as to the condition of plaintiff's title was not the proximate cause of his loss, which resulted from his voluntary payment, with full knowledge of all the facts. *Burkett v. Griffith*, supra. See, also, as to voluntary payments, *Brumagim v. Tillinghast*, 18 Cal. 265-271, 79 Am. Dec. 176; *Burke v. Gould*, 105 Cal. 277, 38 Pac. 733.

We cannot see that plaintiff has made out a case of payment under duress. Plaintiff in this behalf relies upon *Burke v. Gould*, supra, and *McTigue v. Arctic Ice Cream Co.*, 20 Cal. App. 708, 718, 130 Pac. 165. These cases recognize that the possessor of personal property may exercise duress over the owner in certain cases by unlawfully refusing to surrender the possession thereof to the owner until his illegal demands are met, and have no applicability to the facts of this case, for the defendant had no possession of any property which it refused to deliver. The payment made by plaintiff was not made to secure his property from the defendant, but to secure a contract of guaranty from the defendant which it would not otherwise have entered into.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.

187 Cal. 162

MILLOTT et al. v. ASSOCIATION OF MARE ISLAND EMPLOYEES et al. (Sac. 3218.)(Supreme Court of California. Oct. 3, 1921.
Rehearing Denied Oct. 31, 1921.)**1. Corporations ⇐82—Shares held by stockholder in excess of certain number held stock, and not evidence of indebtedness, though articles provided for repurchase.**

Though articles of incorporation of corporation organized by employees of navy yard to operate ferry for benefit of such employees provided for the creation of a fund to repurchase stock held by any stockholder in excess of 10 shares, but under the by-laws all shares of stock drew dividends and were transferable, the stock held by a stockholder in excess of 10 shares was corporate stock, and not merely evidence of indebtedness.

2. Corporations ⇐82—Corporations held not compelled to repurchase stock held by a stockholder in excess of certain number of shares.

Where articles of incorporation of corporation organized by employees of navy yard to operate ferry in the interests of such employees provided for the creation of a fund wherewith to purchase the stock held by a stockholder in excess of 10 shares, the corporation and its officers could not be compelled to repurchase such excess stock before distribution of assets on dissolution of corporation.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Petition for writ of mandate by J. P. MilloTT and others against the Association of Mare Island Employees, a corporation, and its directors. Judgment denying writ, and petitioners appeal. Affirmed.

See, also, 186 Pac. 378.

L. G. Harrier, of Oakland, and Theodore W. Chester, of Sacramento, for appellants.

W. H. Morrissey and Frederick M. Shipper, both of San Francisco, for respondents.

ANGELLOTTI, C. J. This is an appeal by plaintiffs from a judgment of the superior court, given upon sustaining a demurrer to the petition, denying an application for a writ of mandate requiring the corporation and its directors to repurchase from the funds of the corporation certain corporate stock styled "excess stock," prior to a distribution of the assets of the corporation among the stockholders.

It appears from the petition that the corporation has sold all of its personal property and is preparing to dissolve, with the result that the money constituting its net assets will be distributed among the stockholders. Petitioners seek to compel purchase by the corporation from the assets before distribu-

tion of all the so-called "excess stock" for an amount per share specified in the by-laws and the consequent extinction of such stock. The result would be that upon a division of the residue pro rata among the remaining stockholders a larger amount would be received by them than if the distribution was made without such purchase among all the stockholders, including those holding "excess stock."

The theory of petitioners is that under the articles of incorporation this "excess stock" —is not "stock" in the real sense of the word, but that it in fact simply evidences a loan to the corporation which should be paid before distribution, and that in any event it is the duty of the corporation and its officers to purchase the same at the price fixed by the articles and by-laws.

The corporation was one formed by employees of the federal government at the Mare Island navy yard; its special object being to acquire and operate a ferry between the city of Vallejo and Mare Island in the interest of employees of such navy yard. The articles provided for the sale and issuance of the stock "with the object of keeping" it, so far as permitted by law, in the hands of employees of the yard, and "under such proxy conditions as to voting same as will assure equal voice and vote to all the stockholders." One of the purposes was to operate such ferry "at a transportation charge that will pay the expenses of operating the ferry together with eight (8%) per cent. per annum to all stockholders subscribing for stock in the corporation, and to create a fund to pay all money borrowed by the corporation and to purchase all the stock that any stockholder may have obtained or acquired in the corporation in excess of 10 shares, the stock of the corporation to be sold and issued with the condition that the corporation may at any time call in and acquire each share of stock that any stockholder holds or has acquired in excess of 10 shares by paying therefor the par value of each such share together with interest at the rate of eight (8%) per cent. per annum on the par value of the stock from the date of its issue, provided that all interest theretofore paid on said stock shall be deducted from the interest to be paid by the corporation in the event of its purchasing such stock." It was provided that the capital stock shall be \$75,000, divided into 75,000 shares of the par value of \$1 each.

The term "excess stock," as used in these proceedings refers to the stock that "any stockholder holds or has acquired in excess of 10 shares." So far as the articles of incorporation are concerned, there is nothing to distinguish it from any other stock issued by the corporation, and the articles simply in effect provided that all stock should be

sold subject to the condition that the corporation might call in, on payment of the specified price and interest, any stock held by a stockholder in excess of 10 shares; in other words, that all stock should be sold subject to the condition that the corporation might at any time reduce any stockholder's holding to 10 shares, by purchasing at the specified rates the additional amount held by him. All was included in the 75,000 shares of the par value of \$1 each.

Examination of the by-laws discloses nothing to indicate that any stock issued by the corporation was not to be considered as ordinary stock, or its holders other than ordinary stockholders. The holders of all stock were undoubtedly "stockholders" within the meaning of article II, relative to the election of directors, and of article IV. All stock was to share in dividends under paragraph 2 of article V, whereby the directors were authorized to declare dividends out of the surplus profits, "when such profits shall, in the opinion of the directors, warrant the same, and after all debts have been paid, and eight per cent. (8%) interest to all stockholders." All stock issued was to be issued as ordinary stock, the only limitation as to issuance to one stockholder of more than 10 shares being that in such event a power of attorney or proxy, designed to secure "equal voice and vote to all stockholders," be executed. Paragraph 3, art. V, and article XIII. All stock was to be transferred in the same way. Article XIV. All stock issued was "subscribed stock" and its holders "stockholders" within the meaning of articles XV and XVI relative to meetings and voting. The contention of petitioners is necessarily based on certain other provisions to which we will now refer. By article XX it was provided that all stock was to be sold "subject to the right of the corporation to repurchase the same at any time upon paying" \$1 per share and interest, and to such other conditions as the board of directors may deem advisable, "except that no compulsory action shall be taken by the corporation that will reduce the ownership of stock to less than ten shares for each member." It is further declared in this article that this provision is "to the end that the business and affairs of the corporation shall be conducted, maintained, and carried on, in the interest of the majority of its stockholders," and that "the corporation shall repurchase (the financial condition of the corporation permitting), first, such shares of stock owned and held by any stockholder in excess of 10 shares, thereby limiting the ownership of stock to 10 shares for each stockholder, and giving to each equal rights and privileges." It is then provided that—

"The corporation may at any time through its board of directors, pursuant to the terms and conditions of sale and issuing of stock, repurchase the same whenever it is deemed for the

best interests of the corporation and stockholders so to do."

It is then provided:

"To the end that the stockholders may have equal say and voice, it is deemed advisable that a form of proxy, agreement of sale, and power of attorney be executed and required of each stockholder as a condition to be complied with before any stock in excess of 10 shares may be purchased by any person."

The form of this is set forth. By it the purchaser appoints some specified stockholder his agent and attorney to represent him and vote said stock at all meetings while he remains owner of the stock, limiting the power of such attorney to vote "as the majority of the persons present as stockholders voting cast their votes," and agrees that, if he revokes the power of attorney, he will sell the stock for \$1 per share (its par value) to said agent, as of the date of revocation. It is further declared that this power of attorney and proxy is not to affect the right of the corporation to purchase said stock "at any time * * * by paying me" \$1 per share and interest.

In article XVII it is provided that no repeal or amendment to the by-laws shall affect the obligations of the corporation to pay 8 per cent. interest "to its stockholders, or any funds that it may borrow, or any security it may give for funds borrowed, or affect the obligation of the corporation to pay one dollar (\$1.00) per share and interest at eight per cent. (8%) to stockholders who have assisted the corporation by purchasing more than 10 shares of stock to permit it to raise funds with which to purchase equipment of the ferryboats Vallejo, Ellen, equipment," etc.

The corporation has during its existence repurchased from stockholders so-called excess stock of the value of approximately \$16,000. It is in such financial condition that it can repurchase all such stock without detriment to claims of creditors. It sufficiently appears that it had closed the business for which it was incorporated, sold its property, and is preparing to dissolve, and that the real burden of the complaint of petitioners, who with other stockholders presumably belong to "the 10 share only" class, is that the value of their shares will be smaller on distribution of the assets, by reason of the existence of the so-called excess stock, than it would be if such stock were repurchased by the corporation before distribution at \$1 per share and interest. The corporation has finished its work, and no reason whatever appertaining to the conduct of the affairs of the corporation as a going concern exists for the purchase of any outstanding stock.

[1] There appears to us, in the light afforded by the articles of incorporation and

the by-laws, no lawful foundation for a conclusion that this so-called "excess stock" is evidence of an indebtedness, or its holders simply creditors of the corporation. The object of the issuance of all the stock was, of course, to secure money to buy property essential to the establishment and maintenance of the proposed business, but we had thought that such was always a purpose of the issuance of stock. Each person who acquired stock, whether 10 shares only or more, became a stockholder in the corporation with all the rights and liabilities of a stockholder as to all of the stock held by him for so long as he continued to hold it, subject only in so far as any amount over 10 shares was concerned to the right of the corporation, under the terms of the contract, to repurchase the same from him at its par value, with interest at 8 per cent. per annum. The provision for the payment of par value and interest was simply the fixing by the parties of a purchase price in the event of the exercise of its option by the corporation. The provision in article XVII precluding repeal or amendment of the by-laws in certain particulars, in so far as material here, simply precludes any repeal or amendment of the provisions securing to the stockholder the designated price in the event of a repurchase by the corporation. The general guaranty of 8 per cent. interest on stock, whatever it means or may be worth, runs invariably, in so far as the by-laws are concerned, to all stockholders.

[2] The remaining question is whether the corporation officers can be compelled to repurchase at the fixed price all stock held by any stockholder in excess of 10 shares, under the existing circumstances. We may concede for the purposes of the decision the validity in all respects of the provisions of the by-laws relative to this matter. Careful consideration of articles and by-laws leaves no doubt as to the full purpose and scope of these provisions; the same being substantially stated therein. The object was to have the business of this corporation, which was to be confined as far as possible to employees of the Mare Island navy yard, run, in so far as was practicable, according to the desires of the majority of persons who were stockholders rather than according to the desires of the holders of the majority of stock. Equality of "say and voice" to every individual stockholder in the management of the business of the corporation as a going concern, regardless of the amount of stock held by him, was the sole object of all these provisions as to repurchase, as it was with regard to the provisions as to manner of voting, and requirement of proxy. There is to our minds nothing in articles or by-laws to warrant a conclusion that for some purpose not at all incident to the management of the corporation as a going concern, in this case

in the closing of the affairs of the corporation, the mere increase in value of certain stock held by certain stockholders to be attained by extinguishing by purchase of their stock the rights of others to participate as stockholders in the distribution of the corporate assets, the corporation or its officers can compel a retransfer of any stock. As we have seen, this corporation has ceased to do business, has sold its property, and is about to dissolve, and apparently has a large residue of money to distribute pro rata among its stockholders. So far as the corporation is concerned and the management of its affairs, there is no longer any necessity for or propriety in the repurchase of any stock. The only thing remaining to be done is to dissolve and distribute the assets among the existing stockholders according to their respective holdings. We are satisfied that respondents are not acting in violation of articles of incorporation or by-laws in refusing at this stage to attempt a repurchase of any stock.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

(187 Cal. 181)

COULTER v. POOL, County Auditor, et al.
(S. F. 9792.)

(Supreme Court of California. Oct. 7, 1921.)

1. Counties $\S$ 61—Statutes $\S$ 89—County engineer act held unconstitutional in that it creates offices and delegates authority to supervisors, and permits departure in uniformity of county government.

St. 1919, p. 1290, providing for the appointment of a county engineer, held unconstitutional in that it creates a county office and delegates to the board of supervisors of counties not having charters under Const. art. 11, $\S$ 7½, 7½a, authority to fix the compensation of such county officer in violation of section 5, and in that it permits a departure from uniformity in county government provided for by section 4, by making it optional with supervisors of county as to whether such officer shall be appointed; the county engineer so provided for being a county officer, and not a mere employee, notwithstanding provision of statute that he shall be deemed an "employee and not a county officer."

2. Statutes $\S$ 181(1)—Construed according to legislative intent.

A statute will be construed according to the legislative intent if consistent with the real object and purpose of the statute.

3. Constitutional law $\S$ 47—Constitutionality not dependent on legislative declaration as to purpose, but on scope and effect of statute.

A legislative declaration, whether contained in the title or in the body of a statute, that the

statute was intended to promote a certain purpose, is not conclusive on the courts, and they must inquire into the real as distinguished from the ostensible purpose of the statute, and determine whether it in its scope and effect departs from the declared legislative design and contravenes the Constitution.

4. Officers ⚡3—Test as to whether statute creates public office or really provides for employment of employee.

Whether a statute creates a public office or provides for the employment of the employee depends, not upon the name given the particular office, but upon the power granted, the duties and functions to be performed, and other circumstances manifesting the true character of the position.

5. Officers ⚡1—"Public officer" defined.

A "public officer" is a public agent, and acts only on behalf of the public, whose sanction is generally necessary to give his act the authority and power of a public act or law, a public officer being distinguished from a mere employee in that a public duty is delegated and intrusted to him, and in that there is a fixed tenure of position, the execution of a public oath of office, and generally of an official bond, the liability to be called to account for misfeasance or nonfeasance in office, and the payment of a salary from the general county treasury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

6. Counties ⚡61—"County officer" defined.

A "county officer" is a public officer who fills a position usually provided for in the organization of counties and county governments, and is selected by the county to represent it continuously and as part of the regular and permanent administration of public power in carrying out certain acts with the performance of which it is charged in behalf of the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County Officer.]

7. Statutes ⚡89—"System" within constitutional provision as to system of county governments, defined.

The word "system," within Const. art. 11, § 4, providing that the Legislature shall establish a "system" of county governments which shall be uniform throughout the state, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete harmonious whole, and imports both a unity of purpose and entirety of operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, System.]

8. Highways ⚡113(4)—Contractor who performed work on order of county supervisors entitled to compensation.

Contractor who performed work on order of county supervisors under Pol. Code, §§ 2641, 2645, subsequent to appointment of county engineer, held entitled to payment in view of the invalidity of the county engineer act.

In Bank.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Application by Paul Coulter for a writ of mandamus against C. A. Pool, as Auditor of the County of Sonoma, and others. Writ refused, and plaintiff appeals. Reversed.

W. F. Cowan, of Santa Rosa (R. M. F. Soto, of San Francisco, of counsel), for appellant.

G. W. Hoyle, Dist. Atty., of Santa Rosa, for respondents.

LENNON, J. In this proceeding the plaintiff sought, and was denied, mandamus to compel the defendants, respectively the auditor and the treasurer of the county of Sonoma, to audit and pay the claim of plaintiff presented against said county in the sum of \$39.24 for labor alleged to have been performed by the plaintiff upon certain of said county's highways.

The claim in controversy is founded primarily upon the admitted fact that plaintiff performed labor upon said highways under and by virtue of the direction and authority of one of the supervisors of said county elected from and representing the supervisorial district in which the labor was performed, and who, by virtue of his office, was road commissioner for said district, and, as such commissioner was given supervision of the highways in his district. Pol. Code, §§ 2641, 2645. The labor which is the basis of the claim in controversy was performed on July 26, 1919, subsequent to the appointment by the board of supervisors of a county engineer, made pursuant to the provisions of an act entitled:

"An act providing for a county engineer for each county in this state, * * * his appointment, manner of removal, qualifications, compensation and duties; transferring to such engineer certain powers, functions and duties heretofore vested in and performed by county surveyors and members of the board of supervisors; * * * to provide for abolishing the office of county surveyor and for the fixing and levying of taxes for road purposes." Stats. 1919, p. 1290.

Section 13 of this act provides that it shall be known and designated as "the county engineer act," and it will be hereinafter referred to by that title. Stats. 1919, pp. 1290, 1295. In keeping with the provisions of this act, the board of supervisors, when appointing the county engineer for a term of four years, fixed his salary at the sum of \$350 per month, and the number and compensation of his assistants. Said labor was performed by plaintiff without, and never has had, the authority, inspection, and approval of said county engineer as required by the provisions of subdivision "b" of section 5 of

said act. The claim in question was, however, approved and allowed by the board of supervisors as a legal charge against the county, apparently upon the theory that, inasmuch as an ordinance passed subsequent to the ordinance appointing the county engineer, with apparent intent to do so, excluded the supervisorial district in which the labor involved was performed from the scope and operation of the ordinance appointing the engineer, it thereby, in effect, left the supervisor of that district as the ex officio road commissioner thereof in control of the work to be done on the highway therein to the exclusion of the authority and direction of the county engineer. The writ seeking an order directing the auditing and payment of the claim thus allowed was denied by the court below upon the theory that the county engineer act, having been adopted by the board of supervisors of Sonoma county, applied throughout that county; that the board of supervisors had no authority to except one district of that county from the operation of the act, and that plaintiff's claim was therefore void on its face because the work performed by plaintiff was not performed under the provisions of the county engineer act. The proceeding in mandamus is now here upon appeal of the plaintiff.

[1] We shall concern ourselves only with the constitutionality of the act, for if it be held, as we think it must, to be unconstitutional, then it does not invalidate the plaintiff's claim, and there is no need to discuss and decide the several remaining questions involved in the appeal.

[2, 3] At the outset we are satisfied that the act in question contemplates the creation of a county office, and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer. And we are convinced that this is so despite the verbiage of the act, industriously employed, which, among other things, declares that the county engineer appointed by the board of supervisors "shall be deemed an employee and not a county officer * * * subject to the control and supervision of the board of supervisors." We are not unmindful of the cardinal rules of statutory construction which require an interpretation of a statute which will give effect to the legislative intent, which, if consistent with the real object and purpose of the statute, must be adopted, and doubtless the express legislative declaration found in section 1 of the act purporting to designate the official character of the county engineer and specifying the category in which, when appointed, he and his duties must be considered and treated, tends in some degree to show the legislative intent to provide that the county engineer was to be a mere employee of the board of super-

visors, and not a county officer who was to be part and parcel of that uniform system of county government contemplated and commanded by the Constitution. Const. of California, art. 11, § 4. While ordinarily it is the rule that, when the lawmaking power distinctly states its design in the enactment of a particular statute, no room is left for construction, nevertheless, as the District Court of Appeal well said during its discussion of this phase of the case:

"The label placed by the Legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms."

In other words, a legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose, is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the Legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes the fundamental and supreme law of the state. *Matter of Jacobs*, 98 N. Y. 98, 110, 50 Am. Rep. 636; *State v. Redmon*, 134 Wis. 89, 107, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. This being so, it cannot be rightfully held that, standing alone, the legislative declaration in the instant case compels the conclusion without more ado that the act in question did no more than provide for the mere employment of a county engineer, and did not, in truth and in fact, attempt to create a county officer to be known as the county engineer. A proper construction of the act requires that due regard be given to the real object of the act. *People v. Dana*, 22 Cal. 11; *Genilla v. Hanley*, 6 Cal. App. 614, 92 Pac. 752. This may, we think, be readily ascertained, despite the legislative declaration to the contrary, by a consideration of the requirements of the act as gathered from the context of the act in its entirety.

[4] Looking, then, to the context of the act in its entirety for the purpose of ascertaining its real, as distinguished from its ostensible, purpose, we are first brought to a consideration of the question of what distinguishes a public office from a mere employment. The words "public office" are used in so many senses that it is hardly possible to undertake a precise definition of the meaning and purpose of the phrase which will adequately and effectively cover every situation. It is far less difficult to conceive and comprehend the requirements which characterize a public office than it is to formulate a definition thereof which will have universal application

and be entirely free from fault. Its definition and application depend, not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. *Knox v. L. A. County*, 58 Cal. 59; *Mechem on Public Offices*, § 4; *Hartigan v. Board*, 49 W. Va. 14, 38 S. E. 698. A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. *State v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

[5] A public officer is a public agent, and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office, and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury. *U. S. v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *U. S. v. Germaine*, 99 U. S. 511, 25 L. Ed. 482; *People v. Langdon*, 40 Mich. 673; *State v. Jennings*, supra; *Knox v. L. A. Co.*, supra.

[6] As a matter of course, in keeping with these definitions, a county officer is a public officer, and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the "county" to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public. *Sheboygan County v. Parker*, 70 U. S. 93, 18 L. Ed. 33; *State v. Samuelson*, 131 Wis. 499, 111 N. W. 712; *State v. Higginbotham*, 84 Ark. 537, 106 S. W. 484.

Measuring the provisions of the act hereinabove referred to by the authorities just cited, it seems evident, beyond argument, that

the so-called "employee" provided for in the statute in question is, in fact, a public and a county officer. The act specifies (section 2) that the tenure of the position of county engineer shall be a term of four years from the date of his "appointment," providing for removal only in the event of inefficiency, malfeasance, or misconduct in office, and then upon written charges filed with the board of supervisors and after a hearing of the charges by said board, and, if found guilty, the board must forthwith remove him from "office" and shall immediately appoint his "successor" in the manner provided in the act. The act also requires (section 2) that "prior to entering upon the duties of his employment the county engineer shall file with the county clerk the *oath of office as prescribed for the county officers* and a bond conditioned upon the faithful performance of his duties, with sufficient sureties approved by a judge of the superior court, in the sum of five thousand dollars." (Italics ours.) The salary, which is to be fixed by the board of supervisors, "shall be paid monthly out of the county treasury of the county in which he is appointed and in the same manner as county officers; * * * provided, however, that the compensation of the county engineer in any county shall not be less than the compensation received by the county surveyor of that county at the time said county engineer is first appointed." Section 3. With respect to duties, it is provided that, among other things, "the county engineer shall be ex officio road commissioner of and for each and every road district of his county, and, subject to the control and supervision of the board of supervisors as herein provided" (section 4), and "shall * * * make, or cause to be made, all surveys, maps, plans, specifications and estimates necessary or required for the construction, improvement, maintenance and repair of the county roads, highways and bridges, and shall, from and after the first Monday in September, 1919, have and exercise all the powers and duties, and perform all the functions which are now by law conferred or imposed upon county surveyors * * *" (section 5 [a]). The act further provides that the county engineer "may also hold and perform the duties of the office of county surveyor, but in all such cases no salary or other compensation shall be paid to him as county surveyor" (section 5 [f]), and that he shall, at regular monthly meetings of the board make a report to the board containing "the recommendation of acceptance or rejection of any public work, completed, and all official announcements or statements which the engineer is required to make to the board" (section 5 [h]), and "submit to the board of supervisors a certificate over his signature and official seal to the effect that such work by the contractors thereof has

been completed in accordance with the specifications thereof and recommending its acceptance" (section 9). The act in terms provides that, upon the appointment of the county engineer, the county office of county surveyor shall, in certain specified contingencies, be deemed abolished. Nevertheless, as is evidenced by some of the provisions above set forth, the office and duties of the county surveyor are, in effect, by the act in question merged into the office and duties of the county engineer. The county surveyor, under the general law in force throughout the state, is a county officer (Pol. Code, § 4013), and as such is required to do certain designated county work, not specially mentioned in the act in question, pertaining to the governmental functions of the county (Pol. Code, § 4214 et seq.). The Legislature therefore attempted to transfer the burden of the duties of the county surveyor to the so-called county engineer, in conjunction with the added and different duties imposed upon him by the act in question. That this is so is further evidenced by an amendment to the county engineer act in 1921 by which a provision was added to the effect that, upon the petition of a certain percentage of qualified electors of the county, the board of supervisors in any county which shall have adopted the provisions of the act "shall discontinue such office of county engineer by ordinance declaring their intention so to do and in such ordinance the board shall provide that the person holding the office of county engineer at the time the ordinance becomes effective shall be and become the county surveyor of such county until the next ensuing general election. * * *" Stats. 1921, p. 934.

That the position of county engineer is in fact a county office is apparent, in view of the authorities previously cited, from the provisions of the act above quoted and referred to, namely, the provision for trial and removal of the county engineer in the event of misfeasance or nonfeasance in office, the fixing of the tenure of office, the requirement of a bond and the taking of the oath prescribed for county officers, payment of salary from the general county treasury, the political and governmental nature of his duties, and the relation between the position of county engineer and the office of county surveyor. "Clearly, it was a county office." *Reed v. Hammond*, 18 Cal. App. 442, 123 Pac. 346. This being so, it may be stated, in passing, that it follows that the county engineer act is practically inoperative for the reason that the act itself specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person appointed to the position of county engineer is void to that extent for the reason that the Constitution imposes upon the Legislature exclusively the duty of regulating

the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7½ or 7½a of article 11 of the Constitution, or there is some other express constitutional exception. The state Legislature cannot directly delegate to the boards of supervisors of the various counties the power of fixing the compensation of a county officer. Const. Cal. art. 11, § 5; *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161.

Concluding, as we do and must, that the position of "county engineer" which the Legislature attempted to provide for by the act under consideration is in truth and in fact a county office, we are then confronted with the question of whether or not the act, if permitted to become operative, is in keeping with and does not violate the mandatory provision of the Constitution which requires that "the Legislature shall establish a system of county governments which shall be uniform throughout the state. * * *" Const. Cal. art. 11, § 4.

We may concede, for the purpose of discussion, that the rule prohibiting the delegation of legislative powers by a state Legislature does not necessarily prohibit a conditional statute, the taking effect of which in each locality may be made to depend upon such subsequent event as its approval by the electors of that locality. Likewise it may be conceded that the act in question may be said to be a general and uniform law because the general provisions thereof are applicable alike to every county in the state. The fact remains, however, that the Constitution contemplates and commands that the system of county governments shall be uniform throughout the state, except in those special instances where the Constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which adopt charters in accordance with the provisions of sections 7½ and 7½a of the Constitution. There is no section of the Constitution which specially excepts the political functions dealt with by the act in question from the requirement that the general scheme of county governments provided for by the Legislature must be uniform throughout the state. Therefore, if the county engineer act will, in its operation, necessarily tend to interfere with this uniformity, it is unconstitutional and void.

Section 1 of the act provides that—

"The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent. of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer * * * as county engineer."

Section 11 provides that, if the provisions of the act are adopted in a county by the appointment of a county engineer, the office of county surveyor shall be abolished either upon the date upon which the appointment is made and accepted if the person who holds the office of county surveyor is the one appointed county engineer, or, in other cases, upon the expiration of the term of the person who holds the office of county surveyor at the time the appointment of county engineer is made. By the 1921 amendment previously mentioned, the office of county engineer may be abolished, and that of county surveyor reinstated, upon the petition of a certain percentage of electors. It is evident, therefore, that the act is not mandatory in its operation. To the contrary, it is provided in the act that the question as to whether its provisions shall become operative in any particular county or whether that county shall continue under the provisions of the general law on the subject heretofore in force is a matter to be determined, in the last analysis, solely by a percentage of the electors of that county. This being so, the act by its express terms renders possible and probable a situation where in one or more of the counties of the state the duties of surveying and fixing the boundaries of the public lands and roads, etc., would be performed by the county surveyor, an officer elected by the people of the respective counties and subject to the rules governing elected officials, while in another or other counties there might be an arrangement whereby these same duties would be performed by an official appointed by the board of supervisors, which official would, in addition to the duties prescribed by the general law for county surveyors, also perform the various duties set forth in section 5 of the county engineer act. In the counties operating under the general law each supervisor is ex officio road commissioner in his supervisorial district, whereas in counties electing to adopt the provisions of the county engineer act the county engineer would be "ex officio road commissioner of and for each and every road district of his county."

[7] The word "system," as employed in the Constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation. *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; *Board v. State*, 26 Okl. 366, 109 Pac. 563; *State v. Riordan*, 24 Wis. 484. As previously indicated, uniformity means consistency, resemblance, sameness, a conformity to one pattern. In this resemblance, in this sameness, in this conformity of a class to one pattern, consists the uniformity of system which is essential to the creation and

continuity of a uniform system. And therefore the constitutional mandate to establish a uniform system of county government throughout the state means one system applicable alike in all its parts and continuously operating equally in all of the counties of the state. If a particular county were expressly exempted from the operation of the act in question, there would be no doubt but that it would violate the uniformity of system contemplated and required by the Constitution. And, while in the act under consideration no particular county is expressly exempted from the operation of the law, nevertheless people of any one or more counties may, without regard to any action taken by the remaining counties, determine that they will or will not be subject to the operation of the law, and thereby, of their own volition, create an exception to the general and uniform system of county government. In other words, the Legislature by the act in question attempted to do by indirection that which it could not do directly; that is to say, having no power to exempt one or more counties from the operation of the act, it could not confer that power upon the people of the different counties. The Legislature itself must by its own enactment establish in the first instance a system of county government uniform throughout the state, and it necessarily follows that such system when once established must, in so far as its uniformity is concerned, be kept intact by the Legislature, and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them.

Inasmuch as the county engineer act provides for a county office involving the exercise of political functions, we conclude that the said act violates the constitutional requirement that the system of county governments prescribed by the Legislature shall be uniform throughout the state, by reason of the fact that it is not mandatory in its operation, but that it is optional with each county whether or not the office provided for by the act shall be established therein. *L. A. County v. Kirk*, 148 Cal. 385, 83 Pac. 250.

This conclusion is not in conflict with the cases relied upon by respondents. In *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, the court had under consideration a statute which authorized the appointment of sealers of weights and measures, but left the determination as to whether or not this authorization should be availed of to the different counties and municipalities. The statute dealt with an office which was specifically provided for by a special section of the Constitution (Const. art. 11, § 14), and which the court held was "distinct from the general political functions of counties and cities and

the general scheme of county or municipal government." Likewise the statute upheld in the case of Board of Law Library Trustees v. Board of Supervisors, 99 Cal. 571, 34 Pac. 244, left to the election of the different counties the matter of the establishment of law libraries, but such institutions are not part of the system of county government, at least in so far as the execution of "political functions" is concerned, and consequently the point here presented was not discussed in that case. In *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427, the act provided for one additional deputy sheriff and two deputy clerks in any county in which an additional judge of the superior court was created by the Legislature. This provision was valid, for, as stated in the opinion, it operated in each county alike upon the creation of an additional judge in that county by the Legislature.

[8] The employment of plaintiff to perform the work in question was ratified by the board of supervisors by allowing his claim for compensation for the work (*Power v. May*, 123 Cal. 147, 55 Pac. 796), and, in view of the fact that the county engineer act must be held unconstitutional, the record discloses no valid objection to the payment of the claim thus allowed. Disregarding the findings concerning the proceedings under the said county engineer act, the remaining findings of the trial court are sufficient to support a judgment in plaintiff's favor. Accordingly the judgment is reversed, with directions to the trial court to grant the relief prayed for in plaintiff's petition.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

187 Cal. 175

PACIFIC PORTLAND CEMENT CO., CONSOLIDATED, v. PLACER COUNTY LAND CO. (Sac. 2912.)

(Supreme Court of California. Oct. 6, 1921.)

1. Vendor and purchaser ⚡31—Conveyances of land in chain of title, naming center line of track as a boundary held notice to purchaser of railroad's claim.

A call in several conveyances in chain of title for the center line of a railway track as one of the boundaries gave notice to purchaser of the adverse occupation and claims of a railroad right of way extending to the fence bordering on the apparent right of way.

2. Vendor and purchaser ⚡44—Evidence held not sufficient to support finding that the inclusion of right of way of a railroad in a deed was a mutual mistake.

On a purchaser's claim for deficiency in quantity, evidence that the inclusion of railroad

right of way in the deed was a mutual mistake held not sufficient to support judgment for purchaser.

3. Vendor and purchaser ⚡31—Purchaser, with notice that railroad claimed right of way, had duty to investigate extent of claim.

Where a purchaser claiming damages for deficiency in quantity had notice from conveyances in chain of title and from a fence on the land that a railroad occupied and claimed a right of way in the land, he was bound to investigate the extent of the railroad's rights.

4. Vendor and purchaser ⚡31—Public statute of Congress, granting right of way to railroad, was constructive notice to purchaser of railroad's claim.

The act of Congress under which a right of way was granted to railroad company, being a public statute, was constructive notice to both vendor and purchaser of the adverse claim of the railroad company.

5. Vendor and purchaser ⚡37(3)—In absence of fraud or an agreement, express or implied, for a good or particular title, purchaser of land buys at his peril.

In absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril, and the vendor's representation that he had title to a disputed strip occupied as railroad right of way, of which the purchaser had notice, was a mere statement of opinion.

6. Vendor and purchaser ⚡37(3)—Mere expressions of opinion by vendor as to sufficiency of title do not constitute fraud or deceit.

Mere expressions of opinion as to sufficiency of title, when means of information are equally accessible to both parties and no confidential relation exists between them, do not constitute fraud or deceit on the part of the vendor.

7. Vendor and purchaser ⚡31—Purchaser with notice of adverse possession of part of land cannot avoid liability for purchase price.

Where the purchaser had notice, through conveyances in chain of title, naming as a boundary the middle of a railroad track, and from the fact that the railroad ran across the land and its right of way was fenced, that part of the land was held by the railroad as a right of way, he cannot avoid paying the purchase price of the entire tract for which he bargained.

In Bank.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the Pacific Portland Cement Company, Consolidated, against the Placer County Land Company. From judgment for defendant, plaintiff appeals. Reversed.

Pillsbury, Madison & Sutro, of San Francisco, and A. E. Roth, of Stanford University, (Marshall P. Madison, of San Francisco, of counsel), for appellant.

Geo. W. Hamilton, of Auburn, for respondent.

SLOANE, J. This action was begun by plaintiff to foreclose a purchase-money mortgage on land conveyed by plaintiff to defendant. There was a cross-complaint by defendant to recover damages from failure of title to a portion of the land. Judgment was for the defendant, and the plaintiff appeals.

The only matters in dispute arise under the averments of the cross-complaint that the agreement with and deed to the defendant called for a tract containing 22½ acres, whereas plaintiff only had title to 16 acres of the tract conveyed. The deed to defendant described the land by courses and distances as follows:

"Beginning at the northeast corner of the west half of the northeast quarter of section 10 in township 12, north, range 8 east, Mount Diablo base and meridian, and running thence south along the line between the east half and the west half of the northeast quarter of section 10 a distance of 1320 feet to a stake; thence at right angles west a distance of 802 feet to the center line of the Central Pacific railway track; thence in a northerly direction along said center line of said railroad track to its intersection with the north line of said section 10; thence east along the north line of said section 10 a distance of 669 feet to the place of beginning; being a fractional part of the north half of the west half of the northeast quarter of said section 10."

No reference is made in the deed to the acreage of the tract, but it is in evidence that a computation of the area inclosed within the described boundaries shows that it comprises 22½ acres.

[1] It is conceded that the Southern Pacific Company, as successor to the Central Pacific Railway Company, at all times affected by these proceedings, owned a strip of the above-described premises 200 feet in width along the entire westerly line, described as the "center line of the Central Pacific Railway track," and to the east thereof, comprising about six acres, and to which strip the plaintiff at no time had any title. For many years prior to the conveyance in question the railway companies had occupied the westerly part of this strip as a right of way for their tracks, and had maintained a fence on the easterly line between such strip and the remaining premises covered by plaintiff's deed. It is from the failure to obtain title to this strip of land under the deed from plaintiff to defendant that the controversy on this appeal arises.

The trial court, after finding the facts as above stated, further found that the plaintiff and its agents had knowledge of "the existence of the tracks and fence lines constructed and maintained over and across such mortgaged premises," and were advised and informed of the fact that all the right, title, or interest or estate that they or either of them had in or to said strip was "subject and subordinate to the rights, claims and title of the

railway company," but that neither plaintiff nor its agents advised or informed the defendant thereof. This finding is followed immediately by the further inconsistent and apparently irreconcilable finding that neither the plaintiff nor the defendant "had knowledge or were otherwise informed or advised" of the fact of ownership and right of possession by the railway company of the strip or parcel of land hereinbefore described.

As the evidence indisputably shows that all of the parties to this action knew and had known for years that the railway company was maintaining its tracks upon this strip of land and was maintaining the fence hereinbefore referred to, and as the deed itself carries the west line of the land conveyed to and along the center of a railway track, the only explanation for the finding that neither plaintiff nor defendant knew of the railway's ownership or right of possession is that the court intended to find that neither of them was informed of the nature or validity of the railway company's right or title. That such was the situation is a fair inference from the testimony in the case. It is clearly evident from the testimony of the agents of defendant who conducted the negotiations for the purchase of this land that they knew of the occupancy of this strip, or some portion of it, by the railway company, and that it was claimed and used by said company for a right of way, and that the railway company was maintaining the fence along the easterly border of this strip, thus separating it from the main part of the tract. Before the purchase was consummated defendant was furnished with an abstract of title to the entire tract, and in one of the transfers set out in the abstract there was a reservation "saving and excepting the right of way of the said Central Pacific Railroad Company." The call in each of the several conveyances for the "center line of the Central Pacific Railroad track," as one of the boundaries, must have served as notice that the railway company was claiming and occupying some portion of the tract as a right of way. Defendant's agents admitted that they had previous knowledge of litigation between the railroad and other landowners over this 200-foot right of way extending across adjacent lands. This 200-foot strip is claimed by the railway under an early congressional grant. The title of the company had, it was claimed, in one instance at least, been successfully contested, and defendant's agent and representative testified to knowledge that similar litigation had occurred on other sections of the railway line in that neighborhood, and "that sometimes the railroad company wins and sometimes loses." That defendant had notice that some portion of the tract it was bargaining for was occupied and claimed as a railroad right of way is beyond question.

That such claim extended from the railway track to the line of fence was suggestively apparent. The only reasonable conclusion is that both parties to the transaction understood that the disputed strip was included in the conveyance, as it had been in the several previous deeds in the chain of title, to pass to the grantee any interest that might be maintained against the railroad company, but with full knowledge of the railway's possession and subject to any valid claim it might have.

[2, 3] The theory upon which the trial court made its findings in favor of defendant, namely, that the inclusion of the entire acreage in this conveyance was the result of the mutual belief of both parties to the transaction that plaintiff had an undisputed title to this right of way strip clearly cannot be maintained, and upon no other theory presented by the facts or the findings can the defendant defeat plaintiff's action or recover on its cross-complaint. Fraud is not alleged in the pleadings, and the defendant at least had sufficient notice of the railroad's right of way to put it on inquiry. Indeed, it knew of the adverse claim to some portion of this tract, and the duty was imposed upon it to make investigation as to the extent of the railroad's rights.

[4] That the deed to defendant calls for this 200-foot strip is undisputed, but it is equally clear that the grantor knew that it did not have title thereto, or at least that the railroad company was occupying and claiming it adversely, and the grantee was aware that at least some portion of the strip was claimed and occupied by the railroad as a right of way. Even the act of Congress under which the 200 feet of land claimed by the railway company was granted, being a public statute, was constructive notice to both parties of this adverse claim. *Central Pac. Ry. Co. v. Droge*, 171 Cal. 32, 42, 151 Pac. 663.

[5] Eliminating the findings of mutual mistake, and any question of fraudulent misrepresentation, or express covenants of title, and the application of the rule of caveat emptor becomes too plain to require argument or authority. The general rule applicable is stated in 39 Cyc. p. 1252, as follows:

"It is well settled that, in the absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril, and is bound to look to the title and

competency of the vendor. Therefore a purchaser cannot rescind on the ground that he was mistaken as to his vendor's title. But where both parties are under a mistake as to the vendor's title, equity will relieve the purchaser from the contract."

[6] The most that can be said in support of defendant's case here is that the plaintiff, its vendor, represented that it had title to this disputed strip; but in the face of the fact that both parties to the transaction had knowledge of the adverse claim and possession of the railroad company, this representation becomes a mere statement of opinion as to the legal effect of the adverse claim.

"Mere expressions of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, or the same facts are within the knowledge of both parties, and when no confidential relation exists between them, do not constitute fraud or deceit upon the part of the vendor. It is a mere statement of opinion, and does not justify the party to whom the statement is made in relying thereon." *Choate v. Hyde*, 129 Cal. 580, 62 Pac. 118; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Rheingans v. Smith*, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

[7] If defendant was misled in entering into this purchase, it was not because of any mistake as to the acreage of the tract. It is not disputed that the deed purported to convey the entire 22½ acres bargained for. The mistake, if any, was as to the title to the strip included in the railroad's right of way, and, as has been pointed out, both parties were in possession of the facts which showed that plaintiff's claim of title was at least doubtful and its representation of ownership merely matter of opinion.

The undisputed facts in this case clearly indicate that the conveyances of this strip by the owners of record through a considerable chain of title were accepted with knowledge of the adverse claim of the railroad, and the defendant here in its turn took a sporting chance, which it confessedly thought at the time of the purchase was good, that the railroad's title could be defeated. Under such conditions it cannot avoid its liability for the purchase price.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

54 Cal. App. 107

**STANDARD LUMBER CO. v. MADARY'S
PLANING MILL et al. (Civ. 2337.)**

(District Court of Appeal, Third District, California. Aug. 30, 1921.)

1. Trespass ⇨10—Public right to use railroad spur does not carry right of access over adjoining land.

The right of the public to the use of a spur track of a railroad does not carry with it the right of access thereto over an adjoining owner's lands not dedicated to public use.

2. Injunction ⇨12—Not refused for injury accomplished where continuation threatened.

Injunction will not be refused because injury has been accomplished where apparent continuation is threatened.

3. Injunction ⇨135—Granting temporary injunction largely discretionary.

The granting of a temporary injunction is largely discretionary.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Standard Lumber Company against Madary's Planing Mill and others. From an order granting a temporary injunction, defendants appeal. Order affirmed.

J. C. Webster and J. T. B. Warne, both of Sonora, for appellants.

Morrison, Dunne & Brobeck, of San Francisco, and J. B. Curtin, of Sonora, for respondent.

FINCH, P. J. This is an appeal from an order granting a temporary injunction. The Sugar Pine Railway and a spur track therefrom run through plaintiff's land. Included in said land and line between the spur track and plaintiff's east boundary line is a triangular parcel about 400 feet long from north to south and 60 feet wide at the north side. The land immediately east of the triangle belongs to the railway company. From the southerly point of the triangle for about 200 feet in a northerly direction along the west side of the spur track are skids for the purpose of loading lumber on cars. These skids seem to cover an area 30 or more feet in width. The plaintiff's east boundary line runs diagonally through the space occupied by the skids, somewhat less than half of such area being on the plaintiff's land.

[1] Appellants state that the land which the defendants are enjoined from using had "become subject to the use of a common carrier of freight, the Sugar Pine Railway Company and its shippers." Defendant Madary, in his affidavit in opposition to the motion for a temporary injunction, states that for more than four years "said lands have been

* * * used under claim of right, by the Sugar Pine Railway Company, a common carrier, for its spur track and for loading facilities to permit defendants, as shippers of lumber, to load their cars for shipment." This evidence is contradicted by that of the plaintiff. D. H. Steinmetz, secretary and general manager of the plaintiff, testified that three or four different men were given personal permission by plaintiff to use its lands and the skidway for the purpose of loading cars, but that such permits had been revoked; and that, during the year 1919, Madary's planing mill used part of said lands of plaintiff, but without "right or permission or authority so to do." If the evidence produced by plaintiff is true, and for the purposes of this appeal it must be taken as true, then the principle announced in *Southern California Railway Co. v. Slauson*, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58, and *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, cited by appellant, has no application. The right of the public to the use of the spur track does not carry with it the right of access thereto over the plaintiff's lands not dedicated to a public use.

[2] It is contended that any damage to plaintiff's land was suffered prior to the commencement of the action, and that therefore the plaintiff was not entitled to an injunction. As said in *Smithers v. Fitch*, 82 Cal. 158, 22 Pac. 935:

"The evidence indicated that the trespasses already committed would probably be repeated indefinitely, and to avoid a multiplicity of actions, for damages, and perhaps breaches of the peace, an injunction was called for and properly awarded."

A trespass of a continuing nature may be enjoined. *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; *United Railroads v. Superior Court*, 172 Cal. 80, 155 Pac. 463.

"It is almost axiomatic to say that an injunction against a continuing trespass will not be denied merely because acts of trespass actually have been accomplished." *Farrel v. City of Ontario*, 36 Cal. App. 754, 173 Pac. 392.

It may be further stated, in support of the holding of the trial court, that the plaintiff introduced evidence to the effect that it had a million feet of lumber ready for shipment, and needed all of said lands for its use in handling and shipping such lumber, and that the use of said lands by the defendants would prevent the plaintiff from using the same and shipping such lumber. It was also shown that there is another spur track on the opposite side of the main line available for the use of the defendants.

[3] The granting of a temporary injunction is largely in the discretion of the trial

court, and there is nothing in the record to indicate an abuse of such discretion.

The order appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

54 Cal. App. 54

PEOPLE v. SPENCER. (Cr. 575.)

(District Court of Appeal, Third District, California. Aug. 23, 1921.)

1. Larceny — Intoxicating liquors not the subject of larceny.

Intoxicating liquor manufactured for beverage purposes after Const. U. S. Amend. 18, has taken effect cannot be the subject of larceny, since such liquor cannot in legal contemplation be property, inasmuch as there cannot be ownership thereof, in view of Volstead Act of the United States and Civ. Code, § 654.

2. Burglary — One who enters building with intent to take intoxicating liquor cannot be convicted of burglary.

One who entered building with the intent to take intoxicating liquor which had been manufactured for beverage purposes since Const. U. S. Amend. 18, has taken effect is not guilty of burglary, since the liquor is not in legal contemplation property, inasmuch as it is not subject to ownership, in view of the Volstead Act of the United States and Civ. Code, § 654.

3. Burglary — Information need not describe particular property defendant intended to steal.

Information charging burglary need not describe the property which defendant intended to steal.

Appeal from Superior Court, Mendocino County; H. S. Preston, Judge.

Annet Spencer was accused by information of the crime of burglary with intent to steal intoxicating liquors, and from order sustaining demurrer to the information, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Charles Kasch, of Ukiah, for respondent.

HART, J. The defendant was accused by an information filed by the district attorney of Mendocino county in the superior court of said county of the crime of burglary.

The defendant demurred to the information on the grounds: (1) That said information does not state facts sufficient to constitute a public offense; (2) that said information contains matters which, if true, would constitute legal bar to the prosecution of said offense. The demurrer was sustained, and the information thereupon dismissed. The people appeal from the judgment of dismissal after demurrer sustained.

The charging part of the information reads as follows:

"That the said defendant, Annet Spencer, on the 19th day of February, A. D. 1921, at the said Mendocino county, state of California, and before the filing of this information, did then and there willfully, unlawfully, and burglariously enter the outhouse of one Lorenzo Albonico at the ranch of said Lorenzo Albonico, about 1¼ miles east of the town of Covelo, in said county, with the intent then and there and therein to steal, take, and carry away certain intoxicating liquor, to wit, wine containing more than ½ of 1 per cent. by volume of alcohol, said wine having been manufactured since January 20, 1921, for beverage purposes of the value of less than \$50 and more than \$1 lawful money of the United States of America and of the personal property of one Lorenzo Albonico, contrary," etc.

The theory upon which the demurrer was sustained by the court below and upon which insistence upon an affirmation of the judgment is urged in this court is that the article which the information charges that the defendant entered the building with the intent to steal is not property or a thing of value and consequently is not a subject of larceny. This theory is founded upon the provisions of the act of Congress, known as the Volstead Act (41 Stat. 305), which was enacted for the purpose of properly enforcing or of facilitating the proper enforcement throughout the United States of the provisions of the Eighteenth Amendment of the federal Constitution, prohibiting the manufacture, sale, transportation, possession, etc., of intoxicating liquors.

Under the provisions of said act any liquors which contain one-half of 1 per centum or more of alcohol by volume to be used as beverages, come within the ban of the statute. It will be noted that the information in this case alleges that the wine which the defendant is charged with having stolen contained more than one-half of 1 per cent. by volume of alcohol and that the same had been manufactured, for beverage purposes, since January 20, 1921.

Section 8351b of said act, as the same has been codified (Barnes' Federal Code, 1921 Supplement), provides that—

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act. * * *

Section 8351t of the same act declares that any room, house, building, or other structure, where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, etc., is a common nuisance and annexes a penalty for the maintenance of such nuisance.

Section 8352, among other things, provides:

"It shall be unlawful to have or possess any liquor or property designed for the manufac-

ture of liquor intended for use in violating this title or which has been so used, and no property right shall exist in any such liquor or property."

It is clear, from the foregoing provisions of the Volstead Act, that intoxicating liquors are not property within the meaning of the law. Civ. Code, § 654. Said section reads:

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."

[1] It is obvious that there cannot be under the law as it exists to-day in this country an ownership of intoxicating liquors manufactured for beverage purposes since the enactment of the Volstead Act, and manifestly, if there cannot be an ownership of such liquors, they cannot be in legal contemplation property. It necessarily follows that the charge of larceny cannot be predicated of the act of taking intoxicating liquors by one from the possession of another.

[2] It is true that the gist of the crime of burglary is the entering of a building with the intent to commit either grand or petit larceny or other felony, and, although no property may be taken by a person so entering a building or other felony committed therein, the crime is nevertheless consummated upon an entry of the building being effected with the intent to commit any of the crimes mentioned in the statute. The description or specific mention in this case of the particular property which the defendant entered the building with intent to steal is evidentiary, wholly surplusage, and unnecessary to incorporate into that pleading, and it seems to us that the district attorney has thus "surplusaged" himself out of court in this case, for, having alleged in the information that the defendant entered the building with the intent to steal the particular property described therein, we are authorized to assume that he could only support the charge so preferred by evidence showing that the defendant did enter the building with the intent to steal the wine that was stored therein, and with no intent to steal any other property which might be in said building; in other words, we have a right to assume from the nature of the averments of the information that the district attorney thus purposely restricted himself to the right to prove the case by showing that the intent of the defendant in entering the building was only to take the wine, and this probably for the reason that the evidence available to him to establish the allegations of the information would and in fact could only show, if anything at all, that the defendant entered the building with the intent to take no other article therefrom than the wine which was stored or kept therein. This being so, the

defendant could not be guilty of the crime of burglary, since, as we have above suggested, wine or other intoxicating liquors which come within the prohibition of the Eighteenth Amendment and the Volstead Act, not being property, cannot be the subject of larceny. Although a person, himself having no right to its possession, may intend to and in fact take intoxicating liquor from the possession of another, he cannot be proceeded against either criminally or civilly because of such intent or of the taking thereof.

The soundness of the foregoing views would seem to be unquestionable; yet we are not without authority for their support. In *People v. Caridis*, 29 Cal. App. 166, 154 Pac. 1061, the defendant was charged by an information with the crime of grand larceny in that he had feloniously stolen and taken from another person a certain lottery ticket of a certain lottery company. A demurrer to the information was sustained upon the ground that the facts stated therein did not constitute a public offense, "in the particular that it affirmatively appeared that the subject-matter of the alleged larceny had no legitimate value," and the action was thereupon dismissed. The people appealed, and in affirming the judgment the court said:

"The lottery ticket which was the subject-matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law and which apparently existed and was conducted by its promoters in defiance of the law. Pen. Code, § 319 et seq. It is a well-settled principle that an obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value."

In *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772, the indictment charged the defendant with the crime of entering a building in the nighttime with intent to steal a dog kept therein, the property of the owner of the stable, of the value of \$25. The trial court sustained a motion to quash the indictment, and upon appeal the Supreme Court said, in upholding the judgment, that under the laws of the state of Ohio a dog was not property and therefore could not be the subject of larceny. The court further said:

"It will be time enough for the courts to say that a dog is the subject of larceny when the lawmaking power of the state has so declared. 'Constructive crimes are odious and dangerous.'" *Findlay v. Bean*, 8 Serg. & Rawle (Pa.) 571.

Parenthetically we may observe that in this state dogs, in derogation of the common-law rule, are declared to be personal property, "and their value is to be ascertained in the same manner as the value of other property." Pen. Code, § 491.

There are other cases to the same effect as the above, but, as before stated, the proposition seems to be so clearly tenable that further citations are deemed unnecessary.

[3] It may be suggested that the district attorney, if he conceived it proper or necessary to name the specific property which the accused entered the building with the intent to steal, could have mentioned the bottles or other vessels containing the wine, and thus have described what in law is property and subject to asportation. But, be that as it may, the judgment, for the reasons herein given, should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

54 Cal. App. 72

NORRIS v. CAMPBELL ELECTRIC CORPORATION et al. (Civ. 3878.)

(District Court of Appeal, First District, Division 2, California. Aug. 23, 1921. Rehearing Denied Sept. 20, 1921.)

1 Appeal and error $\S$ 880(2)—**Error in finding as to common ownership of defendant corporations held available only to those with which plaintiff had no contract.**

Though a finding of the court, in an action against two manufacturing corporations and a sales corporation to recover commissions due under a contract with the latter for the sale of products of the former, that all three corporations were owned and operated by the same persons, and that plaintiff's services were rendered at the request of all, was not supported by the evidence, such error was available on appeal only to the manufacturing corporations, with which the evidence showed plaintiff had no contractual relations.

2. Work and labor $\S$ 22—**Complaint for services under express promise held sufficient.**

In an action to recover commissions on sales, the complaint, alleging that defendants were indebted to plaintiff for services rendered at their special instance and request, being in the form of a common count for services rendered under an express promise to pay therefor, was sufficient on demurrer.

3. Principal and agent $\S$ 89(4½)—**Manufacturing corporations and sales agent properly joined in action to recover commissions.**

In an action to recover commissions due on a contract with a sales corporation for the sale of products of two manufacturing corporations, for which it was sales agent, all three corporations were properly joined as joint debtors.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by George F. Norris against the Campbell Electric Corporation and others.

Judgment for plaintiff, and defendants appeal. Affirmed in part.

Arthur H. Barendt, of San Francisco, for appellants.

Louis H. Brownstone and Louis E. Goodman, both of San Francisco, for respondent.

LANGDON, P. J. This action is to recover money alleged to be due the plaintiff as commission on sales of X-ray equipment and similar articles manufactured and sold by the defendant corporations. Plaintiff alleged that each of the defendants was a corporation organized under the laws of a state other than California; "that within two years last past the said defendants became indebted to plaintiff in the sum of \$4,832.43 for services rendered to said defendants by plaintiff at said defendants' special instance and request, in the sale of merchandise for said defendants."

It is then alleged that a portion of said sum has been paid and that there remains due and unpaid the sum of \$1,566.54, for which sum judgment is prayed. A joint judgment was rendered against the defendants for the sum of \$1,294.15, from which they appeal.

Respondent justifies the joint judgment rendered in this case by the finding of the trial court:

"That the defendants herein, while organized as three distinct corporate entities, are owned by and operated by the same persons and have the same officers and the same place of business in Lynn, Mass., and the services rendered by the plaintiff herein were rendered to, for, and at the request of all of said three defendant corporations."

That finding is attacked by the appellants as being unsustained by the evidence. The testimony of the plaintiff regarding at least one of the defendants, Vacuum Glass Company, is so vague and unsatisfactory as to give it little value as evidence. The record contains, then, practically undisputed, the following testimony of Fred R. Campbell, the treasurer of all three corporations defendant, and the only officer common to the three corporations:

"The Campbell Electric Company was incorporated in 1909 for the purpose of manufacturing X-ray and electro-medical and other electrical apparatus with factory and offices in the Keith Bldg., at 54 Central Square, Lynn, Mass. The Vacuum Glass Company was incorporated in 1909 for the purpose of manufacturing incandescent lamps, X-ray tubes and electro-medical glassware, and took up its quarters in the Fabens Building at 316 Union street, Lynn, Mass. In the year 1912 the Vacuum Glass Company sold its machinery for the manufacture of incandescent lamps, but continued the manufacture of X-ray tubes. In 1913 the Campbell Electric Company bought a large factory building at 17 Stewart street, and

moved its quarters from the Keith Building in Central Square to the building at 17 Stewart street. At the same time the Vacuum Glass Company was rented small quarters in the building at 17 Stewart street, to which its machinery for the manufacture of X-ray tubes was removed, and where it manufactures in entirely separate quarters from the Campbell Electric Company or the Campbell Electric Corporation."

It also appears by the testimony of the same witness that the Campbell Electric Corporation was incorporated in 1917 for the purpose of selling the Campbell Electric Company's apparatus and supplies, and maintains entirely separate quarters from either of the other two defendants, and has its own corps of clerks entirely distinct from the Campbell Electric Company or Vacuum Glass Company. The list of directors of the Campbell Electric Corporation is furnished, and Mr. Campbell stated, in answer to interrogatories, that "none of these directors except myself were officers of either the Campbell Electric Company or Vacuum Glass Company, and none of them except myself were identified in any way with the Campbell Electric Company or Vacuum Glass Company."

[1] There is no evidence to support the portion of the finding relating to the ownership of the three corporations and no inquiry was made as to that fact. Though the finding as a whole is not, therefore, supported by the evidence, the error is available on this appeal only to the Campbell Electric Company and the Vacuum Glass Company. The evidence is without conflict that plaintiff's services were rendered under contracts, both written and oral, with the Campbell Electric Corporation, which was the sales agent for the products of the other concerns, and that plaintiff had no contractual relations with the other corporations. The written contract of the plaintiff with the Campbell Electric Corporation provided for payment of commissions to the plaintiff of 33½ per cent. on all goods sold, with certain exceptions. Payments of such commissions were to be made, not only on cash sales, but as to all sales which were made on installments and where notes were accepted in part payment, the agent was to be paid a portion of the cash actually received until two-thirds only of the commission had been paid. The remaining one-third was to be held by the company until the customer had made final payment. The oral contract for the sale of the products of the

Vacuum Glass Company was indefinite as to the manner of payment of commissions, but throughout the entire transactions the plaintiff was led to believe that he was dealing with the corporation upon the same terms as those specified in the written contract. All correspondence and orders covering the products manufactured by either the Campbell Electric Company or the Vacuum Glass Company were sent by plaintiff to the Campbell Electric Corporation and the orders were filled without question.

The trial court found that the services had been rendered as alleged in the complaint, and that the commission due and unpaid thereon was \$2,294.15. It also found that there was no open and mutual book account existing between plaintiff and any of the defendants as alleged in the cross-complaint of the Campbell Electric Corporation, and that plaintiff was not indebted to any of the defendants as claimed in said cross-complaint.

[2, 3] It is strenuously argued that the complaint is insufficient, and that the demurrers thereto, which were both general and special, should have been sustained. The complaint is in the form of a common count for services rendered under an express promise to pay therefor. This form of pleading has been expressly approved in *Pike v. Zadig*, 171 Cal. 273, 278, 152 Pac. 923. The three defendants were properly joined in the action as joint debtors. *Pike v. Zadig*, supra; *Montgomery v. Dorn*, 25 Cal. App. 666, 670, 145 Pac. 148. The demurrers were properly overruled.

The findings are sufficient to support the judgment against the Campbell Electric Corporation, but in the absence of evidence showing that all three corporations were in fact one concern, the findings are insufficient to support the judgment against the Vacuum Glass Company and the Campbell Electric Company.

The judgment in so far as it denies recovery upon the cross-complaint or counterclaim, and in so far as it relates to the defendant Campbell Electric Corporation, is affirmed; in so far as it relates to the other defendants it is reversed.

The defendants Vacuum Glass Company and Campbell Electric Company shall be entitled to such portion of the costs of this appeal as upon the filing of the remittitur the trial court shall find they have expended.

We concur: STURTEVANT, J.;
NOURSE, J.

53 Cal. App. 764

STOKES v. WATKINSON. (Civ. 3869.)

(District Court of Appeal, First District, Division 1, California. Aug. 8, 1921. Hearing Denied by Supreme Court Oct. 6, 1921.)

1. Pleading ⚡121(4)—Denial of allegation of due recordation of assessment for want of information and belief insufficient.

In an action to foreclose street assessment liens, in which plaintiff alleged the proper recordation of the assessment, defendant's denial of proper recordation for want of information and belief *held* insufficient.

2. Municipal corporations ⚡483(3)—Recordation of assessment in loose-leaf book by superintendent of streets held sufficient.

Superintendent of streets' recordation of assessment by inserting copies of the originals in loose-leaf book and keeping them so inserted subject to public inspection, *held* sufficient.

3. Evidence ⚡344—Copies of assessments and warrants contained in certified records of superintendent of streets admissible in lien foreclosure action.

In an action to foreclose street assessment liens, copies of the assessments and warrants contained in the certified records of the superintendent of streets *held* admissible under Street Improvement Act 1911, § 37, and Code Civ. Proc. §§ 1855 and 1893.

4. Evidence ⚡344—Omission of seal from copy of affidavit of demand and nonpayment held immaterial.

In an action to foreclose street assessment lien, omission from copy of affidavit of demand and nonpayment offered by plaintiff of the copy of the notary's seal *held* immaterial, where pleadings admitted that a proper return of demand and nonpayment was made by plaintiff.

5. Municipal corporations ⚡515(1)—Omission of seal from copy of affidavit of demand and nonpayment held not to affect right to foreclosure of lien.

In an action to foreclose street assessment lien, omission from certified copy of affidavit of demand and nonpayment offered by plaintiff of the copy of the notary's seal *held* immaterial; the omission being a mere irregularity which was cured by Street Improvement Act, 1911, § 26.

6. Municipal corporations ⚡572—Defendant's offer pending assessment foreclosure action to pay assessment without costs insufficient to deprive plaintiff of right to recover costs.

Defendant's offer, pending action to foreclose street assessment liens, to pay the assessments in full without the costs that had accrued, did not deprive the plaintiff of the right to prosecute the action and to recover costs under Street Improvement Act 1911, § 27, and Code Civ. Proc. § 1022, subd. 5.

7. Municipal corporations ⚡474—Assessment lien will not be held void on the ground that property not within the district was benefited by the improvement.

Assessment liens will not be held void on the ground that all property benefited was not

embraced within the district; the limits of the district being a matter committed solely to the discretion of the municipal legislative body.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Consolidated actions by G. H. Stokes against Henrietta P. Watkinson, individually and as executrix of the last will of Joseph Henry Thomas Watkinson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. T. Kearney, of Richmond, and Edward C. Harrison, of San Francisco, for appellant.

Faulkner & Faulkner, of San Francisco, for respondent.

RICHARDS, J. This is an appeal on the part of the defendant individually and as the executrix of the last will of her deceased husband, Joseph H. T. Watkinson, from a judgment of foreclosure of certain street assessment liens.

The property affected by the action consisted of a large number of lots situate along the northeasterly side of Pullman avenue in the city of Richmond, all of which lots belonged to the appellant's testator in his lifetime. The street improvement in question consisted of certain sewer construction work along the line of Pullman avenue, performed under and pursuant to the provisions of the Street Improvement Act (St. 1911, p. 730), approved April 7, 1911, and having its inception in the month of August, 1914, through the passage of a resolution of intention to make said improvement by the council of the city of Richmond on that date. The work proceeded thereafter under said act until its completion, approval, and acceptance by the street commissioner of said city in the month of March, 1915, whereupon the said superintendent of streets proceeded to make the assessments against the several lots owned by the defendant's testator, who was then still living, and also to make and record and deliver the warrants for each of said assessments to one Fred Meyers, the assignee of the original contractor, and who, as such, was authorized under said improvement act to demand and receive the amount due from the owner of the lots in question according to each of the assessments levied against each of them. The plaintiff alleges that such demand was personally made by said Meyers upon said Joseph H. T. Watkinson in his lifetime, and that he failed and refused to pay the several amounts so demanded. Thereafter said Meyers assigned to the plaintiff herein all of his right, title, and interest in and to the money due upon said warrants and assessments, and thereafter the said plaintiff commenced 43 separate actions to foreclose his assessment lien upon each sep-

arate parcel of land upon which such several assessments had been levied. In each of said actions the plaintiff prayed for an attorney's fee of \$15, to which he claimed to be entitled under the terms of said improvement act, together with costs in each case. Prior to the inception of these several actions Joseph H. T. Watkinson had died, and his widow, Henrietta P. Watkinson, had succeeded to his interest in said several tracts of land and had been duly appointed executrix of his will. She was therefore made individually and as such executrix the defendant in said several foreclosure suits, and upon her motion, after the institution thereof, the court in which said actions were pending ordered a consolidation of them, whereupon the plaintiff, while objecting to said order, complied with the same by filing a supplemental complaint in which all of said actions were consolidated, and in which, in asking for a foreclosure of said liens, the plaintiff prayed for a reasonable allowance of counsel fees and for his costs. Upon the trial of these actions, as thus consolidated, the court decreed a foreclosure of said liens, and in the matter of counsel fees allowed the plaintiff in each of said original actions an attorney's fee of 60 cents, together with the costs accrued in each action. From the judgment of foreclosure thus decreed the defendant has prosecuted this appeal.

There is also another appeal by plaintiff from that portion of said decree awarding counsel fees and which is dealt with in a separate opinion.

Upon the present appeal the appellant's first contention is that the assessment which forms the basis of each of these several liens was never properly recorded. In making this contention the appellant relied upon the case of *Federal Construction Co. v. Curd*, 179 Cal. 479, 177 Pac. 473, which case was decided by the Supreme Court some time after the date of the trial and judgment in the instant case. The respondent meets this contention with the showing that in the plaintiff's consolidated complaint it was alleged that the documents constituting those records of the superintendent of streets which were required by the terms of the improvement act in question to be recorded in his office were and each of them was duly recorded therein, that these allegations of matters of public record were denied by the defendant in her answer for want of information and belief, and that such denials were insufficient in point of law to put in issue the due recordation of these documents. The respondent further urges, and the record shows, that no objection was made by the defendant at the trial to the form or substance or physical character of the record book or books showing the recordation of these documents. The respondent further urges that the record does not affirmatively

show that the method of recordation of the documents in question which was condemned in the case of *Federal Construction Co. v. Curd*, supra, was the one adopted by the street superintendent in the proceedings involved in this case. We have carefully examined the record herein with a view to determining the merit of the objections urged by the respondent against the consideration of this point upon appeal.

[1] As to the pleadings of the parties, we find the plaintiff does allege the proper recordation of the documents which the superintendent of streets was required by law to record and to keep a record of. This averment would suffice to put the defendant upon notice and inquiry as to the existence and state of such record, and, this being so, the defendant is not permitted by a well-established rule of pleading to base her denial of the due and proper recordation of such documents upon a want of information and belief. Such denials have been uniformly held insufficient to put in issue the due recordation of documents required by law to be recorded and alleged to have been so recorded. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122; *Rogers Bros. v. Beck*, 184 Pac. 515; *Brickley, etc., v. Silman*, 33 Cal. App. 643, 166 Pac. 371; *Wm. Wilson Co. v. Trainor*, 27 Cal. App. 43, 148 Pac. 954; *Art Metal Construction Co. v. Anderson Co.*, 182 Cal. 29, 186 Pac. 776.

This being the law, it becomes unnecessary to determine whether or not the objections which the defendant interposed to the introduction of the record book of the superintendent of streets in evidence were sufficient to predicate the attack which the appellant makes upon their sufficiency to comply with the statute upon this appeal; for, if the averments of the complaint with respect to the due recordation of the documents in question were admitted by the defective form of the defendant's denials, it follows that no evidence was required upon that subject, and hence no objections which were urged nor assignments of error which were made to the introduction of such evidence need be considered upon appeal. *Mendocino County v. Peters*, supra.

[2] But aside from the foregoing considerations, which we think disposes of the appellant's first contention herein, we may say that from our inspection of this record we are by no means satisfied that it affirmatively appears therefrom that the recordation of the documents above referred to was subject to the infirmities existing in the record before the Supreme Court in the case of *Federal Construction Co. v. Curd*, supra; for, while in both cases a so-called "loose-leaf book" was used by the superintendent of streets for purposes of recordation, the infirmity disclosed in the *Curd* Case was not

in the form or physical features of said book, but consisted rather in the fact that the originals of the documents required to be recorded by the terms of the act had been placed in the book and then at once withdrawn and handed to the contractor for the purpose of making his demand, and that during the period of their absence for that purpose there was no record whatever of these documents in the office of the superintendent of streets. It does not appear that such was the method or practice pursued by the superintendent of streets in the instant case, but, on the contrary, it does appear that the papers inserted and kept in the loose-leaf book of the superintendent of streets in this case were copies of the originals handed to the contractor for the purposes of his demands, and that such copies at all times after their insertion in said book were kept there subject to public inspection. We are of the opinion that the requirements of the statute would be satisfied and fully subserved by such a procedure.

[3] The next contention of the appellant is that the plaintiff's evidence as to the existence and substance of the assessments and warrants upon which he relies to support his alleged liens was insufficient for the reason that the plaintiff rested his proof of the existence and substance of these documents, not upon the production of the original documents, but upon the copies thereof contained in the certified records of the superintendent of streets. We see no merit in this contention nor in the refinement of argument with which appellant seeks to support it. The Street Improvement Act, under which the proceedings involved in this case were had, in section 37 thereof, and in respect to be records to be kept by the superintendent of streets, provides that—

"The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals."

Language could not be plainer than this in order to place the records of the superintendent of streets upon the same basis as to evidentiary value as other public records possess by virtue of sections 1855 and 1893 of the Code of Civil Procedure.

[4, 5] The appellant's next contention is that the affidavit of demand and nonpayment, a certified copy of which was offered by the plaintiff, was irregular and insufficient to prove the existence and substance of such original demand, for the reason that it appears that there was absent from the copy of this document so introduced in evidence the copy of the seal of the officer who attached his jurat to the original document. The respondent makes several answers to this contention, all of which appear to be

good. The first is that the pleadings admit that a proper return of his demand and of the fact of nonpayment was made by the assignee of the contractor. A second, and we think also sufficient, answer is that the absence of a notary's seal from the original or of a copy of the impression of such seal from the recorded copy of such original would constitute a mere irregularity which would be cured by the provisions of section 26 of the Improvement Act, under which these proceedings were taken, and which provides as follows:

"No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section 5 of this act, before the passage of the resolution ordering the work to be done."

See, also, *Bienfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225; *McGinn v. Van Ness*, 40 Cal. App. 600, 181 Pac. 70, 183 Pac. 950.

[6] The appellant's next contention is that the trial court erred in its award of costs to the plaintiff in each of the cases which were consolidated into the single proceeding in which the plaintiff was allowed judgment. This objection is predicated upon the fact that many months after the institution of these several actions the defendant made and filed an offer to pay the several assessments in full, without costs. Such an offer, however, would be ineffectual to prevent the plaintiff from the recovery of costs already accrued, and would also be ineffectual under the Code section permitting such offers to allow judgment to be filed for the reason that it did not embrace an offer to pay the costs accrued to the date when it was made. The plaintiff, having the right to commence and prosecute these several actions, if he had a right to his judgment of foreclosure, had also the right under the provisions of section 27 of the Improvement Act, and also under the provisions of section 1022, subd. 5, of the Code of Civil Procedure, to recover his costs.

[7] The final contention of the appellant, to the effect that the proceedings which form the basis of these assessment liens were void because all of the property benefited by the improvement was not embraced within the district assessed for such work, is without merit, since the question as to the limits of assessment districts in the matter of making such improvements is one that is committed solely to the discretion of the municipal body determining upon such improvement under the district plan. *Larsen v. City and*

County of San Francisco, 182 Cal. 1, 186 Pac. 757.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

Opinion of Supreme Court, In Bank,
Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the district court of appeal of the first appellate district, division one, is denied.

In denying the application we withhold our approval from that portion of the opinion which holds that the denial for want of information and belief of the allegation that the assessment was duly recorded in the office of the superintendent of streets was not a sufficient denial. This portion of the opinion is not essential to the judgment of the district court of appeal in view of the further answer contained in the opinion to the claim of want of proper record.

All concur except SHAW, J., absent.

54 Cal. App. 83

SCHUYLER v. PANTAGES et al. (Civ. 3860.)

(District Court of Appeal, First District, Division 1, California. Aug. 24, 1921. Hearing Denied by Supreme Court Oct. 20, 1921.)

1. Corporations ⇨452—Contract bearing only signature of president and manager held to bind corporation.

A contract on its face purporting to be a contract of a corporation, bearing only the signature of person expressly stated to be president and manager, and in whose name it was doing business, bound the corporation.

2. Contracts ⇨282—Theater company held to have right to terminate engagement.

A clause in an agreement under which plaintiff was to produce vaudeville upon defendant's circuit reciting that, if defendant determined the services to be unsatisfactory to it, defendant might thereupon cancel and terminate the agreement, gave defendant right to terminate the contract at the close of the first regular performance, in absence of bad faith, and a declaration of a local manager that plaintiff's performance was unsatisfactory was sufficient.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Elise Schuyler against Alexander Pantages and others. Judgment for plaintiff, and defendants appeal. Reversed.

A. J. Treat and Wm. A. Kelly, both of San Francisco, for appellants.

R. H. Countryman and John T. Pidwell, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action for damages for the breach of a written contract alleged to have been entered into between herself and the defendants, by the terms of which the plaintiff was to produce upon the circuit of the defendants for a period of 14 weeks a vaudeville production which she had written and was, with the aid of another, to perform in the various playhouses of the defendants throughout said circuit, and for which she was to receive the sum of \$115 per week and her traveling expenses.

The plaintiff's complaint is in five counts; all, however, being based upon the same transaction. In the third of said counts the plaintiff includes in her averments and demands for damages the value of a drop curtain alleged to be the sum of \$500, ordered by her for the purposes of her production, and rendered valueless by the defendants' refusal to permit her to perform her said agreement; while in the last of said counts the plaintiff includes a demand for damages in the sum of \$25,000 for injuries to her reputation as a writer and producer of plays, and to her physical health, arising out of the defendants' refusal to permit the production in their playhouses of her performance.

The defendants in their answer deny entering into the agreement with the plaintiff which she pleads in substance in her complaint; but they allege that the plaintiff and Alexander Pantages did enter into a written agreement for the production of her play, a copy of which agreement they attach to their answer. They also deny the breach of said agreement, and that the plaintiff sustained any damages from any such breach. For a counterclaim they allege that the defendant Alexander Pantages loaned plaintiff the sum of \$200, for which he seeks the recovery.

The findings of the trial court were generally in favor of the plaintiff, the court fixing the plaintiff's damages at the sum of \$2,860, without differentiating how such sum was to be apportioned among the plaintiff's several demands for damages, except as the court allowed interest upon the sum of \$1,410, as indicating that to be the portion allowed as damages for the direct breach of a written contract. The defendants appeal from the judgment rendered and entered upon these findings.

The appellants' first contention is that in so far as said judgment is against the defendant Pantages Circuit of Vaudeville Theaters, Inc. (a corporation), it is not sustainable, since the contract upon which the plaintiff relies for a recovery does not purport to have been signed by said corporation, but only by the defendant Alexander Pantages in person.

[1] This contention we hold to be without

merit. The contract on its face purports to be the contract of the corporation of which Alexander Pantages is expressly stated to be the president and manager. It refers throughout to the circuit of theaters conducted by said corporation and to the production of the plaintiff's performance therein.

In addition to this, the complaint alleges, and the answer admits, that the defendant Alexander Pantages did business under the name and style of Pantages Circuit of Vaudeville Theaters. Such being the condition of the contract and the pleadings, we deem the signature of the contract by Alexander Pantages sufficient to bind the corporation of which he was the president and manager, and in the name of which he was engaged in the business with direct relation to which this contract was entered into.

[2] The next contention of the appellants, however, is more serious, and is to our minds determinative of this appeal.

The contract in question contains, among its several provisions, the following clause:

"VI. If before or during this engagement the first party determines that the second party has reduced or changed the personnel or number of performers, or changed or lowered the quality of act contemplated herein, or if it determines the services herein contemplated to be unsatisfactory to it, the first party may thereupon cancel and terminate this agreement."

It is the appellants' contention that under the foregoing clause of said contract the party of the first part thereto reserved the absolute right, in the absence of bad faith, to cancel and terminate the agreement at any time during the plaintiff's engagement "if it determines the services herein contemplated to be unsatisfactory to it," and that, having exercised this right at the beginning of the plaintiff's engagement, or, in other words, at the close of her first regular performance, and no bad faith in so doing being shown, there is an end to the plaintiff's case.

We are constrained to hold that this contention must be sustained. In the case of *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 182 Pac. 428, 6 A. L. R. 1493, the Supreme Court (Mr Justice Shaw writing the opinion) discusses quite lucidly the two classes of contracts in which one party is required to do something which expressly is to be the satisfaction of the other party, namely:

"(1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility."

In relation to the first of these two classes of agreements the opinion adopts the rule laid down in 13 *Corpus Juris*, p. 675, as follows:

"In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he

renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision; and a court or jury cannot say that such party should be satisfied where he asserts that he is not."

We are of the opinion that the agreement in the instant case comes clearly within the first class of agreements above referred to, and hence within the rule last above quoted. The cases cited in *Corpus Juris* as illustrating the rule deal with such agreements as those for the painting of a portrait (*Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351); the writing of articles for a newspaper (*Crawford v. Mail, etc., Co.*, 163 N. Y. 405, 57 N. E. 616); the preparation of a literary or scientific article for an encyclopedia (*Walker v. E. D. W. Thompson Co.*, 37 App. Div. 536, 56 N. Y. Supp. 326); a play to be written by an author for an actor (*Haven v. Russell* [Sup.] 34 N. Y. Supp. 292); a design for a banknote (*Gray v. Alabama Nat. Bank* [City Ct.] 10 N. Y. Supp. 5); and the like. Being an agreement of the class illustrated in the foregoing citations, it follows that the act of the local manager of the corporation defendant in declaring the plaintiff's attempted performance of the same unsatisfactory, and in refusing to permit the further performance thereof, and the further act of Alexander Pantages himself in ratifying the local manager's said action, were within the rights of the defendants under said agreement, and hence were acts upon which the plaintiff had no right to any or all of her several alleged causes of action.

In so deciding we take note of the respondent's contentions that the terms of the contract required the exercise of the personal judgment of Alexander Pantages as to whether her performance was satisfactory; that this personal judgment on his part had not been exercised, since he was not personally present when the performance which was objected to was given; that this function of determining whether or not the plaintiff's performance was satisfactory could not be delegated to the person who essayed to exercise it, and hence that Pantages' attempted ratification of the local manager's action could avail the defendants nothing. We do not find that the contract is susceptible of the construction which the respondent seeks to give to it in this respect. The clause above quoted does not require that the plaintiff's performance shall be satisfactory to Alexander Pantages personally, but to the corporation itself, which must, of course, act through its officers and agents. There are other provisions of the contract which would seem to invest the local managers of the numerous theaters of the corporation upon its somewhat widespread vaudeville circuit with full discretion as to the performances to be given thereat, while the evidence in the case discloses without

contradiction that the local managers of vaudeville theaters are invested with the power of determining whether or not a certain performance is being satisfactorily given.

We are, therefore, of the opinion that the plaintiff's engagement under her said agreement was terminated by the declaration of the defendants' local manager that her performance was unsatisfactory and that it could not go on. The good faith of the defendants' local manager in so determining, while impugned by the respondent in her brief, is not seriously assailed either in her pleadings or the proofs in the case, nor is it questioned in the findings of the trial court. On the contrary, the evidence preponderates in negating such a conclusion.

It follows from the foregoing that, since the defendants were within their rights in declaring the plaintiff's performance unsatisfactory and in refusing to permit its further production, her whole case falls, and her several claims for damages, having thus no foundation, are insufficient to sustain any portion of the findings and judgment of the trial court in her favor.

This conclusion renders unnecessary a discussion of the further questions presented in the case. It follows that the judgment must be reversed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 59

METZLER et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR HUMBOLDT COUNTY et al.

Ex parte METZLER et al.

(Civ. 2351; Cr. 573.)

(District Court of Appeal, Third District, California. Aug. 23, 1921. Hearing Denied by Supreme Court Oct. 20, 1921.)

1. Certiorari ☞29—Habeas corpus ☞30(1)
—If court had jurisdiction, writ must be discharged despite errors of law.

If a court, whose action or judgment is attacked by application for habeas corpus or writ of certiorari, had jurisdiction to hear and determine the matter, the writ must be discharged, though the court committed some errors of law.

2. Certiorari ☞50—Entire record of proceedings must be certified to appellate court.

On application for writ of certiorari, the entire record of the proceedings, eventuating in the judgment against petitioners, must be certified to the appellate court.

3. Contempt ☞54(1)—Affidavit charging contempt out of presence of court is necessary.

Under Code Civ. Proc. §§ 1209, 1211, the court's jurisdiction to punish for contempt,

committed out of its immediate presence, cannot be put in motion, in the absence of the filing of an affidavit charging facts constituting such contempt.

4. Contempt ☞54(1)—Court informed by attorneys of contempt by them out of its presence exceeded jurisdiction in adjudging them guilty thereof.

Though attorneys for a minor in a proceeding to adjudge her a ward of the juvenile court admitted before the court that they caused witnesses to be subpoenaed after it had been stipulated by them that the court might make an order adjudging such minor a ward, and the witnesses appeared while the proceeding was being heard, the court, who did not know of such fact until informed by the attorneys, exceeded its jurisdiction in adjudging them guilty of contempt, in the absence of an affidavit charging the facts, as required by Code Civ. Proc. §§ 1209, 1211, in case of contempts committed out of presence of the court.

Application by S. E. Metzler and Ernest S. Mitchell for certiorari and habeas corpus to review a judgment of contempt of the Superior Court of California in and for the County of Humboldt, Denver Sevier, Judge. Judgment annulled, and writ of habeas corpus discharged.

V. A. McGeorge, of Sacramento, and Metzler & Mitchell, of Eureka, for petitioners.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for respondents.

HART, J. The petitioners were, on June 2, 1921, by the superior court of Humboldt county adjudged guilty of contempt of court and each sentenced to pay a fine of \$100, with the alternative of imprisonment in the county jail of said county, "until such fine be paid, at the rate of one day's imprisonment for every two dollars of said fine." They refused to pay the fines so imposed and were committed to the county jail, where they remained until the 4th day of June, 1921, at which time, upon the issuance by this court, upon their petition, of a writ of habeas corpus looking to their release from what they alleged to be the illegal restraint of their persons, they were set at liberty, having given the bail to which they were ordered to be admitted by this court upon the issuance of said writ.

[1] Subsequently to the issuance of said writ of habeas corpus, and prior to the hearing thereof, the petitioners filed in this court a petition praying for a writ of certiorari for the review of the proceedings culminating in the judgment of contempt against petitioners. Both proceedings pending before us, therefore, involve precisely the same judgment of contempt, and the office of each of the writs applied for here by the petitioners is to determine precisely the same ultimate

question, to wit: Whether the action of the court in adjudging petitioners guilty of contempt of court and punishing them therefor, upon the record upon which each of the applications is supported, remained within its jurisdiction. Abstractly speaking, it is well understood that the sole question which may be determined, either upon habeas corpus or upon a writ of review, is that of jurisdiction, and if it be found in either case that the court whose action or judgment is thus attacked had jurisdiction to hear and determine the matter, the writ must be discharged although it may appear upon the record that the court, in passing upon and deciding the matter, had committed some errors of law.

[2] In the proceeding before us upon the application for the writ of certiorari, as the very name of that writ implies shall be done, and in consonance to the remedial function peculiar thereto, the entire record of the proceeding bearing upon and eventuating in the judgment of contempt against each of the petitioners has been certified to this court, and although, in view of the conclusion at which we have arrived, the ultimate question of law submitted here could be determined upon the record supporting either application, we prefer to confine ourselves, in determining whether the judgment of contempt against the petitioners was beyond the jurisdiction of the court to a consideration of the petition for the writ of certiorari, for the reason that, as we feel constrained to hold that the court exceeded its jurisdiction in the matter, a petition for a hearing in the Supreme Court after the decision on certiorari here will lie, while a discharge on habeas corpus would wholly terminate the matter, so far as is concerned the particular proceeding to which both petitions here are addressed.

The record certified to this court in response to the writ of review issued by this court herein discloses that the proceeding out of which grew the judgment of contempt against both petitioners involved a matter pending and being heard by the respondent court, sitting in separate session in the exercise of its jurisdiction as a juvenile court. It is thus made to appear that, on the 10th day of May, 1921, the probation officer of the county of Humboldt filed in the superior court of said county, as in the exercise of its juvenile jurisdiction, a petition, alleging that a certain unmarried Indian female "comes within the provisions of subdivision 2, 4, and 11, of the Juvenile Court Law of the state of California, in this: That said — has no parent or guardian willing to exercise or capable of exercising proper parental control, and has no parent or guardian actually exercising such proper parental control, and that said — is in need of such control," and further alleged that said minor "has within three months last past given birth to an illegitimate child, which has since died; that

the father and mother of said minor are living separate and apart, that said minor has been living with her father, who is, by reason of his acts of cruelty and depravity, an unfit person to have the care, custody and control of said minor; that the home of the mother of said minor is not a fit and proper place for said minor to reside or to live in." It appears, at least inferentially, from the record, that the father of the said minor was accused of being responsible for the motherhood of the minor, although it does not so appear that the father was at the time of the proceeding before the superior court or under arrest.

Upon the filing of the petition above referred to a citation, directed to the father of said minor, was issued by the court, ordering his appearance with said minor before said court on the 16th day of May, 1921, and to show cause why said minor should not be adjudged a ward of the juvenile court. On the day named the matter came up for hearing, the minor being represented by the petitioners, who were law partners, and, after certain testimony had been received in support of the allegations of the petition, the minor was called to the stand, and before any attempt was made to question her the judge observed:

"Now it might be possible that this recital [doubtless referring to a statement by the minor] may be spared. Isn't it possible," the judge proceeded to inquire, "that this girl can be placed in some home?"

To this question the petitioner, Metzler, replied:

"That is all we ask, that this girl be placed in a home, a good home."

After the court had asked whether the father would bear the expense of the support of the minor and an affirmative reply to said question by Mr. Metzler, the court declared:

"Then it is a matter of selecting a party under whom we will place her, some good woman and some good family."

The court thereupon inquired:

"Is it satisfactory to both sides that Miss Beasley [executive secretary of the Welfare Department of the county of Humboldt] find parties that will be satisfactory to the court?"

To which petitioner, Metzler, answered:

"We will be satisfied with the family that Miss Beasley selects. We feel that Mr. — [naming the father of the girl] should be permitted to visit his daughter at the Detention Home [the minor being in the custody of said home pending the final disposition of the proceeding], or that she be released. I feel that he should be given that right as a father."

To this suggestion the district attorney declared that he would object, unless the

parties in charge of said home were present when the father visited and conversed with the minor.

The further hearing of the proceeding was then postponed until the 19th day of May, 1921, at which time, in objecting to the application of the district attorney for a further continuance of the matter until the following day, petitioner, Metzler, insisted that the minor, since she had not down to that time been adjudged a ward of the court, should be taken from the detention home and returned to the custody of her father, who, he declared was compelled to support the minor, "no matter whether she was born in or out of wedlock." The petitioner proceeded to say that he desired to interview the little girl in order to get at the facts relative to the charge that her father had been guilty of the acts towards her of which he had been accused, intimating that he could not secure a truthful statement from the child as to the charge against her father while she was in the presence of the managers of the detention home. This proposition was objected to by the district attorney. Metzler thereupon stated to the court that he desired to withdraw from the stipulation previously entered into respecting the disposition that should be made of the minor by the court, and the court in reply to that proposition stated that counsel could not withdraw from the stipulation without the consent of the court, nor could he do so without making a motion based upon a showing which would justify the court in permitting him to withdraw from the stipulation. The court also declared that he did not think that counsel (the petitioners) were acting in good faith in making their application to interview the little girl without the presence of her then custodians or in making their application to withdraw from the stipulation by which they agreed that the court could place the minor in the care and control of some good family pending her minority.

The matter then was continued until the following day, the 20th of May, 1921, and on said day Miss Beasley reported that she had up to that time been unable to secure a home or a proper person to whom the care and custody of the minor might be committed, and asked for further time within which to find such a home and person. Thereupon the district attorney moved for a further continuance of the matter "until Miss Beasley's report is prepared and then the court inform the attorneys." At this juncture the petitioner, Mitchell, addressed the court as follows: "The other day a stipulation was entered into for the purpose of avoiding going into the sordid details of a minor of that age. It becomes necessary to go into it, and we informed the court after the stipulation was entered into that we withdrew our stipulation. We have sub-

pœnaed our witnesses to-day." He proceeded to say that the witnesses were present in court at that time, "and if it is continued we would like to have it continued to a day certain in order to have our witnesses here. if necessary." To this the court replied:

"You entered into a stipulation in this court, and it went down in the record; there is just one way for you to get relief from that stipulation, you know that as well as I do, that you will have to make a motion and do it upon affidavits and serve it properly. You or no other attorney has a right to say this stipulation is off, and you are not bound by it. You know that as well as I do, and as to subpoenaing witnesses here at this time, I told your partner yesterday that he could not do that. When did you get the subpoenas out of this court?"

"Mr. Mitchell: The day we were in court.

"Court: Yesterday?"

"Mr. Mitchell: No, prior to that time.

"Court: What day?"

"Mr. Mitchell: It was delivered to the sheriff day before yesterday I believe.

"Court: Now you have no right to issue any subpoena when there is no hearing at this time. There was no hearing at this time.

"Mr. Mitchell: It was continued.

"Court: What for? Who gave that subpoena to the sheriff, you or Mr. Metzler?"

"Mr. Mitchell: I am not certain, I think Mr. Metzler gave it, but I am not certain.

"Court: Did you tell him to do it?"

"Mr. Mitchell: Yes, your honor.

"Court: And you knew there was no hearing here at that time. We will take this matter up next Thursday. Under section 1209 of the Code of Civil Procedure, disobediences are contempt of court, and various items are set forth. The fourth is 'abuse of the process or proceedings of the court.' Now the county is not going to pay the witnesses. You had no right to subpoena these witnesses here at this time, and you and your partner are cited to appear in court next Thursday to show cause why you should not be punished for contempt of court, and you shall pay those witnesses out of your own pocket—summoning people here to come at their own expence. (To Mr. Cairns, Asst. District Attorney:) I want you to look up this proposition, I don't know whether it is contempt of court or not, but it seems to me to verge very strongly on it.

"Mr. Cairns: Do you desire me to give any further notice?"

"Court: You may serve the regular notice on the firm because Mr. Metzler is not here. The motion of the attorneys Metzler & Mitchell for an order of this court to have control of this girl is denied.

"Mr. Mitchell: Is the hearing continued until next Thursday?"

"Court: No, sir. This contempt proceeding is a different proposition. The other will be when Miss Beasley has found a suitable home, when she reports she has found a home, suitable for this girl."

Immediately following the above proceedings a citation entitled, "In the Matter of S. E. Metzler and Ernest S. Mitchell, in Contempt," was issued and signed by the

judge of said court, and the same served upon the petitioners, reciting the history of the proceedings relating to the matter of the petition to have the said minor adjudged a ward of the court, and referring to the statement of petitioners that they desired to withdraw from the stipulation mentioned and had subpoenaed witnesses to appear in court for the purpose of contesting the petition to have the minor declared a ward of the juvenile court, and requiring the petitioners to appear in said court at 10 o'clock in the forenoon of the 26th day of May, 1921, "then and there to show cause, if any you have, why you, and each of you, should not be adjudged to be guilty of contempt of this court for misbehavior in office and a willful violation of duty as officers and attorneys of this court, and for an abuse of the process of this court, as hereinabove set forth, and why you, and each of you, should not be punished therefor as provided by law."

The citation above referred to was unverified, and was the only document or paper supporting the proceeding in contempt, there having been no affidavit or affidavits filed charging the petitioners with contempt of court or the abuse of the process thereof. On the 26th day of May the contempt matter was called, and the petitioners demurred to the citation upon numerous grounds, among which were the following:

(1) That the court has no jurisdiction of the subject-matter of the proceeding or of the persons of the petitioners, for the reason that no affidavits or complaint have or has been filed "in this cause charging respondents with the commission of the matters and things set forth in the said order to show cause; * * * (2) that the court has no jurisdiction to punish respondents for contempt for the reason that none of their acts, or acts set out or mentioned in said order to show cause, constitute a contempt of court."

Petitioners also filed a motion to quash the proceeding on the ground that the court had no jurisdiction to issue the said order to show cause, for the reason that "no affidavit, complaint, or other paper has ever been filed in said cause upon which to predicate said order to show cause," and "the acts, facts and things stated in said order to show cause do not constitute contempt of court."

From the demurrer and the motion to quash the proceeding, it is to be seen that the points upon which the petitioners claim the right to the nullification of the judgment of contempt pronounced against them are that the court was without jurisdiction to pronounce said judgment, and that the facts upon which the proceeding was founded do not constitute or show contempt of court or a contumacious or any abuse of the process thereof.

The power or jurisdiction to impose punishments as for contempt of court not only inheres in the courts, but, in this state, is

expressly conferred upon them by the law. Code Civ. Proc. §§ 1209, 1211. The latter section reads:

"When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer."

It will be noted, on an examination of the foregoing section, that, while a contempt committed in the immediate view or presence of the court may be summarily punished—that is to say, that, in such case, no formal charge or proceeding is requisite to start in motion the court's jurisdiction or power to act in the premises—where the alleged contempt is constructive or committed out of the view or immediate presence of the court, the court's jurisdiction to punish for a contempt so committed cannot operate or be put in motion in the absence of the filing of a formal charge, duly verified, or, in other words, in the absence of the filing of an affidavit reciting the facts constituting the alleged contempt. Indeed, in a case of contempt not committed in the immediate view or presence of the court, the affidavit upon which the proceeding in contempt must be founded constitutes a complaint, and unless it, upon its face, charges facts constituting a contempt, the court is without jurisdiction to proceed. *Batchelder v. Moore*, 42 Cal. 415; *Hutton v. Superior Court*, 147 Cal. 159, 81 Pac. 409; *Overend v. Superior Court*, 131 Cal. 284, 63 Pac. 372; *Rogers v. Superior Court*, 145 Cal. 91, 78 Pac. 344; *Frowley v. Superior Court*, 158 Cal. 220, 226, 110 Pac. 817; *Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061; *In re Selowsky*, 38 Cal. App. 569, 577, 177 Pac. 301.

[4] We are not prepared to say that the facts upon which the court acted in adjudging the petitioners guilty of contempt are not sufficient to constitute that offense, nor is there any necessity for expressing herein an opinion upon that proposition, since we are of the opinion that the alleged contempt was one that was not committed in the immediate view or presence of the court, and that therefore the court did not acquire jurisdiction to punish the petitioners as for contempt. It will be observed that the sole ground upon which the adjudication of contempt is founded was in the act or acts of the petitioners in subpoenaing witnesses to be present in court in the proceeding initiated for the purpose of adjudging the minor re-

ferred to a ward of the juvenile court under certain provisions of the juvenile court law, after it had been stipulated by the petitioners, as counsel for said minor, that the court might make an order adjudging said minor a ward of said court. The mere fact that the witnesses for whom the subpoenas in question were issued responded to the process and appeared in court while the proceeding against the minor was being heard does not and could not itself constitute an act of contempt. Their presence in court was merely the effect of the alleged act of contempt on the part of petitioners.

There can be no possible doubt that the acts of the petitioners constituting the alleged contempt were committed outside the view and immediate presence of the court. A subpoena issued for the purpose of compelling the attendance of a witness in any proceeding in the superior court is issued by the clerks thereof, under the seal of the court, the act of issuing it is in its nature purely ministerial and with the physical act of issuing the subpoena neither the court nor the judge thereof has anything to do. It maybe, and generally is, issued without the judge or the court having any knowledge thereof until the witnesses appear in the proceeding in which their testimony is required, and then the court may only assume that such witnesses have been regularly subpoenaed. In this case, it is clear that the judge of the court had no knowledge whatever of the act of the petitioners in causing the witnesses to be subpoenaed until he was informed thereof by the petitioner Mitchell himself, during the course of the proceeding involving the question of the disposition to be made of said minor. Thus it is plainly manifest that, as stated, the act of the petitioners in causing the subpoenas to be issued was committed outside of the immediate view and presence of the court. It has, however, been suggested that the admission of the petitioners before the court that they caused the subpoenas to be issued was sufficient to give the court jurisdiction of the petitioners and the subject-matter of the alleged contempt. We do not assent to that proposition. As we have shown above, and as all the cases clearly and positively declare, to give the court jurisdiction to punish for contempt where the alleged contempt has been committed outside of its immediate view and presence, there must be an affidavit or affidavits or something in the nature of a complaint charging facts clearly disclosing that the contempt claimed has been committed. The situation is no different from that in which a person might appear before a court and openly confess in its presence that he had committed a crime. No one would for a moment undertake to maintain that in such case there being no complaint or indictment

or other accusatory pleading on file charging the person with the crime of which he thus admitted he was guilty, the court in whose presence such admission was made would have jurisdiction to punish the party for the offense. Indeed, if the court should undertake to impose a penalty upon a person admitting his guilt in its presence in the absence of any formal complaint or indictment charging him with the offense, the act of the court would be wholly nugatory or coram non judio.

In accordance with the foregoing views the judgment of contempt rendered and entered by the respondent court against each of the petitioners, S. E. Metzler and Ernest S. Mitchell, is hereby annulled, set aside, and vacated, and the petition for the writ of habeas corpus dismissed, and said writ discharged.

We concur: FINCH, P. J.; BURNETT, J.

(54 Cal. App. 98)

MACCHI v. LA ROCCA (LA ROCCA, Intervener). (Civ. 3957.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1921. Hearing Denied by Supreme Court Oct. 21, 1921.)

1. Marriage 54—Woman's interest in property acquired during illegal marriage vests irrespective of amount contributed.

Since a legal wife's interest in community property vests without contribution of any part of the actual purchase price, it is immaterial how much money for the purchase of property acquired by a man and woman while cohabiting under an illegal marriage was actually contributed by the woman; the same rule, though strictly speaking there can be no community property, being applicable by analogy as would obtain under a valid marriage.

2. Trusts 81(4)—Minor son acquires no interest in property purchased with his earnings by father.

Since the earnings of a minor automatically become the earnings of his father (Civ. Code, § 197) who may use them as he sees fit, a minor son acquired no interest in property purchased in part with earnings contributed by him for the payment of household expenses, and no trust resulted in his favor.

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by Maria Macchi against Augustino La Rocca, in which Francisco La Rocca intervened. Judgment for plaintiff, and defendant and intervener appeal. Affirmed.

Jos. L. Taaffe, of San Francisco, for defendant appellant.

Leon Samuels, of San Francisco, for intervenor appellant.

J. H. Morris, of San Francisco, for respondent.

NOURSE, J. Plaintiff commenced this action for an equal division of certain property acquired by defendant and herself during the period of an illegal marriage. Defendant answered, admitting the illegality of the marriage, the cohabitation of the parties during the period alleged, and the acquisition of the property, but denied that plaintiff contributed one-half of the purchase price thereof, and alleged that plaintiff contributed but one-third of said purchase price, and that the remaining two-thirds was contributed by defendant from his own earnings and from a portion of the earnings of his minor son which had been delivered to defendant during the period of cohabitation. The defendant then prayed judgment awarding plaintiff an undivided one-third interest in the property in suit and for a determination of the respective rights of himself and son in the remainder. This son filed a complaint in intervention, setting up practically the same set of facts, and prayed for an undivided one-third interest in the property. Upon plaintiff's motion for judgment upon the pleadings, judgment was entered in favor of plaintiff, awarding her an undivided one-half interest in the property against both defendant and the intervenor. From this judgment the defendant and intervenor appeal on the same record.

The facts admitted in the pleadings are that in November, 1906, plaintiff and defendant procured a marriage license from the county clerk in the county of Santa Clara and thereafter, without solemnization of any kind, lived together as husband and wife until about the 8th day of July, 1920, when plaintiff for the first time discovered that their cohabitation had been illegal. During this period the parties acquired a piece of property in San Francisco, which they occupied as their home, and it is this property, together with the household furniture and personal property located therein, which is the subject-matter of this litigation. During the period of cohabitation both plaintiff and defendant worked in various canneries and other establishments and contributed their earnings to the household expenses and the acquisition of this property. Plaintiff had a minor daughter by a former marriage, while the defendant had two minor sons by a former marriage, these children living for the greater part of the period with their parents. They also worked from time to time and contributed their earnings to their parents to help meet the household expenses. It is alleged in the complaint that

during this period the plaintiff earned and turned over to defendant the sum of \$8,500, and that her minor daughter during the last four years of the same period earned the sum of \$1,750, which was also turned over to the defendant, and that a portion of said sum so contributed to the defendant was used in the purchase of this property. On the other hand, the defendant denied that he had received these sums, but alleged that the earnings of plaintiff which were turned over to him did not exceed the sum of \$2,500, and that the earnings of plaintiff's minor daughter were received by her mother and at no time turned over to defendant. It is also alleged in the answer and in the complaint in intervention that plaintiff's minor son during this period earned approximately \$5,600, and the greater portion thereof was used by defendant in the purchase of this property. The value of the property in suit is admitted to be \$8,500 with an outstanding indebtedness of \$1,350.

The only issue raised by the answer is as to the amount of actual cash contributed by plaintiff and used by defendant in the purchase of the property. The only issue raised by the complaint in intervention is one of law purely, and that is the right of a father to use the earnings of his minor son without accounting therefor to the son.

[1] The issue of fact raised by the answer is wholly immaterial to the determination of the case. Where a man and woman have acquired property while cohabiting as husband and wife under an illegal marriage, though, strictly speaking, there can be no community property, the same rule will be applied by analogy as would obtain under a valid marriage. Under such rule it is immaterial how much money the wife has actually contributed to the purchase of the property involved, because, if a legal wife, her interest in the community property would vest by reason of her services as a wife and without contribution of any part of the actual purchase price of the property. Upon this point the case is controlled by *Coats v. Coats*, 160 Cal. 671, 675, 118 Pac. 441, 36 L. R. A. (N. S.) 844, and *Schneider v. Schneider*, 191 Pac. 533, 11 A. L. R. 1386.

[2] As to the rights of the intervenor, his earnings while a minor automatically became the earnings of his father. Section 197, Civ. Code. The father, being entitled to the earnings of his son, might use them as he saw fit, and whether they were used to meet the household expenses or in the purchase of property was no concern of the son. In the absence of an express agreement (and none is pleaded), the minor son acquired no interest in the property purchased in part with his earnings, and no trust resulted in his favor.

Neither the answer nor the complaint in intervention raised a material issue of fact

which would have required a trial, and judgment on the pleadings was therefore properly entered.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 88

DI FIORE et al. v. BOHNETT. (Civ. 3911.)

(District Court of Appeal, First District, Division 2, California. Aug. 25, 1921.)

Sales  411—Complaint held not good as one on contract.

A complaint alleging that defendant sold plaintiff an entire fruit crop, and plaintiff advanced a portion of the price, but that defendant failed and refused to deliver any more than a portion whereby plaintiff was damaged in a certain sum sued for, was in assumpsit for money had and received, and not upon the contract, since to sue for breach plaintiff should have alleged performance, offer to perform, or readiness and willingness to perform.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by S. Di Fiore and D. Di Fiore, a partnership doing business under the firm name of D. Di Fiore Canning Company, against F. O. Bohnett. From a judgment sustaining demurrer to complaint, plaintiffs appeal. Affirmed.

S. G. Tompkins, of San Jose, for appellants.

Bohnett & Hill, of San Jose, for respondent.

NOURSE, J. Plaintiffs sued defendant for \$417.95, the amended complaint alleging that on the 14th day of June, 1917, the defendant and S. Di Fiore, doing business under the name of D. Di Fiore Canning Company, entered into an agreement whereby the defendant sold and the canning company purchased the defendant's crop of fresh apricots grown during the season of 1917 at the price of \$75 per ton, the estimated quantity being 40 tons. The complaint also alleges that at the time of the execution of the contract S. Di Fiore paid and advanced to defendant on account of the purchase price of said fruit the sum of \$500, that but 2,188 pounds of said fruit was delivered, of the value of \$82.05, and that defendant has failed, neglected, and refused to deliver any more. It is then alleged that, by reason of defendant's failure to deliver the balance of the apricots, plaintiff has been damaged in the sum of \$417.95, the amount sued for. A demurrer was interposed, specifying as grounds thereof that the complaint did not state a cause of action, that the plaintiffs did not have legal capacity to sue, in that they had failed

to comply with the provisions of sections 2466 and 2468 of the Civil Code, and that the cause of action was barred by the provisions of subdivision 1, § 339, of the Code of Civil Procedure. This demurrer was sustained without leave to amend, and from the judgment following the plaintiff appeals.

It does not appear when the original complaint was filed, but appellant concedes that, if the action was in assumpsit, and not an action on the contract, it is barred by the statute of limitations. The "action upon the contract" to which appellant refers would be an action for damages for its breach. That the complaint does not contain the essential averments for such an action is apparent. It being evident that the contract called for the purchase of the entire crop grown by respondent during the 1917 season, appellant would not be permitted to take such portion of the crop as he chose and refuse to take the balance. In order to sue for breach of the contract, it was therefore necessary for appellant to allege his performance, offer to perform, or readiness and willingness to perform. *Barron v. Frink*, 30 Cal. 486, 488; *L. A. Gas. & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 778, 106 Pac. 55.

Here the complaint does not contain any of such averments, but it is apparent from the face of the complaint that the contract was abandoned, and that appellant did not seek its performance. His cause of action, then, was one in implied assumpsit for money had and received, and as such was concededly barred by the statute of limitations.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 90

PEOPLE v. ENGLISH. (Cr. 560.)

(District Court of Appeal, Third District, California. Aug. 26, 1921.)

Elections  329—Evidence that person personated in fraudulent voting was entitled to vote sufficient.

Evidence on prosecution under Pen. Code, § 46, for fraudulent voting, held, in view of Pol. Code, § 52, as to residence, and section 1239 as amended by St. 1917, p. 416, as to determining place of residence for voting purposes, sufficient to warrant finding that the person personated by defendant was legally entitled to vote at the time and place.

Appeal from Superior Court, Sacramento County; H. D. Burroughs, Judge.

John English was convicted of fraudulent voting, and appeals. Affirmed.

S. Luke Howe and Sheridan Downey, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, himself a duly qualified elector and entitled to vote in precinct No. 83 of Sacramento county, was indicted by the grand jury of said county for the crime of voting at the general primary election held throughout the state on the 31st day of August, 1920, in said precinct No. 83 of said county, upon the false and fraudulent representation that he was one John Henry Miller, who, the indictment alleges, was "a duly qualified elector of the county of Sacramento" at the time of said election, "and then and there duly and legally qualified and entitled to vote as such elector at said election at August primary" in said precinct No. 83 of said county.

A trial of the accused resulted in his conviction by the jury of the offense so charged, and he prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The indictment was based on section 46 of the Penal Code, which is as follows:

"Every person not entitled to vote, who fraudulently attempts to vote, or who, being entitled to vote, attempts to vote more than once at any election, or who personates, or attempts to personate, a person legally entitled to vote, is punishable by imprisonment in the state prison for not less than one nor more than two years."

It will be noted that by the foregoing section, three different offenses against the election franchise are described or defined, the indictment being founded upon the last part of the section, whereby it is made a crime for one, himself being entitled to vote at an election, who personates, or attempts to personate, a person legally entitled to vote. Under the indictment upon which the defendant was tried and convicted, it was, to justify a conviction, essential for the people to establish by the requisite degree of proof these facts or elements: (1) That the defendant himself was under the law entitled to vote at the primary election referred to in the indictment; (2) that the said John H. Miller was likewise entitled to vote at said election; (3) that the defendant voted at said primary election under the name of John Henry Miller, and upon the false representation that he was said person.

No question is raised here of the sufficiency of the proof to support the finding of the jury, as implied from the verdict, that the defendant himself was legally entitled to vote, and that he represented himself to be and did vote at said primary election as "John Henry Miller." Nor is it questioned that a person named John Henry Miller was registered as a voter in precinct No. 83 of Sacramento county, and that he did not him-

self vote at the primary election in question. It is contended, however, that the evidence is wholly insufficient to show that said John Henry Miller was legally entitled to vote in said precinct at the time of the holding of the primary election in said county of Sacramento on the 31st day of August, 1920, and this point constitutes the sole ground of complaint against the legal integrity of the verdict.

The rules of law in this state by which the question of residence is to be determined are set forth in sections 52 and 1239 of the Political Code. The section first named, among other things, declares:

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

"1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose;

"2. There can only be one residence;

"3. A residence cannot be lost until another is gained. * * *

Section 1239 of the same Code, which is under the title and chapter of said Code relating to "voting and challenges" at elections, provides, in part as follows:

"The board of election, in determining the place of residence of any person, must be governed by the following rules, as far as they are applicable:

"1. That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning; * * *

"3. A person must not be considered to have lost his residence who leaves his home to go into another state, or precinct in this state, for temporary purposes merely, with the intention of returning;

"4. A person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely, without the intention of making such precinct his home. * * *

"10. The mere intention to acquire a new residence, without the fact of removal, avails nothing, neither does the fact of removal, without the intention."

See Stats. 1917, pp. 416, 417.

The question here is whether the record discloses evidence which, when tested by the rules above stated herein, is such as to preclude us from justly declaring that the fact that said Miller was a resident and entitled to vote in said precinct No. 83, at the time of the primary election mentioned, was sufficiently established, the existence of the other elements of the crime charged being, as seen, conceded.

It was shown that the John Henry Miller named in the indictment was a laboring man, and had lived at a hotel owned and conducted by a Mrs. Mary McIsaac, at 1401 Front street, in Sacramento city, for about 17

years down to the 15th day of June, 1921. Said Miller was a registered voter from said hotel, and had at a number of elections voted in the election precinct in which the hotel was situated. Miller would often, during the years he resided at said hotel, leave Sacramento to work for others, but upon finishing the work for the performance of which he had been employed, would return to Sacramento and to the said hotel, where he resided, and would remain until any work he might obtain would again require him to leave the city. For several months he was employed by Mrs. McIsaac about the hotel. He was thus employed down to the 15th day of June, 1920. Mrs. McIsaac, testifying for the people, stated that Miller was at times "nervous and unstrung," and when in that state would quit working for her. She said that, on the 15th day of June, 1920, Miller ceased working for her, and she paid him in full what she owed him; that Miller, having been at some time previously operated upon to correct some physical ailment, stated to her on the day just named that it was necessary for him to submit to another such operation, and that he was going to a hospital in Sacramento that day for that purpose; that she then said to Miller that she was tired of his presence at the hotel, that as both were of a nervous disposition and could not get along together, it was her desire that he would not return to her place, or words to that effect, and that Miller, replying to that suggestion, said that he intended, after he was operated upon and discharged from the hospital, to go to Oakland, where he would remain with his brother, who resided in that city, until his health was restored. Continuing, Mrs. McIsaac stated that she assisted in getting Miller to the hospital, but that he remained at the institution only a few hours, leaving for the purpose of taking work "up the river"; that she would say, so far as she was able to recollect, that Miller never stopped at or slept in her house after June 15, 1920, although she did say that, after that date, he left with her for safe-keeping some money he had earned in his more recent employment. On redirect examination the witness testified:

"Q. Isn't it a fact that the man, John Henry Miller, was in the habit of going out into the country and returning to your place, making that as his home? A. Well, I know he would work on the boats, then he would come back and ask me if I had any place for him, but he never asked me to keep a room for him. Q. Oh, I understand that, but it was his custom, during the 17 years, when he came to Sacramento, to make your place his residence; wasn't that it? A. Well, yes. Q. That is correct, isn't it? Mrs. McIsaac? A. Yes, sir. Q. And when he left, in June, and went to the hospital, and then he came back to your place didn't he? A. Yes. Q. Did he stay there, at all? A. No, he did not. He went to the country—no. Q. Well, you told Mr. Howe that he

left and went to the hospital and didn't stay there, and came back to your place. A. He went to the hospital, yes—oh, yes. My son-in-law took him out, made arrangements with the Sisters at the Sister's Hospital, and was going—now, whether he paid the bill or not I don't know; but he went and bought two night-shirts, and went out there and made arrangements, and when I came back in the morning, he was up there. Q. Up in your house? A. Yes. He came in, and I said: 'Miller, you can't stay here.'"

John H. Miller was called by the defendant and, testifying as to his residence at 1401 Front street, stated that he left the hotel of Mrs. McIsaac on the 15th day of June, 1920, for the purpose of going to the Sisters' hospital in Sacramento for an operation; that he remained there but a few hours, when he returned to Mrs. McIsaac's place; that Mrs. McIsaac said to him that he could not live at her hotel any longer, and he thereafter secured a position as a watchman on the steamer Flora, plying the Sacramento river and which was moored at a station known as Vernon, a number of miles north of Sacramento on the Sacramento river. He testified that upon taking the position as watchman on the steamer Flora, he considered that his residence was on the boat. When asked what he meant by residence, he replied that it was the place where he ate his meals and slept. He said that he left the McIsaac Hotel with the intention of not returning to the city of Sacramento and taking up his residence; that he intended to go to Oakland and reside. He testified on cross-examination that for the past 17 years he had frequently worked on the boats on the Sacramento river, and that "every time that I finished I would come back to 1401 Front street"; that he was registered as a voter from 1401 Front street (the McIsaac Hotel), and that he had on several occasions voted at elections from that place. He likewise testified that when he left the Sisters' hospital on the 15th day of June he returned to the McIsaac Hotel and remained there several days, or until he went to Vernon to take the position on the steamer Flora as a watchman; that after he ceased working on the steamer he went to the Holland land district, which is on an island south of the city of Sacramento; that he got sick while there, and was for that reason unable to work longer, and came back to Sacramento in the month of July, 1920; that he slept "up town, but I guess some nights I slept in the corner," referring, as he later explained, to the McIsaac place; that after he recovered from his illness he again went to Vernon and resumed work as a watchman on the steamer Flora and remained there until he came to Sacramento; that he shortly thereafter went over to the Yolo county side of the Sacramento river, where the boat was "tied up," and worked there as a watchman on the boat until the 17th of September. He further

stated that he had not gone to Oakland after the 15th of June, that he had no residence there and that he had no residence in Yolo county, other than living on the boat while engaged in his work as watchman. He testified that he had known the defendant about 35 years and knew him while he stopped at the McIsaac place.

The foregoing brief recapitulation of the evidence is sufficient to show that, tested by the rules of law (above stated herein) whereby the matter of residence is to be determined, the case as made by the proofs is such that the question whether the said Miller was, on the 31st day of August, 1920, the time of the holding of the primary election at which the defendant is charged with having voted upon the false representation that he was said Miller, entitled to vote as a registered voter of precinct No. 83 of said county, was one for decision by the jury; and, the jury having accepted the testimony as being sufficient to establish in their minds the truth of that element of the crime charged beyond a reasonable doubt, we are not prepared to say that the conclusion so arrived at was not justified. We can say, however, that, upon its face, the testimony is sufficient to support the verdict.

There is nothing in the evidence to show that the witness Miller ever changed or abandoned his residence at the McIsaac hotel or that he attempted to establish a residence at any other place or intended to do so. It is true that he stated that he left the McIsaac hotel with the intention of abandoning it as his place of residence, and it is also true that he stated that, after leaving said hotel on the 15th of June, 1920, to work on the steamer Flora at Vernon, his residence was on said steamer. The latter statement involved a legal conclusion, and as so made by the witness it was shown to be wholly without probative force upon that question by his explanation that he considered the place here he took his meals and slept sufficient to constitute a legal residence. As to his statement that he took his leave from said hotel with the intention of not returning thereto, it is clear that, under the law, such intention, even if it were in his mind, was not of itself sufficient to constitute an abandonment of said place as his residence or to effect any such result. As we have seen, under the law, every person has a residence (Pol. Code, § 52), and "that the mere intention to acquire a new residence, without the fact of removal," cannot have the effect of changing a person's residence from the place where he has established it to some other

place. Pol. Code, § 1239. There is no evidence that he registered at any other voting precinct, and such evidence would readily have been available in documentary form had it existed, because the records of the registration office would have shown that his registration as a voter in precinct No. 83 of Sacramento county had been canceled. Indeed, the affidavit of registration of Miller, which was introduced and received in evidence in this case, constituted some evidence of the fact that he was not registered as a voter in any other precinct or county, otherwise said affidavit would probably not have been in existence. It is clear that said precinct No. 83 at the time of the holding of said primary election was his residence, even though he had therein no room or house in which to dwell. In *Huston v. Anderson*, 145 Cal. 320, 328, 78 Pac. 626, 635, which involved an election contest and in which an objection was raised to the right of a certain person who had voted at the election to vote, said person having previously to the election moved to another precinct to undertake temporary employment only, the court said, referring to said objection:

"The evidence was sufficient to sustain a conclusion that he had no intention of making the precinct into which he moved his residence. * * * If the voter had no intention of making the precinct into which he moved his home, but went there for temporary purposes only, he did not gain a residence there, and consequently did not lose his legal residence in the precinct from which he moved, *notwithstanding that he may not have had any certain house, room, or place therein that he could call his home.* [Italics ours.] That precinct continued to be his legal residence until he gained a legal residence elsewhere. The evidence was such that it might have sustained a contrary finding, but not such as to warrant us in disturbing the findings of the court below. See, in this connection, *Smith v. Thomas*, 121 Cal. 533; *Stewart v. Kyser*, 105 Cal. 459."

See, also, *Sheehan v. Scott*, 145 Cal. 634, 79 Pac. 350.

What is said in the above case is cogently pertinent to the case here, although we are not prepared to say that the evidence, taking it at its face value, would have warranted the jury in reaching any other conclusion than that evidenced by their verdict. Our conclusion is that the verdict is amply supported by the evidence, and, accordingly, the judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

187 Cal. 194

McCULLY v. McARTHUR. (L. A. 6222.)

(Supreme Court of California. Oct. 7, 1921.)

1. Deeds ⚡56(2)—Delivery depends on intention to unconditionally transfer title.

No set form of delivery is necessary, and whether a delivery has been effected depends upon the intention of the parties to unconditionally transfer the title to the property.

2. Appeal and error ⚡994(3), 995—Weight of evidence and credibility of witnesses for trial court.

It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses.

3. Deeds ⚡208(1)—Evidence held sufficient to sustain finding of delivery of deeds.

Evidence held sufficient to sustain a finding of delivery of deeds.

4. Cancellation of instruments ⚡53—Finding that neither grantor nor her estate was owner of certain property at all times held correct.

Where there was a finding that grantor executed deeds and made a delivery of them, a further finding that neither she nor her estate was the owner of the property is correct, since delivery passed title from the grantor.

5. Cancellation of instruments ⚡53—Finding that for sufficient consideration grantor of her own free will executed and delivered deeds supports finding that it is not true that deeds were without consideration.

A finding that for sufficient consideration the grantor of her own free will executed and delivered deeds upholds a finding to the effect that it is not true that the deeds were without consideration, since the execution of the deeds voluntarily with knowledge of their contents, and with intent to convey, makes consideration unnecessary to support the deeds, as valid conveyances of land, by Civ. Code, § 1040.

6. Appeal and error ⚡1071(5)—Immaterial finding that deeds were not made in contemplation of death held not prejudicial.

Where the trial court made a finding that deeds were delivered during the lifetime of the grantor, and that title was in the grantee,

whether delivery was in contemplation of death is immaterial, and a finding that the deeds were not made in contemplation of death was not prejudicial.

7. Deeds ⚡208(1)—Evidence held sufficient to support findings that delivery of deed had been effected.

Evidence of an unconditional delivery of deeds held sufficient to support findings that at the time of delivery grantor did not wish them returned, and that they were not returned to grantor.

8. Evidence ⚡314(2)—Testimony of grantor as to what physician told her about her health was properly excluded.

Testimony of a grantor as to what a physician told her concerning the state of her health was hearsay and properly excluded.

9. Cancellation of instruments ⚡43—Testimony as to whether grantor feared grantee where there was no claim of coercion, was properly excluded.

In an action to cancel deeds, testimony as to whether grantor feared the grantee where there was no claim of coercion, was properly excluded.

10. Witnesses ⚡245—Questions which had already been asked and answered were properly excluded.

Testimony concerning destruction of deeds was properly rejected, where the same questions had already been asked and answered.

11. Judgment ⚡251(2)—Relief to defendant not limited to that claimed by cross-complaint if within issues raised by complaint.

In an action to cancel deeds, where defendant set up cross-complaint, alleging that he was owner of a half interest in the property, he is not limited in relief to his affirmative defense claiming a half interest in the property, and a judgment that he was owner of all the property was within the issues made by the complaint asking a cancellation of the deeds.

12. Appeal and error ⚡189(3)—Objection to dismissal of cross-complaint and separate defense must be made below.

Where at the end of the case defendant on motion dismissed his cross-complaint and separate defense, it cannot be attacked for first time on appeal.

13. Judgment ⚡251(3)—Withdrawal of cross-complaint and separate defense carried with it its corresponding prayer for relief.

In suit to cancel deeds, where defendant set up cross-complaint and separate defense, alleging a half interest in the property, the withdrawal of the cross-complaint and separate defense carried with it the corresponding prayer for relief, and left only the general prayer of the answer, for such other and further relief as to the court may seem meet and proper.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Suit by Earl J. McCully, executor of the estate of Lulu M. McArthur, deceased, against Clifford W. McArthur, also known as Clifford B. Whitmore. From judgment for defendant, plaintiff appeals. Affirmed.

Earl J. McCully and Robt. T. Linney, both of Los Angeles, for appellant.

John B. Haas and Gilbert F. Wyvell, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the plaintiff from a judgment in favor of the defendant, in an action for the cancellation of four deeds to real property located in several counties of the state, in which Lulu M. McArthur, the original plaintiff herein, was the grantor, and the defendant the grantee, and to quiet the title to the property. Lulu M. McArthur died prior to the trial of the action, and Earl J. McCully, executor of her estate, was substituted as plaintiff.

The facts about which there is no dispute are these: Mrs. McArthur and respondent had resided together in the relation of mother and son for 20 years preceding the execution of the deeds in question. No kinship existed between them, and Mrs. McArthur had not adopted respondent. She was 60 years of age and very ill at the time of the transaction. At that time she was living on a ranch at Rivera. Her deposition was taken prior to the trial. She testified therein that she was told by the nurse, Rose Morrison, that she might die before morning. The matter of transferring the property had been under consideration for some time previous to the day on which the deeds were executed, November 3, 1917. On that date respondent brought a notary, Estelle Le Sage, and his attorney, Mrs. Mabel Willebrandt, from Los Angeles to the ranch. Mrs. Willebrandt presented the deeds to Mrs. McArthur, who signed them while propped up in bed. The execution was witnessed by the notary and two other women, Mrs. McArthur declaring she did not desire to have the deeds recorded. It was discovered that Miss Le Sage had not brought her notarial seal along. The deeds were taken to Los Angeles the same day by respondent, Mrs. Willebrandt, and Miss Le Sage, where the seal was affixed, and the deeds given to respondent, who retained them and caused them to be recorded in April of the following year. Between November 3, 1917, and April, 1918, Mrs. McArthur destroyed what she believed at the time were the original deeds, but which proved to be copies. This action was brought on May 2, 1918. The facts which are involved in dispute will sufficiently appear in the summary of the evidence.

The complaint alleged the material facts, and prayed for a cancellation of the deeds, and that they be declared null and void, be released of public record, and that appellant

be declared the owner of the property. Respondent in his answer denied the allegations of the complaint. As a special defense and by way of cross-complaint he alleged that he was the owner of an undivided one-half interest in the property described in the complaint, and prayed that he be adjudged the owner of such interest. In a separate defense he alleged that he "since the 3d day of November, 1917, held and does now hold the said undivided one-half interest of the said Lulu M. McArthur in trust for said plaintiff." The allegation of the cross-complaint is that appellant was the owner of some interest adverse to respondent, and respondent prayed that appellant be required to set forth the nature of her several claims, and that the title to one-half of the premises be declared to be in respondent. At the conclusion of the trial the court granted respondent's motion to dismiss the cross-complaint and separate defense without prejudice, and gave judgment for the respondent, quieting his title to all the property.

The court found:

"That on the 3d day of November, 1917, for a sufficient consideration, the said Lulu M. McArthur, * * * of her own free will, made, executed, and delivered to the defendant * * * four grant deeds, deeding in fee simple the above-described property to the said defendant, * * * and that the title and fee in and to said property now stands in the name of Clifford W. McArthur; that all denials and allegations in defendant's answer are true."

1. Appellant contends that—

"The evidence in this case is clear and uncontradicted that there was no valid delivery of the deeds"; that "the judgment given was in excess of that demanded in the answer, and this in itself requires a reversal"; that the "court in our opinion, committed several errors in its rulings on the admission of testimony"; and that other findings beside those on the subject of delivery of the deeds are not supported by the evidence.

In answer to this contention respondent correctly states the rule and cites authorities to the effect that where the evidence is sufficient as matter of law, and presents a substantial conflict, the findings will not be disturbed on appeal. He also claims that from the testimony of appellant's own witnesses it might be properly contended that there is a sufficient conflict to justify an affirmation of the judgment.

As appellant asserts, "The defendant makes no claim that there was a delivery of the deeds at any other or subsequent time" than November 3, 1917, the day of their execution, and at the trial respondent's attorney expressly stated that no claim was made of a subsequent delivery. It therefore must be shown that a delivery was made on November 3, 1917.

[1] The question of delivery is essentially one of fact, and depends upon the intention of the parties to unconditionally transfer the title to the property. No set form of delivery is necessary, and whether a delivery has been effected in a particular case must be determined by the facts and the circumstances, including the conduct of the parties. In *Tiffany on Real Property*, volume 2, § 461, p. 1738, it is said:

"While, as before stated, the necessity of delivery in connection with the instruments last named [deeds and contracts under seal], and others of an analogous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression 'delivery' as used in this connection, has been superseded by the more enlightened view that whether the instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. * * * Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not constitute a delivery; nor does a transfer to the grantee himself, if the transfer is not with such intention, but is for another purpose, as, for instance, to enable him to examine the instrument."

In *Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544, it is declared:

"A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. No particular form of delivery is necessary; but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each transaction." *Kenniff v. Caulfield*, 140 Cal. 34, 40 [citing other cases]. Manual tradition of the instrument is not enough; the transfer of possession must be with the intent of presently passing title, and must not be hampered by the reservation of any right of revocation or recall." "It is settled that delivery is not complete until the grantor has voluntarily surrendered all control over it." *Drinkwater v. Hollar*, 6 Cal. App. 117, 91 Pac. 664.

"The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another." *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462.

See, also, *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703; *Stone v. Daily*, 181 Cal. 571, 185 Pac. 665.

[2, 3] Considerable evidence was admitted on the issue of delivery. Respondent on cross-examination testified that—

"When the matter of making these deeds came up, I discussed that with her several weeks before."

Nellie Allen Bell, a witness for appellant, testified that—

She "heard defendant say to Mrs. McArthur before the papers were signed, 'Well, mother, we are ready to sign those papers,' and Mrs. McArthur said, 'All right; I suppose it is the thing to do.'"

Respondent testified:

"The signing took place in Mrs. McArthur's room; she was in bed at the time; I think Mrs. Willebrandt handed those deeds to Mrs. McArthur; and in detail Mrs. Willebrandt explained these deeds to her, when she handed them to her; those deeds were prepared under the request of Mrs. Lulu M. McArthur; the request was made to me, and the deeds were prepared by me and under my immediate direction; these deeds were handed to her one at a time, when they were signed; when she took the deeds she asked a number of questions about the deeds, and Mrs. Willebrandt explained each deed to her in detail."

He also testified that—

"She signed each deed separately, and handed it to me," that Mrs. McArthur said, "'I would like to have her [Mrs. McArthur's sister] sign as a witness,' so that there was no chance thereafter to make any trouble over the deeds."

Estelle Le Sage testified:

"Mrs. McArthur spoke to Mrs. Willebrandt about the deeds, and I said that I had to take them up and put the seal on them; she seemed to be very disappointed, and she said, 'Well, I wanted everything done up this afternoon,' she said, 'I wanted it all done right now,' * * * yes, she said she wanted—very anxious to see them, to see that everything was finished up on them; she was disappointed because I didn't bring my seal; * * * she said she wanted him to have all the property, but there was one that she wanted to hold for a while."

Respondent further testified:

"I put the deeds that night in my desk, in my room. Mrs. McArthur had access to my desk. They remained in the desk from November 3 until I brought them in and put them in the safety deposit box. I think it was several weeks afterwards; I don't remember just exactly the date. I had the box in the Hellman Bank. Why, Mrs. McArthur never demanded of me either the original deeds, during the time the deeds were on the ranch there; she never asked me for the deeds until a very considerable time, months afterwards, and I don't remember of her ever making a demand for the deeds; I can't—I would not say positively that she didn't—but I can't recollect of her having asked me for the deeds until the friction started months and months afterwards," and that she "tried to get me to record them at the time they were first made out"; that "when she handed the deeds to me, she said she wanted the property to stand in my title; she said she wanted it to go to me. She said that I had been instrumental in making all the property. It was understood be-

tween us that whichever one should pass out first, the other should get the property."

We quote further:

"The Court: What occurred at the bank the day you and Mrs. McArthur went there to get the deeds? A. The day Mrs. McArthur and I went?

"The Court: Yes. A. I never went to the bank with her to get the deeds.

"The Court: When and where did you deliver her the copies? A. I didn't deliver them; they were in the bank; I didn't know they were taken for—or a long time afterwards, I don't remember just how long."

Mrs. Willebrandt testified:

"Miss Le Sage placed the seal on the deeds, and handed them to Mr. McArthur, saying, 'Well, they are finished, that is your mother's wish.' * * * I don't think I mentioned about mailing the deeds to her. I don't think I stated that night that I would return the deeds to her to-morrow, after the notarial seal was put on. I didn't understand that she wanted them returned to her. I understood that she wanted it finished; didn't want them in the hands of the notary."

It is appellant's contention that the evidence clearly shows there was no delivery of the deeds. The testimony of his witnesses is set forth, and asserted inconsistencies in the testimony of respondent are pointed out. Appellant also contends that the testimony of respondent is not to be credited; that respondent was anxious to secure the property; that he had "had some words" with deceased at the time she asked him for the deeds; and that these facts make his testimony untrustworthy. He lays stress on the testimony of Mrs. McArthur, "I told her [Mrs. Willebrandt] I wanted the deeds returned to me by mail, and to remember that if I did not die that night I did not wish them delivered," and that Mrs. Willebrandt told her that she would return the deeds; on that of Mrs. Nellie Allen Bell, Mrs. Lottie Foster, and Estelle Le Sage, who testified that Mrs. McArthur requested Mrs. Willebrandt to return the deeds; on Mrs. Foster's further testimony that, "She [Mrs. McArthur] said there should not be a delivery of the deeds; I don't think she said anything further about that delivery; she said to the lady lawyer that they were not to be delivered," that Mrs. McArthur "wanted them back by mail and offered to pay the postage," and that "she said, 'The deeds are not to be delivered now.'" Appellant refers to the testimony of Estelle Le Sage that Mrs. McArthur said, "I don't want them recorded." He claims the testimony of respondent corroborates that of appellant's witnesses in many respects, that respondent testified Mrs. McArthur said she wanted the deeds back, and that she made the request of Mrs. Willebrandt that they be mailed to the ranch.

Appellant points to the happenings subsequent to the signing of the deeds and says:

"It appears from the testimony of other witnesses which need not be reviewed in detail that after the defendant had confessed to Mrs. McArthur that he had the deeds, she obtained from him what he led her to believe were the deeds that she signed; that in the presence of her friend, Alta I. Hitchcock, and Miss Prince, in charge of the safety deposit vault, she destroyed the deeds; that these deeds were in fact merely copies; that McArthur had kept the original deeds, and afterwards recorded them. From the foregoing review it appears that the testimony that Mrs. McArthur did not intend to deliver the deeds, or have them delivered to the grantee, the defendant, by any other person, is absolutely uncontradicted."

Because of the state of the evidence on the question whether Mrs. McArthur intended to and did deliver the deeds, and the apparent force of appellant's contention that the evidence fails to establish a delivery, we have deemed it proper to set it out at some length. It is strongly urged by appellant that, inasmuch as the evidence shows that Mrs. McArthur did not want the deeds recorded, but did want them returned to her after the notarial seal was affixed, and that she attempted to obtain the deeds from respondent, but that he deceived her by retaining the originals and giving her copies—thereby evidencing his recognition of her right to the deeds—it is clear she did not intend to deliver them, and that therefore the findings cannot be sustained.

It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses. Keeping this rule in view, it must be held under the evidence that we are bound by the findings of delivery. There is evidence that Mrs. McArthur handed the deeds to respondent, and said she wanted the property to stand "in his title"; that she asked her sister to witness the conveyance that there might be no trouble over them, that she said she wanted the transfer completed at that time, and that later she requested respondent to have the deeds recorded. The evidence of the relationship and friendly feeling existing between Mrs. McArthur and respondent at the time of the making out and signing of the deeds, and that it was understood between them that one or the other should eventually get the property, may have been regarded as significant by the court in finding for respondent. The evidence that Mrs. McArthur did not wish the deeds recorded at the time they were delivered is not, of itself, necessarily inconsistent with a delivery. The court may have concluded from the evidence that the reason Mrs. McArthur did not desire the deeds recorded was because she did not wish respondent to trade one of the pieces of property at that time. Nor is the evidence that she later attempted

to recover the deeds necessarily conclusive of nondelivery, for the court may have decided that she changed her mind concerning the transfer when the "friction" developed between them. As the evidence relied upon by appellant is in greater or less degree involved in conflict, and the testimony of respondent alone, if accepted, is sufficient to sustain a finding of delivery, it cannot be held that the trial court could not have found from the evidence that Mrs. McArthur intended to and did deliver the deeds.

[4] 2. Appellant contends that certain findings other than those of delivery are not supported by the evidence. Finding 2, which is to the effect that neither Mrs. McArthur nor her estate was the owner of the property at all times, is one of these. Manifestly, this finding is correct, for upon the theory that there was a delivery on November 3, 1917, neither she nor her estate could have been the owner after that date.

[5-7] The other findings complained of are to the effect that it is not true the deeds were without consideration; that it is not true they were made in contemplation of death; that it is not true that Mrs. McArthur instructed Mrs. Willebrandt to return the deeds if she did not die; that it is true respondent had the deeds on November 8; that it is true they were returned to him by Mrs. Willebrandt, but not for the purpose of returning them to Mrs. McArthur; that it is not true respondent on November 8 said the deeds were in the safe deposit box in Los Angeles; and that it is not true that on November 8, or at any other time, respondent went with Mrs. McArthur to the safe deposit box and there delivered the deeds to her, and that she then placed them in her private safe deposit box. These findings are on the issues presented by the pleadings. As we have shown, the finding on delivery is to the effect that for a sufficient consideration Mrs. McArthur of her own free will executed and delivered the deeds. *Lieman v. Golly*, 178 Cal. 544, 174 Pac. 33, was an action to set aside deeds for a lack of consideration. The court said:

"In his brief the appellant claims that the finding of the consideration is insufficient. The ninth finding states that each of said deeds 'was executed for a good consideration passing from defendant to said Annie M. Golly.' No further finding was necessary. On the contrary, since the findings also show that the deeds were executed voluntarily and with knowledge of their contents and the intent to convey, no consideration was necessary to support the deeds as valid conveyances of the land. Civ. Code, sec. 1040."

It is true the complaint alleged the transfer was made in contemplation of death, but in view of the finding that the deeds were delivered during the lifetime of Mrs. McArthur and that title was found to be in respondent, her motive—whether she delivered

the deeds in contemplation of death—is immaterial, and the finding could not have been prejudicial. As to the remaining findings Mrs. Willebrandt testified she gave the deeds to respondent, that she did not understand Mrs. McArthur wanted them returned to her, and respondent testified he told Mrs. McArthur, a short while after the deeds were signed, that he had them in his desk at the ranch. The finding that respondent did not return the deeds to Mrs. McArthur is supported by the evidence, for it is not disputed she secured only the copies. The finding that Mrs. McArthur, on or about November 27, learned for the first time that the copies of the deeds which she destroyed were not the originals is immaterial, for it having been found there was a delivery on November 3, whether she later learned that copies and not originals had been given to her, becomes unimportant.

[8-10] 3. There was no error in excluding the testimony concerning Mrs. McArthur's physical condition. Her testimony to the effect that she thought she was critically ill was admitted, and the statement of the doctor to her concerning her condition, since the doctor was not called as a witness, was hearsay. The testimony of Mrs. Foster, as to whether or not Mrs. McArthur was in fear of respondent, was properly excluded, for there was no claim that the deeds were delivered by reason of respondent's coercion. The testimony of Mrs. McCandless concerning the destruction of the deeds was properly rejected because the questions had already been asked and answered.

[11] 4. Appellant's contention that the judgment must be reversed for the reason that it exceeds the relief prayed for, in that in the separate defense and in the cross-complaint the respondent had alleged himself to be the owner of a one-half interest in the property and asked to be adjudged such owner, cannot be sustained. In *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786, it was contended the judgment was not authorized because it granted the defendant affirmative relief when no such relief was prayed for. The court said:

"There was no error in the action of the court complained of. The case was one in equity, and the court was authorized to grant any relief consistent with the case made and embraced within the issues, although not specifically prayed for."

In this case the relief granted was clearly embraced within the issues, for the complaint asked a cancellation of the deeds, and the court found that respondent was the owner of the property. Appellant argues further that the question presented here "is the effect in an answer of allegations the only effect of which, when the pleading is taken as a whole, is that of a disclaimer and admission against interest as to a part of the

subject-matter of the action." In *Billings v. Drew*, 52 Cal. 565, it was declared:

"They had the right to set up negative as well as affirmative defenses to the action, and the affirmative matter, separately pleaded, did not operate as a waiver or withdrawal of the denials contained in other portions of the answer."

In *Nudd v. Thompson*, 34 Cal. 39, a case involving a motion on the pleadings, it was said:

"We had occasion to consider that question in *Siter v. Jewett*, 33 Cal. 92, and we held that, 'where there are several answers, an admission made in one is not available in proof of issues raised by the others.'"

In *Meyers v. Merillon*, 118 Cal. 352, 50 Pac. 662, the court declared:

"As in separate defenses a denial in one is not waived by an admission of the same matter in another (*Billings v. Drew*, 52 Cal. 565; *Miles v. Woodward*, 115 Cal. 308), so here the denial of the answer is not waived or overcome by an averment in the cross-complaint of substantially the same facts as those which the answer denies."

It follows that respondent is not bound by the averments in the special defense and cross-complaint, and that the relief need not be limited to that prayed for.

[12] In *Southern Pacific R. R. Co. v. Du-four*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, it was stated:

"At the close of defendant's case he withdrew his special defense, and this action of counsel is assigned as error. Upon an examination of the record, we find no objection or exception taken to the withdrawal of this special defense from the answer, and hence do not perceive how it can be a proper subject for review. If plaintiff, relying on the allegations of the defense to cure a defective complaint, was surprised and misled by such action of counsel, upon a proper showing he would have been entitled to a continuance in order that he might amend his complaint or procure additional evidence, but there is nothing to indicate that he applied for such relief."

The question presented here is similar to the one in that case, with the additional fact that respondent moved also to dismiss the cross-complaint. No objection was made by counsel for appellant to the granting of these motions, so the question may not be raised for the first time on appeal.

[13] It follows that respondent's withdrawal of these pleadings, which admitted title to one-half of the property to be in appellant, carried with it the corresponding prayer for relief, and left only the general prayer of the answer, which was "for such other and further relief as to the court may seem meet and proper in the premises."

5. It having been decided that the findings

of delivery, as well as those on other material issues presented by the pleadings, were supported by the evidence, and that appellant's objections to the admission of testimony and to respondent's withdrawal of certain of his pleadings were without merit, it becomes unnecessary to consider respondent's contention that the bill of exceptions, which contains the entire record on appeal, not having been filed and served within the statutory period and that the application for relief from such failure under section 473 of the Code of Civil Procedure having been fatally defective, appellant is not entitled to a review of the evidence.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; LENNON, J.

54 Cal. App. 129

PEOPLE v. BISHOP. (Cr. 996.)

(District Court of Appeal, First District, Division 1. California. Sept. 2, 1921.)

1. Indictment and information $\S$ 110(17)—Information for murder of the second degree held sufficient, although not in statutory language.

An information charging that at a certain time and place one S. did kill and murder decedent in defendant's presence, and that he then and there aided and abetted the commission of the crime, was sufficient, as defendant was informed in a more precise and detailed manner than he would have been had the charge been general and in the language of the statute.

2. Criminal law $\S$ 407(1)—Testimony showing silence under accusation held admissible.

Where defendant was informed against for aiding and abetting S. in a murder, and S., in a statement to officers in defendant's presence, stated defendant had participated in the crime, testimony that defendant sat silent when the statement was being made was relevant when limited to showing an implied admission.

3. Criminal law $\S$ 338(6)—Evidence of statements by S. inconsistent with what witness testified were former statements by S. held inadmissible.

Where, on prosecution for homicide, witness testified to statements by S. tending to show defendant's participation with S. in the crime, testimony in defendant's behalf as to subsequent variant statements by S. was not admissible to show that the former statements of S. were not true; he not testifying.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

James Bishop was convicted of murder of the second degree, and he appeals. Affirmed.

Chas. B. Rosendale, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from the judgment upon conviction of the defendant upon a charge of murder in the second degree. The appellant's first contention is that the trial court was in error in overruling the defendant's demurrer to the information.

[1] The form of the information was unusual, in that its drawer did not content himself with following the language of the statute in relation to the charge of murder, but undertook to set forth the details of the homicide which was committed by one Walter Lee Smith upon the decedent, the murder of whom by said Smith the defendant was specifically charged with having aided and abetted. We think the objection which the defendant urged to the information in this form was hypercritical and unsustained by the cases which are cited by him in its support. The information expressly charges that at a certain time and place the said Walter Lee Smith did kill and murder the decedent in the defendant's presence and that he then and there aided and abetted the commission of the crime. The defendant was thus informed in a much more precise and detailed and definite manner than he would have been had the charge been general and in the language of the statute just what the accusation was which he was expected to meet, and the information was to that extent more favorable to him than it might have been had it been drawn in the language of the statute. His demurrer to it was therefore without merit, and was properly overruled.

[2] The appellant's next contention is that the trial court improperly overruled the defendant's objection to certain testimony offered by one J. A. Cornett. This testimony related to the acts and conduct of the defendant when, shortly after the crime and the detention of said Smith and himself upon suspicion of being the perpetrators, said Smith, in a statement to the officers of the law made in the presence of the defendant, stated that he, the defendant, had participated in the commission of the crime. The defendant sat silent when this statement was being made; and his act and conduct in so doing was the subject of Cornett's testimony to the admission of which the defendant objected. In support of his said objection the defendant's counsel asked and was accorded permission to examine the witness as to the circumstances immediately preceding and attending the statement of Smith, from which it appeared that the defendant, a few minutes previous to the taking of said Smith's statement, had been separately questioned by the officers of the law as to his knowledge of and part in the homicide, and had therein

denied that he had aided and abetted Smith in the perpetration of the crime. Immediately thereafter Smith was questioned in his presence and in the presence of some 12 or 15 other people, and then made the incriminating statements above referred to. After bringing out these facts by his examination of the witness Cornett the defendant objected to his testimony, and now urges error in the trial court in overruling said objection.

We think the point is not well taken. The rule is well established by a consistent line of cases in this and other jurisdictions that the acts and conduct of an accused person, when a statement of his guilty participation in the crime is made in his presence, may be presented to the jury as circumstances tending to show an implied admission of the truth of such statements. 1 Greenleaf on Evidence, §§ 197, 215; Joy on Confessions, 77; Rex v. Bartlett, 7 Car. & Payne, 832; People v. McCrea, 32 Cal. 98; People v. Ah Yute, 53 Cal. 614; People v. Mallon, 103 Cal. 513, 37 Pac. 512; People v. Luie Foo, 112 Cal. 24, 44 Pac. 453; People v. Amaya, 134 Cal. 531, 66 Pac. 794. It is to be noted in this connection that the trial court, in its charge to the jury, expressly limited the purpose of the statements of Smith, as testified to by Cornett, and the conduct of the defendant while such statements were being made, to that above stated. Clearly the testimony of Cornett for such limited purpose was admissible in the light of the above authorities; and hence the defendant's objection to the admission of this evidence was properly overruled.

[3] The appellant's next contention is that the trial court committed error in its refusal to admit in evidence the offered testimony of Leo F. Ferris and William Rambeau, two witnesses called on behalf of the defendant to testify to the making of certain statements by Walter Lee Smith at other times and places contradictory to and inconsistent with the statements made by said Smith in the defendant's presence and to which the witness Cornett had testified. The record discloses that Walter Lee Smith did not testify upon the trial of the defendant, having refused so to do upon the statutory ground. This being so the testimony of these two witnesses was offered, not to contradict or impeach Smith as to the truth of any testimony he had given as a witness in the case, but solely for the purpose of showing that Smith's former and extrajudicial statement as testified to by Cornett was untrue; but the truth or falsity of this statement of Smith was not an issue upon the defendant's trial, and was not material, since the sole purpose of its introduction, and to which it was strictly limited by the court's instruction was to show the conduct of the defendant when this statement of Smith made in his presence implicated him in the commission

of the crime. This being so, the offered evidence of these two witnesses as to the making of other and inconsistent statements by Smith was immaterial and was properly excluded by the trial court.

The appellant's final contention is that the evidence is insufficient to justify the verdict of the jury. We have carefully examined the transcript of the testimony, and are satisfied that this contention is without substantial merit.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(54 Cal. App. 15)

**DUNBAR v. SAN FRANCISCO-OAKLAND
TERMINAL RYS. et al. (Civ. 3856;
S. F. 8879.)**

(District Court of Appeal, First District, Division 1. California. Aug. 15, 1921.)

Hearing Denied by Supreme Court
Oct. 14, 1921.)

1. Negligence §93(2)—Husband's negligence imputable to wife.

Contributory negligence of husband in care of wife riding in a vehicle driven by him is imputable to the wife, and bars recovery by her for personal injuries.

2. Negligence §89(2)—Husband's negligence bar to wife's recovery.

If husband's negligence contributed proximately to injury to wife, the law will not permit him to benefit by his own wrong, and no recovery will be permitted to her, as a recovery for her injuries would be community property in which he would share.

3. Husband and wife §260—Damages for personal injuries to wife community property.

Damages recovered by wife for personal injuries are community property in which husband shares and over which he has control.

4. Street railroads §117(24)—Contributory negligence in driving vehicle at crossing for jury.

In an action by a wife for injuries in a collision between a street car and a horse-drawn vehicle driven by her husband, contributory negligence of the wife or husband in crossing the track held for the jury.

5. Negligence §136(9)—Question for jury.

Negligence ordinarily is a question for the jury to determine from the facts and fair deducible inferences, and it is only when the facts are without dispute or the deductions inevitable that the question is one of law for the court.

6. Street railroads §99(10)—Driver's vigilance at intersection need not be extreme.

A driver of a horse-driven vehicle need not exercise extreme and constant vigilance, in driving across street car tracks, and he may still be free from fault if in going forward he

used his eyes and ears, and either failed to see, or, having seen, miscalculated the danger.

On Hearing in Supreme Court.

7. Street Railroads §114(19)—Liability under last clear chance doctrine held not shown.

In an action to recover for injuries in a collision between a horse-drawn vehicle driven by plaintiff's husband and defendant's street car, evidence and facts held not sufficient to establish defendant's liability on the doctrine of last clear chance.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Matilda J. Dunbar against the San Francisco Oakland Terminal Railways and another. Judgment for plaintiff, and defendants appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

W. H. Smith and A. L. Whittle, both of Oakland, and Morrison, Dunne & Brobeck, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for appellants.

Ostrander & Carey, of Oakland, for respondent.

KERRIGAN, J. This is an action for damages for personal injuries sustained by the plaintiff in a collision between a street car of the corporate defendant and a horse-drawn vehicle driven by the husband of the plaintiff. The collision occurred in Oakland at the junction of Grand avenue and El Embarcadero, a thoroughfare emerging from said avenue. The first-named street runs in an easterly and westerly direction, and the other approximately north and south. The plaintiff alleges in her complaint that she was injured as the result of the negligence of the defendants in operating a street car at said junction at an excessive and dangerous rate of speed, and without giving any warning of its approach by gong or otherwise. Both the corporation and its codefendant—the motorman driving said car—deny the negligence charged, or any negligence; and as a separate defense they allege that the plaintiff's injuries were the result of her contributory negligence, consisting in the fact that she failed to ascertain whether or not a street car was approaching before attempting to cross the car track, or to warn the driver of the horse and buggy to do so, and that the plaintiff failed and neglected to display lights on said buggy, or to cause said vehicle to be driven on the right-hand side of the highway, as required by law. The cause was tried by a jury, and resulted in a judgment for the plaintiff in the sum of \$20,000. The defendants appeal.

The only questions in the case now pre-

sented are: (1) Was the plaintiff guilty of contributory negligence? and (2) If so, did the defendants have a last clear chance to avoid the collision?

The accident happened on the 2d day of August, 1916, at 9 o'clock at night. W. H. Dunbar, and his wife the plaintiff, were in an open one-horse buggy. Dunbar had driven the horse along what is called Lake boulevard and into El Embarcadero, intending to cross the car tracks on Grand avenue to reach the north side of that street and then proceed westerly. As he was approaching said car tracks an electric car of the corporate defendant was coming from the west on the right-hand track at a speed according to the testimony for plaintiff, of 30 miles an hour. Dunbar, without stopping or changing his course and going at the rate of 3 or 4 miles an hour, drove upon the track, and while in the act of crossing, his vehicle was struck by said car, resulting in serious injuries to the plaintiff. The eyesight and hearing of Dunbar and his wife were good; and while Dunbar looked up and down the track he states that he neither heard nor saw the approaching car. Mrs. Dunbar remembers nothing of the accident, not even the fact that she was driving with her husband that evening, nor the occurrences of previous days. Dunbar and his wife were very familiar with the conditions of the locality where the accident occurred. The former was called as a witness, and testified that coming into El Embarcadero he drove on the right-hand side thereof. He jogged along at the rate of 7 or 8 miles an hour to within 50 or 100 feet of the track; he then slackened up into a "roll" which is a little faster than a walk, and at least 4 miles an hour. He looked to the left and then to the right, when he was 40 or 50 feet from the track, and observed no car coming. He looked again when he was 10 or 12 feet from the track, and still saw no car. He knew nothing of the danger until he heard his wife scream, followed immediately by a crash, when he became unconscious. He did not see any street car nor the lights of any, headlight or otherwise, or hear a bell or the rumbling of the heavy car at any time. He had a clear view of Grand avenue to the left. When he looked in that direction there was nothing to obscure his view. From the time he entered El Embarcadero to the moment he heard his wife scream she did not give any expression of fear or caution, either by gesticulation or word, that he could remember. The horse was gentle and obedient and could be quickly stopped. The car struck the left front wheel of the buggy. The horse escaped injury. The buggy was equipped with a light fastened on the left-hand side with red, white, and blue lights, red on the left, blue on the right, and white in front.

Other witnesses to the accident, called on behalf of the plaintiff, were four occupants of an automobile which, like the plaintiff's vehicle, was proceeding along El Embarcadero toward Grand avenue, and which was thence to proceed easterly along the right-hand side of Grand avenue without crossing the track. The buggy had passed the automobile, heading for the track, and the occupants of the latter, fearing a collision, stopped their car about 40 feet from the track, and waited to see what might happen. They were William Glavin, Helen Glavin, W. J. Thorburn, and Helen Thorburn. They testified that they saw no lighted lamp on the buggy; that the street car was running at about 30 miles an hour from the moment they perceived it until the collision; that they heard no warning of the approach of the car; that the speed of the car was not slackened until after the impact; and that the hind wheels of the buggy were struck by the car. William J. Thorburn also testified that the horse approached the track trotting, and, as he neared it, slowed down, crossing it walking. The car was 150 feet away when he first saw it. When the automobile was stopped the horse's head was about 5 feet from the nearest rail. At that moment the car was about 150 feet away from the horse. At that time he saw the headlight of the car, which was what first called his attention to its approach. The light clearly illuminated the automobile. The light from the car from the moment he first perceived it gradually turned in towards the track as the car turned west. It might have illuminated the track for 30, 40 or 50 yards. He did not pay much attention to it. It did not shine on the track as it came around the bend. At no time did he see it playing upon the buggy. Dunbar was 4 or 5 feet from the track when he started to walk his horse across it. At this time the light was shining on the automobile. The street car continued 140 feet about, after it struck the buggy.

Mrs. Helen Thorburn testified that when the automobile stopped, the horse was just going on the track. At that time the car was a little farther than 84 feet away. The horse and buggy were on the track when the car came around the bend. The car was lighted, and had a burning headlight. The horse trotted until he got within about 10 feet of the track, and then he walked. At that time she had not seen the car. When the horse was 10 feet away from the near rail the car was 78 feet away. While the car was going that 78 feet the horse walked the 10 feet and crossed from one rail to the other before the collision. After the buggy was struck the car stopped in about two lengths.

William Glavin, driver of the automobile, testified that when he first observed the car

it was 50 or 75 feet from the horse and buggy, which, in their turn, were 10 or 15 feet from the track. The front of the car was not lighted, but it was equipped with a burning headlight. Referring to that part of his testimony where he said the car was about 50 or 75 feet from the buggy when he first observed the car, he stated that he must have misunderstood the question, and testified in that behalf that the car at that time was 200 feet south of El Embarcadero. From his testimony we quote:

"It looked just about 200 feet to me, that point, but I would not know just how to mark it here. I don't know the distance from that curve there.

"Q. But the horse and buggy had 110 feet to go while the car had from a point 200 feet south of the El Embarcadero up to the point of the accident to go, didn't it? A. Yes, if that is right, but I don't know whether it is just 110 feet or how many feet it is.

"Q. Well, it is as accurate as anything you can give, isn't it? A. I am not accurate on the measurements, but I could go over there and show you spot for spot on the scene of the accident."

There only remains of the occupants of the automobile Mrs. Helen Glavin. She testified that the car stopped about three car lengths after it struck the buggy. She noticed its headlight when it came around the corner. She saw no lights that illuminated the horse and buggy.

J. M. McCarthy, a witness called by the plaintiff, was a motorman in the employ of the defendant. He testified to having made three tests at the point of the collision to ascertain within what distance a car could be stopped by applying emergency pressure; that, running 20 miles an hour, it could be stopped in 105 feet; at 22½ miles an hour, 164 feet; at 25.7 miles an hour, 225 feet.

W. J. Griesbaum testified that he had had three years' experience in operating electric cars as a motorman; and that a car running at 30 miles an hour, under the circumstances present in this case, could be stopped in 75 or 80 feet.

Defendant Way, first called as a witness for the plaintiff, testified that, according to his best recollection, the speed of his car 100 feet from the point of the accident was 20 miles an hour, and when he was 50 feet away he had slightly checked it; that at 100 feet from that point he was ringing the gong as a signal to the automobile, and that it was at this time that he checked the speed of his car as a precautionary measure; and then when he perceived that the automobile had stopped he released the brakes. As a witness for himself and codefendant he testified that when he first saw the buggy it was revealed by the headlight of his car; that it was on the track and about a car's

length away, that he stopped the car in about its length, which was the shortest possible stop. On his cross-examination he testified that he saw Dunbar lean forward to urge his horse, but at that time the car was virtually upon him. When he leaned forward the horse lunged. The headlight enabled him to distinguish objects from 150 to 200 feet away. A number of photographs of the site of the accident were introduced in evidence by both sides.

It is not claimed that the evidence fails to support the verdict of the jury that the defendants were guilty of negligence, but it is earnestly contended that upon a full and fair consideration of all the evidence favorable to the plaintiff, and the logical deductions to be drawn therefrom, it appears that the plaintiff was guilty of contributory negligence, and that it does not appear that the defendants had a last clear chance of avoiding the collision after discovering that the plaintiff was in a position of peril. We will discuss both of these questions together.

[1-6] Under the facts of the case, if plaintiff's husband was guilty of negligence, such negligence is also imputable to the plaintiff. For a personal injury to a wife, who at the time of the injury is in the care of her husband, the latter's contributory negligence bars the right of recovery. But, regardless of whether or not she was in his care, if his negligence contributed proximately to her injury, the law will not permit him to benefit by his own wrong, and no recovery will be permitted, for under the law in this state a recovery for her injuries is community property, in which he shares and over which he has control. *Basler v. Sacramento Gas & El. Co.*, 158 Cal. 514, 518, 111 Pac. 530, Ann. Cas. 1912A, 642. There are some inconsistencies in the evidence for the plaintiff; but we cannot say that upon the whole evidence bearing upon the subject of negligence the jury was bound to conclude that the plaintiff failed to use reasonable care in attempting to cross the track. We cannot hold as a matter of law that the plaintiff was guilty of contributory negligence. Negligence ordinarily is a question for the jury to determine from the facts and fair deducible inferences. It is only when the facts are without dispute or the deductions inevitable that the court can say that no negligence was shown. We cannot say as a matter of law that Dunbar should have seen the approaching car. If in going forward he used his eyes and ears, and either failed to see, or having seen, miscalculated the danger, he may still have been free from fault. His vigilance does not have to be extreme and constant. *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908. Dunbar took observations when he was 40 or 50 feet away from the track, looking both to the right and the left. At

that time he was driving 7 or 8 miles an hour. He again looked both ways when he was 10 or 12 feet from the track. At that moment he was driving 3 or 4 miles, or 7 or 8 miles, an hour; and at neither of those times did he see or hear the oncoming car. In the meantime the car was coming around a curve in the track at the rate of 30 miles an hour, giving no notice of its presence by the ringing of a gong or otherwise. While the interior of the car was lighted its front was dark, except for the headlight, but it is probable that on account of the curve in the track this was not visible to Dunbar soon enough to enable him to perceive the danger of continuing on his course. The nearer his position to the track, the shorter was his range of observation to the left. If we bear in mind that the headlight of the electric car threw its reflection on the automobile, 40 feet from the track, before it illuminated the buggy; that it was this headlight becoming visible as the car came around the curve which first attracted the attention of some of those in the automobile; that its rays played on them first and only later warned Dunbar of his danger; that when William J. Thorburn first saw the lighted car it was 150 or 200 feet away from the point of collision; and that a car going 30 miles an hour would cover 44 feet in a second, so that a vehicle proceeding at a walk in the path of such car could cover but a short distance between the moment when the approach of the car became known and that in which they must inevitably meet if each should continue on its course unchecked—it becomes sufficiently clear that the question whether or not Dunbar failed to exercise ordinary care in undertaking to cross the car track as he did was one for the determination of the jury. Moreover, the jury might well have inferred that the buggy having been equipped with a lighted lamp on its left side, the motorman ought to have seen it in time to have averted the collision; or, independent of the lamp on the buggy, if the headlight on the car threw its illuminating rays far enough to enable the plaintiff to know of its approach in time to remain in a position of safety, as claimed by the defendants, the jury might well conclude that those rays from the headlight were sufficient to enable the motorman to see the buggy and its predicament in time to avert the collision by stopping the car or

checking its speed. If the headlight cast its rays upon the track and upon plaintiff's vehicle when the car was 150 feet away from the crossing, and as appears from some of the testimony, the car could have been stopped within 75 or 80 feet, it would indicate a clear chance on the part of the defendants to avert the collision. The motorman himself testified that he had felt out his car and checked its speed when he noticed the automobile approaching the crossing, and that he released the pressure when the automobile stopped. The jury might well have inferred from this testimony that the motorman should have seen the plaintiff's vehicle in its position of danger in time to slacken the speed or stop the car. From evidence introduced by the plaintiff it is a fair inference that the operator of the car could have slackened its speed sufficiently to have enabled the plaintiff to cross the track in safety.

Entertaining these views, it follows that, in our opinion, the evidence does not establish that the plaintiff was guilty of contributory negligence as a matter of law; and, the jury having resolved the question in the plaintiff's favor, this court cannot interfere with its conclusion.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court In Bank
Denying Hearing.

PER CURIAM. A majority of the justices failing to assent to the granting of the petition for a hearing in this court, the same stands denied.

[7] This court, however, is unanimously of the opinion that what is said in the opinion of the District Court of Appeal with relation to the last clear chance doctrine should not be affirmed. This was not necessary to the decision of that court. The jury were not instructed on that subject, and the facts stated in the opinion and shown by the evidence were not sufficient to establish defendants' liability on that doctrine. *Thompson v. Railway Co.*, 165 Cal. 754, 134 Pac. 709; *Arnold v. San Francisco-Oakland Terminal Ry. Co.*, 175 Cal. 4, 5, 164 Pac. 798; *Young v. S. P. Co.*, 182 Cal. 369, 190 Pac. 36.

WILBUR, SLOANE, SHURTLEFF, LAW-
LOR, and LENNON, JJ., concur.

54 Cal. App. 182

CLARK v. WADE. (Civ. 3838.)

(District Court of Appeal, First District, Division 1, California. Sept. 7, 1921. Hearing by Supreme Court Nov. 3, 1921.)

1. Landlord and tenant — 233(1)—Omission in finding in rent action held cured.

In action involving liability for rent, in which the court found that premises were so damaged by fire as to become uninhabitable, and that lessor did not put premises in habitable condition within 60 days after fire as required by the lease, failure to find that it would have been possible for lessor to so do *held* cured by express finding that lessee was released from liability under the lease by the lessor's failure to repair premises within such period.

2. Landlord and tenant — 188(1)—Lessee held not to have retained possession as tenant after fire and failure to repair.

Lessee did not remain in possession of premises as a tenant so as to be precluded from denying liability under a lease because of the lessor's failure to repair premises within certain period after fire, as required by lease, where he merely kept an employee upon the premises for purpose of preserving the property under lessor's agreement to compensate him for so doing, and where such employee did not refuse lessor access thereto.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Meyer Clark against J. Holmes Wade. Judgment for plaintiff, and defendant appeals. Affirmed.

Hutchinson, Van Fleet & Christin, of San Francisco, for appellant.

John Francis Neylan, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action brought by him to recover the sum of \$613.35, which he alleges to be due for services rendered by him to the defendant in connection with the preservation, protection, and improvement of certain personal property of the defendant situate in the basement of certain premises known as 924 Market street, in the city and county of San Francisco. The defendant filed an answer denying the existence of any such agreement or indebtedness, and also filed a cross-complaint alleging that the plaintiff was indebted to him in the sum of \$1,750 as rent for the premises above referred to, and which he avers the plaintiff entered into the possession of as the assignee of a certain lease carrying a monthly rental of \$250, and remained in possession thereof as such assignee of the lessee from the 23d day of September, 1917, to the 23d day of July, 1918, during which time he failed to pay such stipulated rental.

Upon the trial and submission of the cause the trial court found that the defendant was indebted to the plaintiff in the sum of \$393.55 for the performance of the above-mentioned services, and for certain expenditures made by him under an agreement with the defendant that he should be paid for such services the reasonable value thereof, and also for his said expenditures in connection therewith. The court also found that the plaintiff had been a tenant under the defendant of the said premises prior to and on the 22d day of December, 1917, but that on said day the premises became uninhabitable by reason of a fire; that the defendant, under the terms of the lease between the parties, was bound to put said premises in a habitable condition if it were possible so to do within a period of 60 days after such fire, and that by reason of his failure so to do the plaintiff had been released of any further obligation to pay rent therefor under the terms of said lease.

The court thus found against the defendant upon his cross-complaint, and so finding ordered judgment in favor of the plaintiff for the sum of \$393.55, together with his costs.

The defendant has appealed from such judgment, urging several errors of the trial court as grounds for the reversal thereof. The first of these is that the evidence is insufficient to justify the finding of the trial court as to the existence of an agreement to pay plaintiff for the work, labor, and services which he was found to have rendered. In making this contention the appellant urges that the trial court held that the contract between the parties was in writing in which the work to be done by the plaintiff was limited to certain specified services. It is true that there was at the beginning some sort of writing between the parties which contained this clause:

"You are hereby authorized to have all sawdust and other refuse in basement at No. 924 Market street removed at our expense. Labor bills incurred in removing water in alleys will be paid by us."

It is also true that during the trial of the cause the court limited the evidence as to the services performed by the plaintiff, and also the expenditures made by him, within the range of this writing; but conceding this, it is apparent that this writing is elastic enough to cover all of the kinds of services which the plaintiff did render, and for which he presented an itemized account, and also to cover the expenditures made by him. In addition to this the evidence shows that the defendant frequently saw the plaintiff at work upon the premises, and the sort of work that he was doing, and that he was making the expenditures in question through the hiring of others to assist him in his work; and that the defendant urged him to keep working and keep

his men working, and that he would see that he was paid a fair daily wage. We think these proven facts were such as to amply justify the findings of the court as to what the agreement was between the parties, and what sum was due the plaintiff thereunder.

[1] Upon the other phase of the case presented by the defendant's cross-complaint, we think the evidence also upholds the findings and conclusions of the trial court to the effect that there was a lease between the parties; that the premises covered by the lease were so badly damaged by fire on December 22, 1917, as to become uninhabitable; that the defendant did not put said premises in a habitable condition within 60 days after said fire as under the terms of the lease he was bound to do in order to hold the lessee. It is true that the court does not expressly find that it was possible so to do; but this omission from the finding we think would be cured by the court's express finding that the plaintiff was released from liability under the lease by the defendant's failure within 60 days to repair the premises. There is sufficient evidence in the case to have justified a more express finding by the court in that regard.

[2] The appellant's contention that the proof showed that the plaintiff had remained in possession of the premises in the capacity of a tenant after the fire, and until notice to quit served upon him in July, 1918, and that during said time he had refused defendant access to the premises for the purpose of making necessary repairs, is not borne out by the evidence in the case, since it sufficiently appears that the plaintiff's presence upon the premises after the fire was in the capacity of a workman engaged in preserving the property, and not as a tenant; and that, while he kept the premises locked for the purposes of protection during such times as he was away, he did not refuse the defendant access thereto for any and all purposes when he was there.

Finding, therefore, no error in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 124

PEOPLE v. WASHBURN. (Cr. 564.)

(District Court of Appeal, Third District, California. Sept. 2, 1921.)

1. Criminal law §1172(7), 1175—Instruction and conviction on lesser offense than that charged and proved held not prejudicial.

Where accused was charged with the offense of assault with a deadly weapon, which charge was amply supported by the evidence, he could not complain of an instruction on sim-

ple assault, nor of his conviction of the lesser offense.

2. Criminal law §822(15)—Refusal to instruct as to accused's testimony held not prejudicial in view of charge given.

In trial for assault with a deadly weapon, refusal of instruction that accused had a right to take the witness stand in his own behalf, and that his testimony should be weighed the same as the testimony of any other witness, held not prejudicial in view of other instructions.

3. Assault and battery §96(3)—Instructions on self-defense need only be clear.

In prosecution for assault with a deadly weapon, it was no objection to the instructions given on the law of self-defense that they "are not near as clear, near as convincing, do not set forth the facts as vividly as the instructions given by the defendant"; it being sufficient that the legal principles of self-defense were presented in clear and simple terms.

4. Assault and battery §96(3)—Instruction on apparent danger approved.

In prosecution for assault with deadly weapon, an instruction that "if from the evidence you believe beyond a reasonable doubt that without any overt act or physical demonstration upon the part of the complaining witness, P., sufficient to warrant the defendant as a reasonable man in believing that he was in great bodily danger," accused assaulted P. with a deadly weapon, such assault would be unjustified, held proper against the objection that the complaining witness' conduct and language and appearance might justify accused in acting without any overt act or physical demonstration.

5. Criminal law §1172(1)—Instruction requiring overt act or physical demonstration to justify self-defense held not prejudicial.

In prosecution for assault with a deadly weapon where the defense was based on the claim that prosecuting witness put his hand in his pocket and advanced toward defendant, an instruction, requiring an overt act or physical demonstration to justify self-defense, if erroneous, held not prejudicial.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

A. J. Washburn was convicted of assault and appeals. Affirmed.

Driver & Driver and Sheridan Downey, all of Sacramento, and G. W. Bedeau, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was charged with the offense of assault with a deadly weapon and convicted of assault. There can be no doubt that the evidence would have amply supported a verdict for the greater offense. Indeed, it is contended by appellant that—

The evidence "shows clearly that if the defendant was guilty of anything at all he was guilty of assault with a deadly weapon and

nothing less. There is no evidence in the records of this case to show that the defendant was guilty of simple assault. * * * The prosecuting witness was hit with an irrigating shovel, $4\frac{1}{2}$ to $5\frac{1}{2}$ feet in length, weighing 8 to 10 pounds, with a steel blade. * * * The defendant admits this—admits he hit the prosecuting witness with an irrigating shovel—admits he broke his arm in 13 pieces, and his only defense for the doing of that act was that it was done in self-defense.”

For the foregoing reason appellant contends that the court committed grievous error by instructing the jury as follows:

“The court has given you instructions covering the crime of assault with a deadly weapon; and also covering the crime of assault, which is included in the charge set forth in the amended information. * * * If you are satisfied beyond a reasonable doubt that the defendant did, as charged in said amended information, make an assault upon Pierce, but entertain a reasonable doubt as to whether the same was made with a deadly instrument, then you can return a verdict of guilty only for the crime of assault, or as it is sometimes called, simple assault.”

[1] In support of his position various decisions are cited to the effect that under such a state of the record, there being no evidence tending to prove a lesser offense than the one charged, it is error for the court to instruct as to said lesser offense, or for the jury to find such a verdict. This is the rule not only in other jurisdictions but in this state as well. However, in California the law is held to be that such error is not prejudicial and does not justify the lower court in granting a motion for a new trial or the appellate court in reversing the judgment. The subject received very careful consideration by the Second Appellate district in the case of *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508. In that case the evidence showed beyond question that the defendant was guilty of murder in the first degree, if guilty of any offense at all. Nevertheless, the court instructed the jury that the defendant might be convicted of manslaughter, and they followed this instruction and so found. In commenting upon this phase of the case, after declaring that the lower court erred in giving such instruction, the appellate court declared that—

“The error in giving the instruction, however, does not entitle defendant to a reversal of the order appealed from, for the reason that section 1404 of the Penal Code provides that a verdict shall not be set aside and a new trial granted on the motion of a defendant, except for some omission or error prejudicial to his substantial rights.”

The court further said:

“The greater offense, that of murder, includes all of the elements of the lesser, that of manslaughter. The sufficiency of the evidence to prove that defendant unlawfully killed deceased is not and cannot be questioned. This

being true, and conceding, as claimed by appellant, that if defendant was guilty of the unlawful killing, such act was by the evidence conclusively shown to have been accompanied by malice aforethought, thus making it murder in the first degree, how can it be said that he was prejudiced because the jury, due to the erroneous instruction, did not, as it should have done, find him guilty of the greater offense?”

A hearing of said cause was denied by the Supreme Court and the decision is controlling upon this point. Of course, the crime of assault is included in the offense charged in the information herein, and since there was evidence of the greater offense, necessarily there was of the lesser. If the jury had found the defendant guilty of assault with a deadly weapon it could not be said that it was not supported, and he would not complain on this ground. His position really amounts to a criticism of the action of the jury in rejecting one of the serious elements of the crime charged and rendering a more favorable verdict than the record warranted. For we must assume that the jury believed that he was not justified in making the assault, and that if said instruction had not been given they would have found him guilty as charged. *People v. Tugwell*, supra. There can be no presumption that any of the jurors had any reasonable doubt of the guilt of the defendant, or that if said instruction had not been given, a verdict of not guilty or a disagreement would have resulted. We cannot impute any misconduct or want of integrity to any of the jurors, and we must hold that, while believing the defendant guilty of the greater offense, they found some circumstance of mitigation that inclined them to exercise this clemency. At any rate, it cannot be said that the error was prejudicial or resulted in a miscarriage of justice.

[2] Appellant complains because the court refused this instruction:

“This defendant, under the laws of California, has a right to take the witness stand in his own behalf. It is your duty to carefully weigh and consider his testimony as you would the testimony of any other witness. You should not reject and disregard his testimony merely because he is the defendant in this case, but you should apply to his testimony the same rules in determining the credence to which the same is entitled that you would apply to any other witness in the case.” This instruction might well have been given, but its refusal was not prejudicial. It was not necessary to tell the jury that the defendant had the right to take the witness stand in his own behalf. The fact that he was permitted to testify would convince them of that right. Besides, no intelligent jury would need such instruction. Nor was the court required to call special attention to the defendant as a witness since from the general instructions given, the jury

must have understood that all the evidence in the case was to be carefully considered, and the same rules applied to all the witnesses for determining their credibility. Indeed the court directed the jury that the defendant "is to be accorded the benefit of the presumption of innocence," and that the evidence must be examined "in the light of this presumption." Moreover the jurors were expressly admonished that—

"The fact that the defendant has been arrested and has been charged with an offense and information has been filed against him creates no presumption whatever of his guilt."

In view of these special directions and the general instructions that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses, that they were to consider all the evidence in the case and should not act arbitrarily in determining its weight and effect, he would have been a stupid juror that could fail to apply the same measure to the testimony of all the witnesses.

[3] Appellant criticizes the action of the court in refusing certain proposed instructions upon the law of self-defense. However, it is quite apparent that the law upon the subject was fully and correctly given, and this is all that can be required. Indeed, the point of the objection is that—

"The instructions given by the court upon the law of self-defense are not near as clear, near as convincing, do not set forth the facts as vividly as the instructions given by the defendant."

We are not concerned with the question of rhetoric, but it is sufficient for us to perceive that the legal principles applicable to self-defense were presented in clear and simple terms so as to be readily understood.

[4] The only other complaint worthy of notice is that the court erred in giving the following instruction:

"If from the evidence you believe beyond a reasonable doubt that without any overt act or physical demonstration upon the part of the complaining witness, E. A. Pierce, sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the said defendant, assaulted the said Pierce with a deadly weapon, as charged in the amended information, then the court instructs you that such assault under such circumstances would not be justified."

The contention is that—

"It is not necessary for the prosecuting witness to make an overt act or physical demonstration before the defendant is justified in striking him. His conduct, his language and his appearance may be such that the defendant would be justified in striking him without any overt act or physical demonstration on behalf of the prosecuting witness."

It is difficult to perceive how there could be any reasonable ground for apprehending great bodily injury in the absence of any overt act or physical demonstration.

[5] Moreover, such an instruction was approved by the Supreme Court in *People v. Iams*, 57 Cal. 115. Therein the instruction was:

"If from the evidence you believe that, without any overt act, or physical demonstration upon the part of the deceased, sufficient to warrant the defendant as a reasonable man in believing that he was in great bodily danger, he, the defendant, fired the fatal shot at the deceased, and killed him, such killing under such circumstances was not justifiable."

Again, the theory of self-defense was based entirely upon the claim that the prosecuting witness put his hand in his pocket and advanced toward the defendant as though intending to assault the latter. This would constitute, of course, an overt act and a physical demonstration. If it did not occur there was no self-defense in the case. Hence, if the instruction, abstractly considered, had been erroneous, as applied to the evidence at the trial, it could not be prejudicial.

We find nothing in the record to justify a reversal of the cause, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

54 Cal. App. 142

HILTON v. HILTON. (Civ. 2339.)

(District Court of Appeal, Third District, California. Sept. 6, 1921.)

1. Divorce §115—Husband may prove adultery by evidence wife bore child during time they had not cohabited.

The presumption of legitimacy of the issue of spouses living together, stated by Code Civ. Proc. § 1962, subd. 5, does not preclude a husband, where he and his wife have lived apart for four or five years, from proving in his divorce action, by his own testimony or that of others, that his wife, though he had no sexual relations with her, gave birth to a child within such period; the purpose of such testimony being, not to establish the child's illegitimacy, but to support the charge of adultery.

2. Divorce §184(12)—Rejection of testimony, on issue of adultery, that defendant wife stated shortly after birth of child that she had not lived with plaintiff for four or five years, prejudicial error.

While, in view of Code Civ. Proc. § 2061, subd. 4, testimony of extrajudicial declarations or verbal admissions of a party is not regarded as very strong or reliable evidence, the rejection, in a husband's divorce action for adultery, of testimony as to statements of defendant a

few months after the birth of a child to her, that she and plaintiff had not lived together for four or five years, was prejudicial error, where plaintiff testified he had not during such time had sexual relations with her, while she asserted plaintiff had frequently visited her and maintained such relations.

3. Husband and wife ⚭34—Evidence held to sustain finding that property settlement and deed from wife to husband were procured by undue influence.

In a husband's action for divorce, wherein he set up a prior property settlement with defendant, evidence held sufficient to sustain a finding that such agreement and a deed pursuant thereto from defendant to plaintiff were procured by undue influence.

4. Husband and wife ⚭48(1)—In transfer of property by one to the other, husband must act in highest good faith.

The relation between husband and wife being of a confidential nature, Civ. Code, §§ 158, 228, require that in a transaction involving the transfer by the one to the other of property of value the husband shall act in the highest good faith toward his wife, to the end that he may not obtain any unfair or unconscientious advantage over her.

5. Husband and wife ⚭48(1)—Before transfer of property to husband, wife should have benefit of preliminary conference with adviser.

In transactions involving the transfer of property between husband and wife, the latter should have the benefit of a full, free, and private preliminary conference with a competent lawyer or business man employed and paid by her, in whom she has confidence, and who would be devoted to her interest only.

6. Deeds ⚭70(5) — Inadequacy of consideration may be considered as tending to show fraud or undue influence inducing transfer of property by wife to husband.

While the want of a valuable consideration for a contract or agreement between husband and wife involving a transfer of property by one to the other is not sufficient to raise the presumption of fraud or undue influence, where the consideration, in view of the confidential relation existing between them, is so small as to shock the conscience, its inadequacy may be considered as tending to establish fraud or undue influence.

7. Husband and wife ⚭279(2)—Wife held not estopped to rescind contract with husband by laches or failure to repay amounts received thereunder.

Where a wife, by reason of undue influence exerted by her husband and family physician, agreed to a property settlement with her husband prior to the institution of a suit for divorce by him, and to deed their home place to him, to be paid for in installments, she did not lose the right to rescind by delay or by her failure to return or tender the payments received by her, where she did not know of her right to rescind until advised by her attorney in the divorce action, and the money received under the contract was used in defraying the living expenses of herself and children.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Albert Hilton against Celia E. Hilton. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

J. E. Greene, of Dinuba, for appellant.

Middlecoff, Scott & Ham, of Visalia, for respondent.

HART, J. The plaintiff brought this action to secure a divorce from the defendant, and as grounds therefor charged as a first cause of action that the defendant had on divers occasions committed acts of cruelty upon and toward him, and as a second cause of action that she had been guilty of adultery. As to the last charge, the amended complaint alleges:

That three children have been born since said marriage, to wit, Laura Hilton, a daughter, aged 13 years; Edwin Hilton, a son, aged 7 years, and Clarence Hilton, aged about 5 months; "that [paragraph IV of second cause of action] plaintiff and defendant separated in the county of Tulare, state of California, in the month of September, 1914, and ever since said time have continued to live separate and apart; * * * that plaintiff is informed and believes, and upon such information and belief alleges the fact to be true, that defendant did, during the months of June, July, and August, 1918, on the ranch of the plaintiff, in the county of Tulare, * * * and on divers days and times between said month of August, 1918, and the time of the commencement of this action, commit adultery; that the name of the man with whom said act was accomplished is unknown to plaintiff; that the said child Clarence Hilton is not the issue of the marriage of said plaintiff and defendant, but is an illegitimate child of defendant and the man with whom said acts of adultery were hereinbefore alleged to have occurred."

It is further alleged that on the 15th day of December, 1917, and prior to the commencement of this action, the plaintiff and the defendant "entered into an agreement settling their property status, a copy of which agreement is hereunto attached and made a part of this complaint," etc.

By the terms of the agreement referred to, the defendant agreed to execute and deliver to the plaintiff a deed to about 100 acres of land, on which there were improvements—in fact, the home place of the parties, and where they were residing at the time of the making of the agreement—and all the appurtenances of said land, for and in consideration of the sum of \$3,500, payable \$500 at the time of the execution of the agreement and \$500 yearly thereafter until the full sum of \$3,500 was paid, no interest chargeable or payable on deferred payments. The agreement provided:

"Until said sum of \$3,500.00 is paid in full, said second party [defendant] shall have the right to live in the dwelling house, where she now resides, on the land above described, without the payment of rent therefor, but upon the full payment of said sum of \$3,500.00 she agrees that she will give possession and remove from said real property within thirty days after receiving notice so to do from said party of the first part, or his assigns."

It was further covenanted that all the household furniture and the wearing apparel in said dwelling house were to be the sole property of the wife and "all said real property, including farming implements and live stock, is the sole and separate property of said party of the first part [plaintiff]."

The following further provisions were contained in said agreement:

"Said party of the second part is to have the exclusive custody and control of the two minor children of the parties hereto, Laura Hilton, now aged 12 years, and Edwin Hilton, now aged 6 years, but said party of the first part is to have the right to visit said children at any and all reasonable times.

"The payment by said party of the first part to said party of the second part of the sum of thirty-five hundred (\$3,500.00) dollars as herein above provided shall be in full payment of every claim and demand of whatsoever kind or nature which said party of the second part now has or may hereafter claim against said party of the first part, including maintenance of herself, of the minor children above mentioned, and so long as said party of the first part shall make such payments as above specified, said party of the second part shall pay all of her own bills and expenses of every kind and nature and shall not incur or cause to be incurred any liability against the said party of the second part."

The defendant's answer specifically denied each and every act of cruelty alleged against her in the complaint, and denied the charge of adultery and that the said Clarence Hilton is her illegitimate son; denied that plaintiff "has not lived with the defendant or cohabited since the times alleged in paragraph IV" of the second cause of action.

Defendant also filed a cross-complaint in which she charged and specifically set forth a series of acts of cruelty, occurring on divers occasions, on the part of the plaintiff towards and upon her. She further alleged in said affirmative pleading that she is, "and at all times mentioned herein," the owner of the land described in the agreement between her and plaintiff whereby she agreed to quitclaim, by a deed of conveyance to the latter, her interest therein. In this connection she charged that the plaintiff and cross-defendant, with the intent to defraud and deprive her of her right to be supported by said cross-defendant, persuaded her to execute the agreement mentioned, that said agreement was entered into by cross-plaintiff without consideration "and was obtained

from this cross-plaintiff by said cross-defendant by undue influence, and the same is fraudulent and void as to this cross-plaintiff and the three children of plaintiff and defendant above named, and that said contract should be annulled; and this cross-plaintiff alleges that, on or about said 15th day of December, 1917, said cross-defendant, by the same means by which he obtained said agreement from said cross-plaintiff, and without any consideration received by this cross-plaintiff or parted with by said cross-defendant, obtained from this cross-plaintiff a quitclaim deed to said 100 acres of land, which said quitclaim deed this cross-plaintiff alleges was and is fraudulent and void as against this defendant and said minor children." It is further alleged by cross-complainant that at the time she signed and so executed said agreement and said deed she had no property of her own, nor any way of supporting herself other than by being supported by her said husband, "and these facts were known to plaintiff"; that at said time she had been married to plaintiff for more than 11 years, and that at that time the sum of \$500 was not sufficient to support said two children, then born and living, and cross-complainant; that when she executed said agreement and said deed she had no independent advice; that the negotiations leading to the execution by her of said instruments were conducted by the family physician of the parties, and that she did not know at that time, or while said negotiations were pending and being so carried on, that she was entitled to independent advice, and was not informed of her right to such advice or of any of her rights; that since the execution of said instruments she has been compelled to borrow the sum of \$150 "in order to supplement said \$500 per year as aforesaid"; that "said family physician at said time was interested in said settlement provided by Exhibit A [the agreement], in that he had been told by said plaintiff that, if said physician would procure this cross-complainant to sign said paper, then said plaintiff would pay to said family physician an indebtedness due from said plaintiff to said family physician, consisting of several hundred dollars, but neither said physician nor plaintiff informed cross-complainant of such fact."

The prayer of the cross-complaint is that the cross-plaintiff be granted a divorce; that the agreement and the quitclaim deed mentioned in the pleadings be annulled and set aside; that the custody of the minor children be awarded to cross-complainant; and that there be an award of such alimony for the support of herself and children as the equities of the case might warrant.

The cross-complaint was met by specific denials in an answer thereto by plaintiff, both as to the allegations of cruelty and the charge in the cross-complaint, that the agree-

ment and the deed in question were obtained from cross-complainant by means of undue influence and fraud.

The court found that the allegations of cruelty in both the complaint and the cross-complaint were untrue, and that the charge in the complaint that defendant had been guilty of adultery was not sustained by the evidence, and that said charge was baseless. It was also found, in connection with the finding upon the charge of adultery against the defendant, that the plaintiff and defendant did not separate in the month of September, 1914, or any other time prior to April, 1919; "although said parties occupied two different and separate cottages located on the lands of the plaintiff described in the complaint, said cottages were only a few rods apart, and said parties continued marital relations until after the conception of said Clarence Hilton."

It was further found that the land described in the complaint and in the agreement referred to was, at the time of the execution of the latter instrument and the deed from defendant quitclaiming said property to plaintiff, of the value of \$23,000, and contained a house which was the home of and was a suitable home for said plaintiff and defendant and their children, "and was then improved with productive vineyards and orchards; that on said 15th day of December, 1917, said real property was incumbered with a mortgage for the sum of \$11,000," the same still subsisting on said property at the time of the commencement of this action; "that at said time defendant was without means and was absolutely dependent upon said plaintiff for support and maintenance for herself and her said minor children; that since said time said real property has increased until at the time of this action it was of the value of \$50,000, and the annual income therefrom was \$4,800."

The court found that the agreement and the deed in question were procured from defendant by means of undue influence and were unsupported by a consideration, and that they were hence fraudulent and void as to the defendant and the minor children of the plaintiff and the defendant, and that the same should be annulled; that at the time of the execution of said instruments the defendant had no property of her own, and no way of supporting herself, but was solely dependant upon her husband (plaintiff) for support, all of which was then known to plaintiff; that, in the transaction resulting in the execution by her of the two instruments mentioned she was without independent advice, and was ignorant during the pendency of said transaction of her right to such advice therein, and was not informed of her rights in that particular. The court found, precisely as the cross-complaint al-

leges, that the negotiations culminating in the execution by her of the agreement and the deed in question were conducted by the family physician of the parties hereto, and that said physician was personally interested in the success of said negotiations for the reasons set forth in the cross-complaint as hereinabove stated.

A decree was framed in accord with the findings upon all the vital issues of fact, awarded plaintiff the custody of the minor child Laura Hilton, and the defendant the custody of the minor children Edwin Hilton and Clarence Hilton, and also a monthly allowance of \$75 for the support of defendant and the minor children of the parties whose custody was awarded to her, and \$175 to be paid by plaintiff to defendant for the purpose of liquidating a loan made by the latter at a certain bank for the support of herself and children after the instruments in question were executed. The appeal is from said decree.

The assignments of error are: (1) That error was committed in the rejection of certain testimony offered by the plaintiff in the support of the charge of adultery; (2) that the finding as to the date of the separation of the parties and the finding that the agreement in question and the deed, which was the culmination thereof, and whereby the defendant quitclaimed to plaintiff whatever interest she had in the land described in said instruments, were procured by means of undue influence, are without sufficient support in the evidence.

1. The assignment first above stated is important because the court found, as we have seen, that neither the allegations of cruelty as set forth in the complaint nor those of cruelty as pleaded in the cross-complaint were sustained by the proofs, thus leaving as a live issue (since there then remained in the case no defense by way of recrimination [Civ. Code, § 122]), the charge made by the plaintiff that the defendant had been guilty of acts of adultery. The said assignment arose from an effort by the plaintiff to prove by the witness Freeman that, in the presence of his wife and himself, on several different occasions within a few months subsequently to the date of the birth of the last child born to the defendant, the latter stated that she and the plaintiff had not lived together or had anything to do with each other "in four or five years." Objection was interposed to the proffered testimony on the ground that it was incompetent as in proof of the charge of adultery. After considerable argument of the point, and counsel for plaintiff had named several other witnesses by whom (so he asserted) he could prove the same declaration by defendant, made within the same period of time,

the objection was sustained. The theory upon which the objection was made by counsel for defendant and sustained by the court was that the testimony proposed would necessarily tend to prove the illegitimacy of the child Clarence, the last born to defendant, thus contravening the established policy of the law against the bastardizing of issue born in wedlock upon the statements or declarations or testimony of the parents, or a man and woman living together or cohabiting ostensibly as husband and wife. The objection was based and sustained upon the provisions of subdivision 5 of section 1962 of the Code of Civil Procedure, viz.:

"That the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."

The theory of said rule is stated as follows by Jones on Evidence, vol. 1, § 96:

"It is well settled on grounds of public policy affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them, nor are the declarations of the husband or wife competent as bearing on the question."

See, also, 2 Greenleaf on Evidence, § 1; Estate of Mills, 137 Cal. 298, 302, 70 Pac. 91, 92 Am. St. Rep. 195; Estate of Walker, 180 Cal. 478, 181 Pac. 792; Estate of McNamara, 181 Cal. 82, 183 Pac. 552, 7 A. L. R. 313.

In the two cases last named the whole subject of the presumptions, both conclusive and disputable, applicable to the question of the legitimacy of issue born in wedlock, is learnedly and exhaustively considered by Mr. Justice Olney; and it seems to have been the view of counsel for defendant in objecting to, and that of the court in excluding, the testimony referred to, that it is by those cases held that the presumption of the legitimacy of issue born in wedlock or during coverture is conclusive even where the husband and wife, although living separate and apart, have, within the period of probable conception and gestation, had opportunity only for coition between each other; that therefore evidence tending to establish the illegitimacy of such issue is wholly incompetent and inadmissible. The cases mentioned do not so hold. Those cases declare, as it was held in the Mills Case, supra, that the word "cohabiting," as used in subdivision 5 of section 1962 of the Code of Civil Procedure, "means the living together of a man and woman ostensibly as husband and wife (1 Bishop on Marriage, Divorce, and Separation, § 1669, note 1)," and that where the parties are so living together the issue of the wife is indisputably presumed to be legitimate,

but that, on the other hand, "it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race or color such that it could not have been conceived by the husband." Estate of Walker, supra, 180 Cal. 491, 181 Pac. 797. In the Estate of Mills, supra, however, the following language is used and it is probable that upon that language the counsel for defendant principally relies to support his position:

"Illegitimacy may be proved; but it cannot be proved by the evidence of a husband or wife that while living together they did not have sexual intercourse."

But this language, or the rule as thus stated, while perfectly consistent with the provision of subdivision 5 of section 1962, Code of Civil Procedure, as the word "cohabiting" as therein used is interpreted by the decisions, does not preclude or declare as incompetent the testimony of either the husband or wife, upon the issue of the legitimacy of a child born in wedlock, of nonintercourse, where they have not "cohabited" or not lived together at the time and during the period of conception and gestation.

The evidence very plainly discloses that the present case does not fall within the result reached in the Mills Case. The testimony of both the plaintiff and the defendant was as one upon the proposition that they had not, for a number of years prior to the birth of the last child, Clarence, born to Mrs. Hilton, lived together in the same house or dwelling. The plaintiff stated that the period of time during which the separation between them had existed down to the date of the trial was between five and six years. The defendant, while candidly admitting that they had not lived together for a number of years, was not able to give the exact period during which they lived separate and apart, giving it as her opinion, however, that it was three or four years. The evidence without conflict shows that at some date several years before the birth of said child the plaintiff left the dwelling in which he and defendant had been living together and took up his abode in a cabin on the same land on which the dwelling was situated and about 100 yards distant from said dwelling, and there slept and had his meals, preparing them himself, for a period of several years prior to the date of the birth of the child; that during that period of time he never on any occasion slept or had a meal in said dwelling; that defendant during said period never had a meal or slept in the cabin so occupied by the plaintiff; that they often met, but seldom, if ever, spoke to or exchanged greetings with each other. Besides this evidence, there is

the agreement dated and presumably executed on the 15th day of December, 1917, whereby the defendant agreed for the consideration therein specified to relinquish to plaintiff all her right and title in and to the land described in said instrument, and which contained, among other things, this recital:

"* * * That the parties hereto are now and for several years last past have been living separate and apart, and it appearing that there is no reasonable prospect of their effecting a reconciliation and resuming the marital relation: * * * Now, therefore, it is mutually agreed," etc.

[1] But the case at bar is wholly different from the cases above referred to. The issue submitted for decision was entirely different. In those cases the question of the legitimacy of the child was directly in issue; it was, indeed, the principal issue, and directly affected the status of the child with respect to an inheritance. Here the question or issue tendered by the pleadings is not whether the child last born to defendant was legitimate, but whether the defendant had been, as charged in the complaint, guilty of having sexual relations with some person other than the plaintiff, her husband. In other words, as has been shown, the plaintiff sought a decree of divorce from the defendant on the ground, among others, that the latter had committed the marital offense of adultery, and he was entitled to prove his case precisely as any other issue of fact may be proved—that is to say, that he may prove it by any relevant fact or circumstance which he may in a competent manner be able to present—and if, as is the theory of the plaintiff in this action, the evidence offered to prove the fact of the adultery of the wife must, in the very nature of the situation, disclose that a child born to the wife is not the child of the husband, or is, in other words, an illegitimate child, that fact is only, so far as the child is concerned, an unfortunate incident of competent proof essential to the establishment of the ultimate fact. At any rate, as before stated, where, as appears to be the uncontroverted fact here, the husband and wife have lived separate and apart for a period of four or five years, it is undoubtedly competent, in an action for divorce on the ground of the adultery of the wife, for the husband, either by his own testimony or that of other witnesses, to prove that, although he has had no sexual relations with his wife during such period of time, she has nevertheless conceived and given birth to a child within said period; the dominant purpose of such testimony not being to establish the fact of the illegitimacy of the child, but solely for the purpose of supporting the charge of adultery against the mother of the child, as alleged in the complaint. Obviously no more forceful or persuasive testimony of

the fact of the wife's adultery in a case like the present as to the facts than that disclosing that she had conceived and borne a child within a period of time during which the husband had never had sexual relations with or access to her can be imagined.

The conclusion necessarily following from the foregoing views is that the court below committed error in its action disallowing the proposed testimony, and that the ruling rejecting said testimony was prejudicial, for reasons now to be considered, there can be no doubt.

[2] While testimony of the extrajudicial declarations or verbal admissions of a party is not regarded as very strong or very reliable evidence (see Code Civ. Proc. § 2061, subd. 4), still, under the circumstances of this case, the rejected testimony proposed by the plaintiff that the defendant had made statements from which it could justly be inferred that there had been no sexual relations maintained between herself and the plaintiff for a period of four or five years prior to and down to the date of the birth of the child last born to her would be of singular or unusual importance and significance upon the issue of adultery, since it appears that the plaintiff with apparent positiveness testified that he had not at any time from the date of their separation, some four or five years prior to the date of the birth of said child, down to the happening of said event, had sexual relations with the defendant, while, on the other hand, the defendant asseverated that, notwithstanding that they had lived separate and apart for a number of years, the plaintiff had frequently during said period of separation visited her house in the daytime and maintained such relations with her. There was no other testimony from either side addressed to that question, and hence it is manifest that thereon a direct and pronounced conflict was presented, and thus the importance of the testimony which plaintiff unavailingly attempted to place before the court and into the record becomes plainly apparent. If said testimony is to be believed (a matter for the trial court to determine), and the statements thus attributed to the defendant are to be interpreted to mean, as with much reason they might be so interpreted, that she, during the period of time alleged to have been mentioned by her, had not sustained sexual relations with the plaintiff, then it would obviously be sufficient to turn the scale upon the issue of adultery in favor of the plaintiff.

[3] 2. The finding that the agreement and the deed in question were procured by means of undue influence is sustained by the evidence.

It was shown that the property described in the instruments in question was at the time of the execution of said instruments of

the value of \$23,000; that part of the land was devoted to the growing of grapes and other fruits, and that the annual proceeds from the sale thereof were amply sufficient to maintain the family; that the defendant at the times mentioned was not aware of the value of the property or the income derived therefrom; that, having had a disagreement with the plaintiff and been mistreated by the plaintiff's children by a former wife, and having also a large part of the time been ill, her mind was so unsettled that she actually was incapable of exercising such judgment in the transaction as would enable her to protect her rights. It was also shown, as the court found, that the negotiations resulting in the execution of the agreement and the deed were conducted by the family physician, who admitted upon the witness stand that the plaintiff promised him that he (plaintiff) would pay said physician a debt of several hundred dollars due from plaintiff to said physician in the event that he (the physician) succeeded in inducing the defendant to make the agreement and execute the deed. It is made to appear that the wife was without independent advice or advice from some disinterested party or some one employed by her for that purpose, who could have explained to her the importance of the transaction and the consequences thereof.

[4, 5] The relation between a husband and wife is of a confidential nature, and the law requires that, in a transaction involving the transfer by the one to the other of property of value the husband shall act in the highest good faith toward his wife, to the end that he may not obtain any unfair or unconscientious advantage over her in such transaction. Civ. Code, §§ 158, 2228. In other words, as is said by Mr. Greenleaf in his work on Evidence (section 688), there must be in such case no such constraint imposed upon the wife by the husband as to prevent her from exercising her free will with relation to the transaction. Moreover, the rule is that in transactions involving the transfer of property between the husband and wife the latter should have "the benefit of a full, free, and private preliminary conference with a competent lawyer or business man, who was employed and paid by her, and in whom she had confidence, and who would be devoted to her interest and hers only." *Pironi v. Corrigan*, 47 N. J. Eq. 157, 20 Atl. 227; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348, and cases therein cited.

[6] While it is true that the want of a valuable consideration for a contract or agreement between husband and wife involving a transfer of property by one to the other is not of itself sufficient to raise the presumption of fraud or undue influence in the procurement of such agreement, yet where, as here, there is a valuable considera-

tion for the agreement which, when viewed by the light of the confidential relation existing between the parties, is so small as to "shock the conscience," the fact of the inadequacy of the consideration may be considered as a circumstance tending to support the claim that the consummation of the transaction has not been free from fraud or undue influence. In this case it is obvious that the consideration is wholly inadequate. The fact is that the amount which the wife appears to have agreed to take in consideration of her relinquishment of all her rights in the property, and indeed her right to support by the plaintiff, is ridiculously small—in fact, hardly sufficient to support herself and children in a proper manner for a period of two years—and when this is considered together with the other circumstances to which we have above adverted, it is clear that the finding of the court that the agreement and the deed were procured by means of undue influence is sufficiently supported. Indeed, it may justly be said that upon its face the agreement is as to defendant so improvident as to give it little, if any, standing in a court of conscience.

[7] It is contended, however, that the defendant is not entitled to a rescission of the agreement for the reason that she postponed rescinding the same for a long period of time after its execution, and that she had borrowed the sum of \$150, hypothecating the agreement as security for the loan, and that she had received the payments due under the agreement up to the time of the commencement of this action and had not returned or offered to return the same or any amount which she had received under the agreement. The evidence shows that she was not informed or knew of her right to rescind until after she had been so advised by her attorney at the time she employed him to defend the present action. But manifestly this is not a case requiring the defendant to restore or offer to restore any money she received from the plaintiff under the terms of the agreement to entitle her to a decree rescinding the same. The money she received under the agreement she used in defraying the living expenses of herself and two children, and she thus received from the plaintiff nothing more than she would have been entitled to receive from him before the agreement was executed. The plaintiff, therefore, could not have been injuriously affected by a failure on the part of the defendant to restore the money he paid to her under the contract. Besides, the plaintiff knew, or at least he must have known, that the money he paid to her under the agreement would be used by her for her support, and therefore was fully aware of the fact that, in case she did rescind or attempt to

rescind the agreement, she would be unable to repay the money paid thereunder; she having no other property or money with which she could repay the amounts received by her. See *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *Gatje v. Armstrong*, 145 Cal. 370, 78 Pac. 872; *Cal. Farm & Fruit Co. et al. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593; *Richards v. Farmers'*, etc., Bank, 7 Cal. App. 387, 94 Pac. 393.

The judgment must be reversed because of the ruling of the court above considered, excluding testimony offered by the plaintiff of alleged admissions by the defendant that she and her husband had not lived together and had had nothing to do with each other for a number of years prior to the date of the birth of the child last born to her. Accordingly the judgment is reversed, with directions to the trial court to try de novo and so determine the single issue of adultery.

We concur: FINCH, P. J.; BURNETT, J.

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PELOIAN et al. v. WALDMAN. (Civ. 3916.)

(District Court of Appeal, First District, Division 1, California. Aug. 31, 1921.)

1. Vendor and purchaser ⇨334(4)—Demand that purchaser should sign contract not in accord with memorandum of sale a withdrawal of vendor's acceptance of offer.

Where a vendor demanded that purchasers should sign a contract for a deed containing conditions not in accord with the provisions of a memorandum of sale, which constituted the original contract, his action amounted to a withdrawal of his acceptance of the offer of the purchasers, and entitled them to a return of a deposit of part payment on the purchase price.

2. Vendor and purchaser ⇨102—"Rescission of contract" accomplished by acts indicating intention.

A vendor rescinding a contract need not use the word "rescind," since any appropriate words or any definite acts by which he indicates that he will not further proceed with fulfillment of the contract, and that he will not permit the vendees to proceed further with the performance of their obligation, will amount to a "rescission" or abandonment of the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rescission.]

3. Vendor and purchaser ⇨334(4)—Money paid as a deposit or as a forfeit on a contract may be recovered by vendees on rescission by vendor.

A vendee's deposit on a contract of sale even if it is referred to as a forfeit, upon rescission of the contract by the vendor, remains as money had and received to the use of the vendees, subject to be recovered in appropriate action.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by John Peloian and another against P. H. Waldman. From judgment for plaintiffs, defendant appeals. Affirmed.

Williams & Fenstermacher, of Fresno, for appellant.

C. K. Bonestell, of Fresno, for respondents.

WASTE, P. J. The plaintiffs brought this action in assumpsit to recover \$1,000 alleged to have been received by the defendant for their use. The defendant answered, denying the indebtedness, and by way of a further defense, set up a contract for the purchase and sale of real estate, entered into by the plaintiffs, the payment of \$1,000 as a deposit and part of the purchase price, the violation of the terms of the agreement on the part of the plaintiffs, and the retention by defendant of the \$1,000 as liquidated damages because of the breach of the contract. The lower court found the facts to be as alleged in the answer, except that it determined that it was the defendant who breached the agreement for the purchase of the real property, and that it was he who had not performed the conditions of the contract. It held that plaintiffs were entitled to recover the money paid, and entered judgment accordingly. Defendant has appealed.

[1] The facts upon which the court based its decision are few and without apparent conflict. On December 20, 1919, through the medium of a real estate agent, the plaintiffs entered into an agreement with the defendant for the purchase by them from him of 20 acres of land in Fresno county, together with sundry personal property, for the sum of \$21,000, \$1,000 of which was paid in cash, the receipt of which was acknowledged by the defendant, the balance to be paid in accordance with the terms of the memorandum of agreement prepared by the real estate agent which was in writing, approved and accepted by both plaintiffs and defendant. The memorandum called for a further payment of \$3,500 and a note for \$1,000, on delivery of a contract setting forth certain covenants and conditions upon which the sale was to be made, and provided that a contract for a deed in the usual form, and containing the usual clauses, warranties and covenants between the vendor and vendees, should be executed. The contract was also to provide that the payments for the land should be made by the retention by the vendor of 60 per cent. of all crops produced on the land until such time as the balance of the purchase price, \$15,500 and interest, should be paid,

Several proposed contracts were drawn by the defendant and submitted to the plaintiffs, all of which contained provisions objectionable to them and not in keeping with the

terms of the memorandum. Plaintiffs refused to sign. On January 20, 1920, the defendant presented another contract, signed by himself and wife, to the plaintiffs and at the same time delivered to them a written notice which required them to sign the proposed agreement by 6 o'clock of that day. Failure to comply with the demand, the notice stated, was to be construed as a breach of plaintiff's offer to purchase, and the \$1,000 deposit would thereupon be forfeited as liquidated damages. This contract, like the others tendered by the defendant, contained additional covenants not provided for by the preliminary agreement, and not in accordance with its terms. One of these conditions required that the 1920 crop of raisins grown on the premises should be delivered to the California Associated Raisin Company, instead of being applied in payment of the purchase price. Another provision of the tendered contract was that the land was sold subject to a crop mortgage for \$300, also subject to an agreement between the seller and one Peter Musto, the exact nature of which does not clearly appear in the proposed agreement, but which is foreign to the terms of the memorandum. The provision for the payment of taxes was not in accord with the original understanding. The plaintiffs refused to sign the agreement upon the ground that the objectionable features not contemplated by the original agreement were included, and demanded a return of their deposit. Defendant took the stand that the contract was at an end, and retained the money. The lower court found that the acts of the appellant amounted to such a withdrawal of his acceptance of the offer of the respondents as to entitle them to the return of the money paid as a deposit and part payment on the purchase price. It held, in effect, that the contract was rescinded by the appellant. Its conclusion, we think, was correct.

[2] It was not necessary for the appellant to use the word "rescind" in order to accomplish what is meant by that term. Any appropriate words, or any definite acts by which a vendor indicates that he will not further proceed with the fulfillment of the contract, and that he will not permit the vendees to proceed further with the performance of their obligation on their part to be performed, will be taken to amount to a rescission, or an abandonment of the contract, so far as the vendor is concerned, and will be held to entitle the vendees not in default to their choice of remedies for the breach, one of which is to sue for the return of the money already paid on the contract. *Pearson v. Brown*, 27 Cal. App. 125, 131, 148 Pac. 956.

[3] The money paid as a deposit, or even "as a forfeit" remains in the hands of the vendor as money had and received to the use of the vendees, subject to be recovered

by them in an appropriate action for that purpose. *Cleary v. Folger*, 84 Cal. 316, 321, 24 Pac. 280, 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443, 452, 25 Pac. 749, 22 Am. St. Rep. 257; *Heilig v. Parlin*, 134 Cal. 99, 102, 66 Pac. 186; *Burmester v. Horn*, 35 Cal. App. 549, 552, 170 Pac. 674.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 133

PEOPLE v. ZARI. (Cr. 945.)

(District Court of Appeal, First District, Division 1. California. Sept. 3, 1921.)

1. Homicide ⚡237—Accused must prove insanity by preponderance of evidence.

Accused, charged with murder and pleading insanity, must establish insanity by a preponderance of the evidence.

2. Homicide ⚡253(4)—Evidence held to show murder in first degree.

In prosecution for wife murder, evidence held to show the killing was without considerable or any provocation, and under circumstances showing an abandoned and malignant heart, so that a verdict of murder in the first degree, rather than manslaughter, was justified.

3. Criminal law ⚡48—Irrationality not test of insanity.

Although one may be irrational, yet if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and to know that it is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct.

4. Homicide ⚡286(1)—Instruction as to presumption of intent from act held proper.

In a murder trial, an instruction that the law conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another was proper, under Code Civ. Proc. § 1963, subd. 2.

5. Criminal law ⚡858(4)—Statute permitting written instructions to be taken to jury room construed.

In a murder trial, where, during its deliberations, the jury returned to the courtroom and asked further explanation of the term "malice," and the court read to the jurors Pen. Code, § 188, it was proper, at the request of one of the jurors, to have the Code section copied to be taken into the jury room, as against the objection that, under section 1137, if this were done, all of the instructions should be reduced to writing and handed to the jury.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Angelo Zari was convicted of murder in the first degree, and appeals from the order

overruling his motion for new trial and from the judgment. Order and judgment affirmed.

Ernest B. D. Spagnoli, of San Francisco, and V. L. Hatfield, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

WASTE, P. J. The appellant was convicted of the crime of murder in the first degree, and sentenced to a term of life imprisonment. He appeals from the order denying his motion for a new trial, and from the judgment.

The facts are few and simple. On May 17, 1920, in a dispute over the possession of certain bank books, the defendant cut his wife's throat with a pocketknife, inflicting injuries from which she died instantly. There were no eyewitnesses to the homicide. Neighbors who heard sounds of the disturbance in the Zari home summoned the police officers. When they arrived the wife lay dead upon the floor, and the defendant was lying near, face downward, with a long cut, described by the surgeons as "more of a superficial wound," across his neck. He had the knife in his hand. When removed to the emergency hospital for treatment the defendant told a representative of the district attorney's office that he "had some trouble with her [his wife], and he killed her with a knife." Later, on the same day, a police officer asked him, "Why did you kill your wife?" and he replied, "I killed her because she had the bank books and wouldn't give them back to me."

[1, 2] The defendant interposed and sought to sustain the defense of insanity. It was incumbent upon him to establish such insanity by a preponderance of the evidence. In the estimation of the jury he did not do so, and it therefore properly disregarded the plea. *People v. Willard*, 150 Cal. 543, 552, 89 Pac. 124. He now contends that he was improperly convicted of murder, upon facts which show nothing more than manslaughter. We have carefully scrutinized the record, and are fully satisfied that this contention cannot be upheld. It is very evident that the jury was not impressed with the story told by the defendant in the light of other compelling features of the case. The circumstances surrounding the brutal killing of the defendant's wife, and the events leading up to it, confirm his own admissions made immediately following the commission of the crime. The record amply supports the theory of the prosecution, which was manifestly accepted by the jury, that the killing was without considerable, or any, provocation, and under such circumstances as to show an abandoned and malignant heart on the part of the defendant.

[3] The appellant complains of the refusal of the trial court to give certain instructions, but we find no error was thus committed.

The requested instruction that absence of proof of motive is a circumstance tending to show innocence, and might in itself create a reasonable doubt of guilt, was properly covered by an instruction given by the court. The requested instruction that, if the jury believed from the evidence that the defendant's mind was irrational at the time of the homicide, even though caused by the continual or excessive use of alcoholic or intoxicating beverages, it was its duty to find the defendant not guilty by reason of insanity, was properly refused. It is not a correct statement of the law on the matter. Although one may be irrational, yet if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and to know that it is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct. *People v. Willard*, supra, 150 Cal. 554, 89 Pac. 124. The question of insanity and its relation to this case was amply covered by the court's charge. The defendant submitted two instructions relating to manslaughter which the court might properly have given. The omission however, was cured by another instruction, and the submission to the jury of a form of verdict by which it might have returned a verdict of manslaughter, had it been so disposed.

[4] Appellant also complains of the giving of certain instructions. The precise instruction, given in the case—to the effect that the jury should not be governed by sympathy—was approved in *People v. Borjorquez*, 35 Cal. App. 350, 353, 169 Pac. 922. The instruction that the jury was not to consider whether or not the defendant was insane at the time of the trial, but was to consider him then sane, was proper. The instruction that if the jury believed that the evidence proved to a moral certainty and beyond a reasonable doubt that the acts of the defendant were inspired by hatred and revenge, and were not those of an insane person, it was its duty to find the defendant guilty, when read with the other instructions, was not error. The instruction that the law conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another, was also proper. Code Civ. Proc. § 1963, subd. 2; *People v. Bushton*, 80 Cal. 160, 165, 22 Pac. 127, 549; *People v. Boling*, 83 Cal. 380, 382, 23 Pac. 421.

[5] The giving of written instructions was waived by both sides, and the court delivered its charge orally. During its deliberations the jury returned to the courtroom and requested a further explanation of the meaning of the word "malice." The court thereupon read to the jurors section 188 of the Penal Code. One of them requested that the Code section be copied, and delivered to the foreman, to be taken into the jury room. The

defendant objected unless all of the instructions were reduced to writing and handed to the jury. The objection was overruled. The section was copied and delivered to the jury as requested. The appellant now assigns this conduct as prejudicial error. He bases his contention upon his construction of section 1137 of the Penal Code, which provides that upon retiring, the jury may take with it, "the written instructions given." We do not think it was ever contemplated by the Legislature that the court might not, if requested by the jury, reduce to writing a portion of the oral instructions, and submit it to them for consideration, just as it might if the instructions had, in fact, been part of a written charge. To hold that under such circumstances as those here reviewed it was incumbent upon the trial judge to reduce a lengthy charge to writing, in order to allow one short Code section to be copied and taken into the jury room for the instruction of the jurors, who asked for nothing more, would result in working an absurdity. The point is absolutely devoid of merit.

The order denying a new trial and the judgment are, and each is, affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

54 Cal. App. 174

MEISTER v. LAWRENCE. (Civ. 3963.)

(District Court of Appeal, First District, Division 2. California. Sept. 7, 1921. Hearing Denied by Supreme Court Nov. 3, 1921.)

Vendor and purchaser ⚡228(5, 6)—**Principal defrauded by agent of half interest in property entitled to entire interest as against purchaser with notice.**

Where purchaser's agent and third person misrepresented to purchaser that vendor required a cash payment of \$13,000, instead of \$5,000, induced purchaser to permit third person to contribute \$6,500 and receive an undivided half interest in the property, and retained the \$1,500 excess paid by purchaser, the transaction was fraudulent, and entitled purchaser to entire interest in the property as against one who purchased third person's interest, without consideration and with knowledge of fraud.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Charles E. Meister, also called Charles Meister against Joe Lawrence, in which the defendant filed a cross-complaint. Judgment for defendant on his cross-complaint, and plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant.

Aram & Carraghar and Clifford A. Russell, all of Sacramento, for respondent.

NOURSE, J. Plaintiff commenced this action in ejectment involving the ownership of an undivided one-half interest in certain property situated in Contra Costa county. Defendant answered and filed a cross-complaint, attacking plaintiff's title as having been founded on fraud. Judgment went for defendant on this cross-complaint, quieting his title to the entire interest in the property, and from this judgment plaintiff appeals.

The facts of the case material to the opinion are that prior to the 8th day of February, 1918, defendant employed one Curtis as his agent to negotiate the purchase for him of the property in suit from one Kirk. The agent arranged with the owner for the purchase of the property for the full price of \$43,768.40, of which amount the sum of \$5,000 was to be paid down, and the balance was to be secured by a deed of trust upon the property. He then, in conjunction with one Goggins, fraudulently represented to defendant that the full purchase price of the property was \$52,800, of which amount \$13,000 must be paid down. Through the connivance of Curtis and Goggins the defendant was then induced to agree to permit Goggins to join in the purchase of the property upon the fraudulent terms which were thus presented to him, and for this purpose defendant, on February 8, 1918, entered into a written agreement with Goggins, reciting that, whereas each of them had deposited the sum of \$6,500 on account of the purchase price of \$52,800 for the property, and that the deed therefor was to be delivered in defendant's name, and Goggins had agreed to sign and execute a joint note and deed of trust for the balance of the purchase price of the property, he (Goggins) was declared to be the owner of an undivided one-half interest in the property. When defendant discovered that the purchase price of the property was but \$43,768.40, that but \$5,000 was paid to the owner, that Goggins paid in nothing, and that he and Curtis retained \$1,500 of the \$6,500 which defendant had paid as his half of the first payment, he immediately complained of the fraud, procured a warrant for the arrest of Goggins, and employed counsel to adjust the difficulties and protect his rights. About this time Curtis died, and Goggins transferred his interest, evidenced by the paper of February 8, 1918, to one Wright. Plaintiff, who was a creditor of a partnership composed of Goggins, Curtis, and one other, on the 14th day of October, 1918, took a deed from Wright, conveying all the right, title, and interest in this property which he had received through the transfer from Goggins. No consideration was paid by plaintiff for this conveyance, but either a partial or complete adjustment of plaintiff's claim against

the Goggins partnership was made through the transaction. It is upon this chain of title that plaintiff relies as evidence of his ownership of the property in suit.

The court found that Curtis and Goggins, who were business associates, made the false representations to the defendant hereinafter recited, and that these acts were a fraud upon defendant; that on the 16th day of August, 1918, plaintiff for the first time discovered the fraud; that he immediately sought both Curtis and Goggins, but he was unable to see Curtis because he was at that time sick in the hospital and died on the 18th day of August; that after diligent search he located Goggins, and confronted him with the information which he had, but that he ran from him and has not since been found; that in the early part of September, 1918, plaintiff sought out defendant and inquired of him as to the interest of said Goggins in said property; that defendant thereupon informed plaintiff that Goggins had no interest therein, and explained to him all the details of the fraud which had been practiced upon him; that thereafter and on the 24th of September, 1918, Goggins purported to assign all his interest in the property to one O. H. Wright, but that said transfer was without consideration and that on the 14th of October, 1918, said Wright purported to transfer his interest in the property to plaintiff, but that said transfer was also without consideration. Finally, the court found that when plaintiff took the transfer from Wright he was fully informed of all the fraudulent acts which have been detailed, and that neither plaintiff nor Wright were bona fide purchasers of said property.

The evidence amply sustains every material portion of the findings of the trial court. As to the good faith of plaintiff, it is made plain by the testimony of numerous witnesses that before he took the transfer from Wright he was fully informed regarding the fraud, that he was told that a warrant had been issued upon a complaint charging Goggins with embezzlement in the transaction, and that Goggins had no enforceable claim against defendant or any interest in the property. It also appeared that Wright was merely a tool in the hands of Goggins, used for the purpose of covering his fraud. From all the circumstances surrounding these latter transfers, the inference could fairly be drawn that no consideration passed to Wright. The circumstances were sufficient to put any reasonable person on notice. There is no error in the record.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 137

PEOPLE v. FRITZ. (Cr. 1001.)

(District Court of Appeal, First District, Division 1, California. Sept. 6, 1921. Rehearing Denied Oct. 6, 1921. Hearing Denied by Supreme Court Nov. 3, 1921.)

1. Indictment and information $\hookrightarrow$ 143—Defect waived by defendant's failure to move to have information set aside.

Defendant, by failure to move to set aside information not subscribed by district attorney under Pen. Code, §§ 809, 995, waived the defect under section 996, and was thereafter precluded from taking advantage thereof.

2. Criminal law $\hookrightarrow$ 1035(2), 1166(1)—Failure to furnish testimony in lower court before trial in superior court held not ground for reversal.

In prosecution for violation of state Medical Practice Act, § 17, that defendant when case was called for trial in the superior court had not received a copy of the transcript of testimony taken in the lower court, demanded when defendant was arraigned, *held* not ground for reversal, where no continuance was asked and no objection made to proceeding with the trial, and no showing or claim made that defendant was prejudiced, and where the transcript was furnished during the trial and was used by defendant's counsel with apparent familiarity.

3. Criminal law $\hookrightarrow$ 1166½(6) — That court proceeded to impanel jury though some of regular jurors did not respond to roll call held not ground for reversal.

That court proceeded to impanel jury though some of the jurors upon the regular panel failed to respond upon roll call *held* not ground for reversal, in absence of showing that any objectionable juror was forced upon defendant after she had exhausted her peremptory challenges.

4. Criminal law $\hookrightarrow$ 811(5)—Instruction as to weight to be given testimony of hired detectives or state agents held improper.

In prosecution for violation of State Medical Practice Act, § 17, instruction as to the weight to be given testimony of hired detectives or state agents *held* improper in that it singled out the testimony of a particular class of witnesses for comment.

5. Criminal law $\hookrightarrow$ 1172(2)—Improper instruction not ground for reversal where evidence clearly established defendant's guilt.

In prosecution for violation of State Medical Practice Act, § 17, instruction on the weight to be given testimony of hired detectives or state agents *held* not ground for reversal, where the evidence clearly established defendant's guilt.

6. Criminal law $\hookrightarrow$ 811(1)—Instructions singling out testimony of particular witness for comment improper.

Instructions should not single out the testimony of a particular witness for comment, or comment on the weight to be attached to a particular piece of evidence.

7. Criminal law ⚡811(6)—Instructions singling out defendant's testimony for comment improper.

In prosecution for violation of State Medical Practice Act, § 17, instruction that no greater presumption attaches in favor of defendant's testimony than attaches in favor of that of any other witness held improper, in that it singled out the testimony of a particular witness for comment.

8. Criminal law ⚡1172(2)—Improper instruction not ground for reversal where evidence clearly established defendant's guilt.

In prosecution for violation of State Medical Practice Act, § 17, instruction that no greater presumption attaches in favor of defendant's testimony than attaches in favor of that of any other witness, though improper, was not ground for reversal, where the evidence clearly established defendant's guilt.

9. Criminal law ⚡655(5)—Court's discussion before jury with defendant's counsel, as to the effect of his argument to jury, improper.

Court's discussion with defendant's counsel, in jurors' presence, as to the import and effect of his argument to the jury, held improper.

10. Criminal law ⚡1166½(13)—Impropriety of court's discussion with defendant's counsel, in jurors' presence, as to effect of counsel's remarks to jury, held cured by instructions.

Impropriety of court's discussion with defendant's counsel, in presence of jury, as to effect of counsel's remarks to jury, held cured by instructions charging jurors not to consider the conversation between defendant's counsel and the court.

Appeal from Superior Court, City and County of San Francisco; Harold Loudersback, Judge.

Rose Fritz was convicted of violating the State Medical Practice Act, and she appeals. Affirmed.

Edwin V. McKenzie, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen. (Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, of counsel), for the People.

WASTE, P. J. The appellant was convicted in the superior court of the city and county of San Francisco of the crime of misdemeanor, to wit, a violation of section 17 of the State Medical Practice Act (St. 1917, p. 93), and was sentenced to pay a fine of \$300, or, in default thereof, to be confined in the county jail for a term of 60 days. She appeals from the judgment of conviction and sentence.

[1] The information in the case is not subscribed by the district attorney or any one acting in his behalf, for which reason the appellant contends that there is no valid information on file. It is undoubtedly the

law that an information in this state must be subscribed by the district attorney (Pen. Code, § 809), and that the information must be set aside by the court in which the defendant is arraigned upon his motion, if it be not so subscribed (Pen. Code, § 995). But if the motion to set aside the information is not thus timely made, and none was made in this case, the defendant will be held to have waived the objection, and is precluded from afterwards taking advantage of the defect. Pen. Code, § 996; People v. Johnston, 48 Cal. 549, 550; People v. Villarino, 66 Cal. 228, 230, 5 Pac. 154.

[2] When the case was called for trial the defendant's counsel stated to the court that he had never received a copy of the transcript of testimony taken in the lower court which, he asserted, he had demanded when the defendant was arraigned, and asked that the record show the fact. He asked for no continuance of the matter, and made no objection to proceeding with the trial. There is nothing in the record to show, and appellant does not now assert, that she suffered any prejudice by reason of the alleged failure to receive the transcript. During the trial such a transcript was present, and was used by counsel for the appellant with apparent familiarity.

[3] At the inception of the trial upon the call of the roll of the regular jury panel, some of the jurors did not answer to their names. The appellant objected to proceeding unless the court should compel the missing talesmen to be brought into court. The court overruled the objection and directed the clerk to proceed with impaneling the jury, in the process of which the defendant exhausted all of her peremptory challenges. She now contends that she was deprived of the right to have all of the jurors upon the panel present in court. We do not think there is any merit in this contention, for the defendant is only entitled to a fair and impartial jury, not a jury composed of any particular individuals. People v. Durant, 116 Cal. 179, 199, 48 Pac. 75; People v. Schafer, 161 Cal. 573, 577, 119 Pac. 920; People v. Kromphold, 172 Cal. 512, 520, 157 Pac. 599. It is not shown in the record, nor suggested by appellant in her briefs, that any objectionable juror was forced upon her after she had exhausted her peremptory challenges.

There is nothing in the contention of the appellant that the verdict rendered is at variance with the allegations of the information, which charges the defendant with violating the provisions of section 17 of the Medical Practice Act of the State of California, setting out the facts. The verdict follows the charging part of the information, which is sufficient. The proof that the defendant held herself out as a practitioner, that she examined patients, and prescribed

for their ailments, is in accord with the allegations of the facts alleged in the information on which the charge of violation of the section of the Medical Practice Act is predicated.

[4-6] The court instructed the jury that it should not disregard the testimony of hired detectives, or state agents, who testified in the case, solely and only for the reason that they had been thus employed, but should give their testimony the same consideration as any other testimony in the case, giving it such weight as, considering its nature, the opportunity for knowing the facts to which the witnesses testified, their appearance and demeanor upon the witness stand, and all other elements which might go to their credibility, including their interest and bias, and should give to their testimony such weight as, under the circumstances, the same in their judgment was entitled to receive. The giving of this instruction was not reversible error, although it rarely happens that a trial judge is warranted in charging the jury respecting the credibility of any witness, or particular class of witnesses, or the manner in which their testimony should be received. It were far better to charge the jurors generally concerning such matters, and let the subject rest there. Instructions which single out the testimony of a particular witness for comment, and instructions bearing on the weight to be attached to a particular piece of evidence, should not be given. *People v. Converse*, 28 Cal. App. 687, 689, 153 Pac. 734.

[7, 8] The defendant took the stand in her own behalf. The court instructed the jury as follows:

"You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if she does so, her credibility and the value and effect of her evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in her own behalf, her testimony is to be weighed in the same manner, and measured according to the same standard, as the testimony of any other witness, and the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to her testimony alike with that of all other witnesses. *No greater presumption attaches in favor of her testimony than attaches in favor of that of any other witness.*"

Appellant complains of the instruction, particularly that portion which is underscored. It has been repeatedly pointed out that it is bad practice for the trial judge to single out the testimony of any witness, especially if the witness be the defendant, and instruct with particular reference to his testimony. While an instruction as to the defendant's testimony, which is not a departure from instructions that have been allowed

to pass by the Supreme Court, does not furnish sufficient ground for reversal, attention has been repeatedly called to the criticism of similar instructions in the more recently decided cases (*People v. Anderson*, 105 Cal. 32, 35, 38 Pac. 513), and it has been emphatically held that justice would be more surely accomplished if no such instructions were given, and the credibility of the defendant were left entirely to the jury (*People v. Boren*, 139 Cal. 210, 215, 72 Pac. 899; *People v. Van Ewan*, 111 Cal. 144, 153, 43 Pac. 520). As was said in both of those cases, it is difficult to logically attribute the giving of any instruction whatever on the subject of a defendant's testimony to anything else than a purpose to expressly disparage the witness before the jury.

[9, 10] At the conclusion of the argument of counsel for the defendant, the court asked what he meant by certain remarks addressed to the jury. Thereupon there ensued a colloquy between the court and counsel, which ended by the counsel being adjudged in contempt of court and fined \$50, with an alternative of spending two days in jail. Appellant took an exception to the action of the court, and now assigns the episode as prejudicial misconduct of the trial judge, entitling her to a reversal of the judgment. We are very candidly of the opinion that the trial court was guilty of a most serious invasion of the rights of the defendant, when it entered into the discussion with counsel before the jurors, as to the import and effect of the latter's argument. But, with apparent realization of its own error, the court instructed the jurors that the conversation which occurred between the attorney for the defendant and the court was not to be considered by them as bearing in any way upon the case, and that they were to entirely disabuse their minds of everything that occurred relative to the issue that had arisen between the court and counsel, and decide the matter as indicated in the instructions, on the evidence presented to them. While the episode is regrettable, and should not have occurred, we must deem its effect to have been cured by the action of the trial court in admonishing the jurors to clear their minds of any impression it might have left. *People v. Ruef*, 14 Cal. App. 576, 600, 114 Pac. 48, 54; *People v. Overacker*, 15 Cal. App. 620, 628, 115 Pac. 756.

From our examination of the entire cause, including the evidence which so clearly establishes the guilt of the appellant of the offense with which she was charged, we are of the opinion that none of the errors complained of resulted in a miscarriage of justice in the case.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 166

COOPER v. VUCINICH. (Civ. 3807.)

(District Court of Appeal, First District, Division 2, California. Sept. 7, 1921.)

1. Appeal and error ⇐1011(1) — Findings on conflicting evidence not disturbed.

Findings of fact will not be disturbed for a mere conflict in the evidence.

2. Municipal corporations ⇐706(7)—Contributory negligence of truck driver struck by motor bus at street intersection held for jury.

Contributory negligence of truck driver, who slowed down before crossing intersecting street containing railroad tracks running parallel with curb, and who was struck by defendant's jitney bus approaching on truck driver's left on intersecting street at excessive rate of speed when bus swerved to wrong side of street in attempt to pass in front of truck, held for jury.

3. Municipal corporations ⇐705(1) — Driver of vehicle should slow down before crossing street containing railroad tracks.

Driver of motor vehicle should slow down upon entering intersecting street containing railroad tracks.

4. Municipal corporations ⇐705(2) — Vehicle has right of way over other vehicle approaching on intersecting street on its left.

Under Motor Vehicle Act, § 20(e), truck had right of way over jitney bus approaching on its left on intersecting street.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by F. A. Cooper against S. Vucinich. Judgment for plaintiff, and defendant appeals. Affirmed.

Rose, Silverstein & Collier, of Oakland, for appellant.

Dixon L. Phillips, of Oakland, and Esther P. Phillips, of San Francisco, for respondent.

NOURSE, J. This is an action for damages for injuries to person and property resulting from a collision between an automobile truck owned and operated by plaintiff and a seven-passenger touring car belonging to defendant and operated by him, through his agent, as a jitney bus. The collision occurred September 14, 1919, at the southwest corner of the intersection of Castro and Seventh streets in the city of Oakland. Judgment was rendered in favor of plaintiff for the sum of \$500. Defendant appeals, attacking certain findings, as not supported by the evidence, to the effect that plaintiff was not guilty of contributory negligence, but was driving carefully on the right-hand side of Castro street, and that defendant was negligent, which negligence was the cause of the damage.

Defendant states:

"Our sole contention of plaintiff's contributory negligence is based upon the fact testified to by him that when he reached the intersection of Seventh and Castro streets he came almost to a stop, and then proceeded to cross Seventh street at a rate of approximately seven miles per hour directly in the path of the jitney automobile."

He argues from this that when he (plaintiff) came almost to a stop the driver of the jitney was entitled to assume that the truck was stopping to allow him to pass and to continue on his course along Seventh street; that when, instead of stopping, the truck proceeded to slowly cross Seventh street, the emergency then arising, necessitated the driver of the jitney to turn to the south (his left) side of the street in an effort to pass in front of the truck and avoid a collision, because the north side was blocked by the truck (which was 15 feet long) and to continue on his course between the tracks would place him in the direct path of the truck; that when the jitney swerved to the south side to pass in front of the truck the driver of the truck had ample opportunity to stop it and avoid the collision, and his failure to do so amounted to negligence.

[1, 2] The findings referred to will not, of course, be disturbed on appeal for a mere conflict in the evidence. The question raised by defendant is whether the evidence relied on constitutes negligence on the part of plaintiff as a matter of law.

Castro street extends in a general northerly and southerly direction, and Seventh street extends in a general easterly and westerly direction. Seventh street is 60 feet wide. Two sets of railroad tracks of the Southern Pacific Company run along the middle parallel with the curb. The distance between each curb and the outer rail of the track is 20 feet, the track is 5 feet wide and the space between the two tracks 10 feet. The truck was traveling slowly in a southerly direction on the west or right-hand side of Castro street. Plaintiff's version of the circumstances leading up to the accident was that just as he went on Seventh street he came almost to a stop, slowing down to between 6 or 8 or 8 or 10 miles an hour, and proceeded at that rate to cross Seventh street; that he looked to see that the way was clear, and when he was just going on the first rail of the northerly track he saw the jitney about 150 feet away in the space between the two sets of tracks, coming toward him; that when he was just crossing the second or southerly track he looked up and saw it about 50 or 60 feet away, traveling at least 45 or 50 miles an hour, and just as the truck left this track the bus swung towards the south or left side to pass in front of the truck, striking it a glancing blow on the left side near the front, swinging the truck

around and hurling its occupants to the pavement, causing the injuries complained of. The jitney continued to the next corner on the left-hand side of Seventh street before stopping. There was no obstruction on the north side of Seventh street, and it was in good repair.

[3, 4] The rule as to the care which the driver of a vehicle must use before crossing a railroad is well established. An omission to slow down upon entering this street might well have been a breach of duty amounting to negligence. The truck being on defendant's right as the vehicles approached the intersection, plaintiff, prima facie, had the right of way under section 20 (e) of the Motor Vehicle Act. Deering, General Laws, p. 931. That plaintiff did not act negligently in this matter, but acted with care and caution, seems to be a reasonable interpretation of the evidence. On the other hand, the evidence shows that defendant was violating the law as to speed, and that he himself produced the emergency complained of; that he then turned to his left side of Seventh street at its intersection with Castro street, although the road to the right was clear, passed in front of the truck, striking it in passing, and traveled to the corner beyond on that side of the street before stopping. This is in accordance with the finding that he was traveling "along the south side of Seventh street at its intersection with said Castro street."

The findings are amply supported by the evidence, and the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J

187 Cal. 222

In re GRAHAM'S ESTATE.**TAPPAN v. FORTMAN.**

(S. F. 9779.)

(Supreme Court of California. Oct. 13, 1921.
Rehearing Denied Nov. 10, 1921.)**1. Executors and administrators §111(1) —
Lawyer executor, though practicing lawyer,
may employ attorney.**

An executor or administrator who is himself a practicing lawyer is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding, under Code Civ. Proc. §§ 1616, 1618, 1619.

**2. Executors and administrators §111(1) —
No denial of allowance of attorney fees merely
because executor is attorney.**

Conceding that it is still within the discretion of the probate court to pass upon the necessity for the employment of an attorney in the administration of an estate the same as upon other matters of necessary expenditure, denial of such necessity cannot be made to rest upon the mere fact that the required services are in the line of the administrator's profession or business.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of Margaret Graham, deceased. From an order denying an allowance in his final account, on objection of Anna Fortman, of fees to an attorney, R. B. Tappan, executor, appeals. Reversed.

See, also, 183 Pac. 952.

Nusbaumer & Bingaman, of Oakland, for appellant.

Allen G. Wright, of San Francisco, amicus curiæ.

L. R. Weinmann, of Alameda, for respondent.

SLOANE, J. This is an appeal by R. B. Tappan, executor of the last will of Margaret Graham, deceased, from an order of court

denying an allowance in the final account of the executor of fees to a attorney employed by said executor in the administration of the estate of said decedent.

[1] The executor, Tappan, is himself a practicing lawyer, and it was the ruling of the probate court that his employment of an attorney for the usual and ordinary legal proceedings of the administration was not a necessary expense of the administration. An allowance of attorney's fees was made for certain extraordinary services rendered by the attorney employed in the course of the administration. So the only question presented is whether an executor or administrator, who is himself a practicing lawyer, is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding.

The Code of Civil Procedure, as in force at the time this estate was in process of administration, contained the following provisions:

"Sec. 1616. Compensation of the executor and administrator. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter."

"Sec. 1618. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him."

Then follows a graded scale of commissions varying with the valuation of the estate. Section 1619 provides that attorneys for executors and administrators shall be allowed out of the estate as fees "for conducting the ordinary probate proceedings the same amounts as are allowed by the last section as compensation for executors and administrators for their own services."

The reasonable necessity for the employment of an attorney to prepare legal papers and conduct the ordinary court proceedings by the average layman administrator is not disputed. Such employment is a matter of universal practice, the compensation is provided for by statute and made equal to that of the executor or administrator, and such allowance is not made an issue in this case further than to claim an exception where such executor or administrator is himself a lawyer and competent to perform the legal services required.

We may therefore confine ourselves to a consideration of the question whether a duty rests upon the executor who is a lawyer to render this professional legal service to the estate without additional compensation rather than to employ another attorney for such service.

Counsel in this case are disposed to agree that, if the executor does perform these legal services, he may not receive extra compensation therefor.

The issue presented here is whether the performance of such professional legal duties is part of the service designated by the Code when it provides that the executor or administrator shall receive "for his services such fees as are provided in this chapter." It is clear that the services incumbent upon the executor in the exercise of his duty to the estate are the same, irrespective of his general vocation in life. The "care, management and settlement of the estate" referred to in section 1616, supra, may call for the services of a plumber, a carpenter, an auctioneer, a real estate agent, or an expert accountant. Must the administrator render these services if they happen to be in the line of his general occupation? Clearly not. He would be entitled to hire such work done and pay for it as part of the "necessary expense of the care, management, and settlement of the estate." If he did perform such services which were not in the line of his duty as administrator, he might not be permitted to receive compensation, but the reason would be one of public policy forbidding him to be his own employer.

In many of the states, and in California prior to 1873, attorney's fees have been approved under the general provision that the administrator "shall be allowed all necessary expenses in the care, management, and settlement of the estate," and, as already pointed out, under such general provision an attorney administrator would be no more called upon to give his professional services to the estate than would the plumber, carpenter, or accountant administrator to render services that might be required in his special line of business, when the care and management of the estate should call for such employment.

It is true that such services as just referred to are of a more exceptional and casual nature than that of handling the legal business of an administration, but that is an additional reason why the latter should not be gratuitously added to the responsibilities of the lawyer administrator, while all others are allowed to avail themselves of outside legal assistance.

The legal end of the probate of an estate has come to be recognized as a distinct branch of employment. Hence we have had various amendments to the Code recognizing and providing for such legal services. In 1873 there was added to the general provision hereinbefore quoted, providing for an allowance to the administrator of all necessary expenses," etc., the words "including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in the probate or other courts." In 1905 the Legislature advanced the position of an attorney in probate matters, so far as relates to compensation, to an equality with the administrator, upon a commission basis

graduated according to the value of the estate, and in 1909 the law as it now stands was enacted, which gives the same compensation to the attorney for the ordinary legal services of a probate proceeding as are allowed to the administrator for the ordinary business administration of the estate.

We are bound to assume that the Legislature in its deliberations has determined that the services rendered by the administrator and by the attorney in such probate proceedings are of equal value, and that the compensation to each is a reasonable compensation for the service rendered. It certainly would be an unjust interpretation of the law which would require of the lawyer administrator twice the service for the same pay that is required of the merchant or mechanic or physician in the same position.

Although the employment of an attorney for the probate of an estate is not required by law, such employment is recognized by our legislation as the usual and customary practice, and it is doubtless conducive to system and accuracy in the administration of the probate law. The probate procedure in California may be considered by many as unduly intricate and expensive, but it cannot be disputed that it is effective in the settlement of estates and the transmission of property and titles in a way to protect the rights of creditors and of heirs and devisees.

The whole matter of the disposition of the estates of deceased persons is within the legislative control. Our Legislature has seen fit to recognize the services and compensation of the administrator, and the services and compensation of an attorney, as relating to distinct employments in probate administration.

There are, and have been to the knowledge of all legislators, hundreds of practicing lawyers serving as executors and administrators, but there has been no intimation in any law upon the subject that a different rule should apply to a lawyer in such position in the matter of employing legal assistance than to an administrator of any other business calling.

And in all of the innumerable instances in this and in other states where lawyer administrators have employed and paid attorneys there seems to be but one case in the courts where the right of such employment has been called in question.

There are decisions cited where, on grounds of public policy, it has been held that an administrator rendering legal services cannot receive additional compensation therefor. *Taylor v. Wright*, 93 Ind. 121; *Hough v. Harvey*, 71 Ill. 72; *Collier v. Munn*, 41 N. Y. 143; *Bushby v. Berkeley*, 153 App. Div. 742, 138 N. Y. Supp. 831; *Doss v. Stevens*, 13 Colo. App. 535, 59 Pac. 67.

Other courts have upheld allowances to the administrator for legal services rendered by him as an attorney in the interests of the estate. *Harris v. Martin*, 9 Ala. 895; *Morgan v. Nelson*, 43 Ala. 586; *In re Mabley's Estate*, 74 Mich. 143, 41 N. W. 835; *Chatfield v. Swing*, 6 Ohio Dec. 666; *Fulton v. Davidson*, 50 Tenn. 614.

The only decision which the diligence of the counsel in this action and of amicus curiæ filing briefs in behalf of this matter has been able to find bearing upon the right of such administrator to employ an attorney is that of *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451. This decision was under a statute similar to the provisions of the California law prior to 1873, which merely allowed to the administrator "all necessary expenses in the care, management and settlement of the estate." It was there held that the administrator, who was a practicing lawyer was not under the necessity of employing additional legal assistance and was not entitled to an allowance therefor. It is said in the course of the opinion:

"In this case the record shows that the administrator was a lawyer. He had control of the estate as agent and attorney for the deceased during her lifetime. He was allowed a claim of \$200 for services and advice to Mrs. Whitten prior to her death. Mr. Whitten, the principal heir, desired to retain him as attorney to represent 'my interest and that of my children, if any, and continue to manage the property, so far at least as our interests are concerned;' and, upon this request, Mr. Noble voluntarily offered to serve as administrator. Because of these facts, no doubt, Mr. Whitten consented to his appointment as administrator, and because of his ability and fitness to conduct the administration of the estate the court appointed him."

To what extent the court was influenced in the decision cited by the circumstances referred to as to the choice of this administrator with a view to his legal services does not appear. In the application of the limitation as a general rule, especially in view of the more specific recognition of the functions of an employed attorney under our Code, its authority is not controlling and its reasoning is not convincing.

[2] Conceding that it is still within the discretion of the probate court in this state to pass upon the necessity for the employment of an attorney in the administration of an estate, the same as upon other matters of necessary expenditure, we are satisfied that denial of such necessity cannot be made to rest upon the mere fact that the required services are in the line of the administrator's profession or business.

The order appealed from is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

187 Cal. 214

(201 P.)

PEOPLE v. LAUMAN. (Cr. 2349.)

(Supreme Court of California. Oct. 11, 1921.
Rehearing Denied Nov. 10, 1921.)

1. Criminal law — 970(7)—Defects in indictment charging defendant with presenting false proofs held not ground for arrest of judgment.

Failure of indictment charging defendant with presenting false proofs in support of a claim upon an insurance policy, under Pen. Code, § 549, to allege that a claim was presented, and that the company whose existence was alleged issued the policy, held not ground for arrest of judgment after conviction under section 1185, as against contention that facts stated did not constitute a public offense in view of sections 959, 960, 1404, and Civ. Code, § 2586, where instructions supplied lacking elements and policies were received in evidence without objection, and such defects were apparently not discovered until after trial.

2. Criminal law — 1144(15)—Jury presumed to have followed instructions.

The jury will be presumed to have followed instructions.

3. False pretenses — 37—Indictment charging presenting false proofs need not allege that policy was in force at time proof of loss was presented.

Indictment charging defendant with presenting false proofs in support of a claim upon it in an insurance policy under Pen. Code, § 549, need not allege that the contract of insurance was in force at the time the proof of loss was presented.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Roy R. Lauman was found guilty of presenting false proofs in support of a claim upon a policy of insurance, and from an order granting a motion in arrest of judgment, the People appeal. Reversed and remanded, with directions.

See, also, 195 Pac. 50.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., Thomas A. Wood and Thomas Lee Woodwine, Dist. Attys., both of Los Angeles, and W. J. Clarke, Deputy Dist. Atty., for the People.

Chandler P. Ward, Samuel R. Blake, and Davis, Rush & MacDonald, all of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the people from an order granting a motion in arrest of judgment. Respondent was charged in each of three counts of an indictment with the crime of presenting false proofs in support of a claim upon a policy of insurance, as defined by section 549 of the Penal Code. He had taken out three policies of fire insurance, one each in the Springfield Fire & Marine Insurance Company, the Prov-

idence-Washington Insurance Company, and the Concordia Fire Insurance Company. The respondent was engaged in the cleaning and dyeing business in the city of Los Angeles, operating under the name of the Imperial Dye Works. The policies covered the building, stock in trade, and other goods connected with the business, and also articles left with respondent by his customers. Two fires occurred on the premises, the first on June 5, 1917, and the second on July 14, 1917. Respondent filed claims and proofs of loss with each of the three companies, and these are the proofs alleged to have been falsely made.

The indictment alleged the existence of the three insurance companies, the procuring of policies of insurance, not alleging they were procured in the above companies, the occurring of the fires, the presentation of the proofs of loss to the said companies, the falsity of the proofs, and respondent's knowledge thereof and intent to cheat and defraud the said companies. Each count charged the presentation of false proofs to one of the companies. A general demurrer was interposed to each count, and was disallowed. A trial of the three counts was had, and the jury returned a verdict of guilty on each count. Respondent interposed a motion for a new trial and a motion in arrest of judgment. The motion for a new trial was denied, no appeal being taken from the order. The motion in arrest of judgment was granted, and from the said order appellant takes this appeal.

A motion in arrest of judgment is defined in section 1185 of the Penal Code as:

An "application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant. * * * It may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced."

Section 1004 of the Penal Code, as far as it is pertinent here, provides that—

"The defendant may demur to the indictment * * * when it appears upon the face thereof either: * * * 2. That it does not substantially conform to the requirements of sections nine hundred and fifty, nine hundred and fifty-one, and nine hundred and fifty-two. * * * 4. That the facts stated do not constitute a public offense."

By section 950 of the Penal Code the indictment must contain:

"2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

Section 951 prescribes the form of the indictment, and section 952 requires that—

"It must be direct and certain, as it regards:
* * * 2. The offense charged. 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

Section 1012 provides in part:

"When the objections mentioned in section one thousand and four appear on the face of the indictment * * * they can only be taken by demurrer, except that the objection * * * that the facts stated do not constitute a public offense, may be taken * * * after the trial, in arrest of judgment."

The demurrer specifies two grounds—that neither the indictment nor any count thereof states facts sufficient to constitute a public offense, and that neither the indictment nor any count thereof substantially conforms to the requirements of sections 950, 951, and 952 of the Penal Code. The motion in arrest of judgment specifies all the grounds mentioned in said section 1004, but on appeal respondent only urges that no count of the indictment alleges facts sufficient to constitute a public offense.

We quote from respondent's opening brief:

"The indictment in this case, and each of the counts contained therein, is fatally defective in alleging merely that the defendant presented 'a false and fraudulent claim of loss by fire.' There is no allegation that a claim was presented upon a contract of insurance for the payment of a loss."

In his supplemental brief it is contended:

"That 'each count of the indictment wholly fails to allege that the contract of insurance which it is alleged Lauman obtained on a certain date was issued either by the company whose corporate existence is alleged or by the company to which it is alleged Lauman presented a proof of loss,' and that 'It is absolutely essential to the stating of a public offense under such section that the indictment charge not only that, at the time of the fire, but at the time of the making and presenting of the proof of loss, there was a valid contract of insurance, then in full force and effect. As stated before, there is no allegation that any contract of insurance or otherwise was existing * * * at the time of its execution or presentation.'"

The different counts of the indictment are all worded alike, except for the difference in the identity of the insurance companies, the items covered, and the terms of the policies. For brevity, we shall discuss the first count only. Considering the contention that there is no allegation that the proofs of loss were presented on contracts of insurance for the payment of a loss, and that there is no allegation that the companies whose existence was alleged issued the policies, it is true the indictment does not, in terms, allege these facts. Section 959 of the Penal Code provides that the indictment is sufficient if—

"the act or omission charged as the offense is clearly and distinctly set forth in ordinary and

concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

The indictment in this case did allege that the Springfield company was organized and doing an insurance business on July 3, 1917; that respondent procured a policy of insurance, and that, intending to cheat the said company, he presented false claims of proof of loss to it. This proof of loss, which is set out in the indictment, is as follows:

"Policy No. 424612, Agency at Los Angeles, Cal. Amount of policy, \$2,500.00. Expiration July 3, 1918. Sworn statement in proof of loss to the Springfield * * * Co. * * * By your policy as above, you insured Roy Lauman, trading as Imperial Dye Works, according to the terms and conditions printed therein."

And at the end of the proof:

"Total amount claimed of this company under above named policy, \$2,011.97."

[1] There are allegations, then, that the company was engaged in the insurance business at the time in question, and that a proof of loss was presented to it on a policy bearing a given number and issued to respondent, which proof of loss described the same character of property as that referred to in other portions of the indictment. It is incomprehensible to us how a person of common understanding could fail to be informed by the indictment that respondent was charged with anything different than presenting to the Springfield company a false claim of loss suffered by fire, upon a policy issued by it to him to cover property so falsely claimed to have been destroyed. The conclusion is irresistible that to a common understanding it would appear that the indictment was intended to charge that the Springfield company had issued a policy to respondent, and that the claim of loss based thereon was upon a contract of insurance for the payment of a loss, inasmuch as a "policy" is but the written evidence of such a contract. Section 2586, Civ. Code. Except for the failure to allege these facts specifically, the indictment was unobjectionable.

[2] The question is then presented whether these omissions resulted in prejudice to the respondent. Section 960 of the Penal Code provides:

"No indictment * * * is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

Section 1404 of the same Code declares:

"Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

Many facts and circumstances shown by the record preclude the idea that the defects of the pleading prejudiced or tended to prejudice respondent's right to be sufficiently informed of the charge against him. In the first place the court instructed the jury as follows:

"An intent to defraud is a material ingredient of the offense set forth in each of the three counts of the indictment, and you must not convict the defendant upon any of the said counts unless you believe beyond all reasonable doubt (1) that a contract of insurance existed between the defendant and the insurance company named in such count of the indictment; (2) that while such contract was in full force and effect that the defendant, in the county of Los Angeles, and within three years next preceding the filing of the indictment, presented or caused to be presented a false proof of claim to such company; (3) that the proof of loss so presented was willfully and intentionally false, and was presented with the intent on the part of the defendant to deceive and defraud said insurance company."

It is plain that the instruction itself supplied the elements which are claimed to be lacking in the indictment, and it will be presumed that the jury followed this instruction when it found respondent guilty on each of the three counts.

Moreover, the policies were received in evidence without objection, and it was stipulated that they were issued to respondent by the respective companies. It was shown that respondent had previously sued two of the companies on their policies, and in the complaints in those actions he alleged the policies were issued to him. These complaints were received in evidence. In addition to these facts the proofs of loss, as we have shown, were set out verbatim in the complaint. These proofs, verified by respondent, stated that the policies were issued by the respective companies to respondent, and that a certain amount was claimed under each of them.

Apparently the attorneys for respondent did not discover the defects in the indictment until after the trial, for before the trial one of the attorneys presented an affidavit for a subpoena duces tecum in which he averred:

"That he is one of the attorneys of record for the defendant herein, Roy R. Lauman. That the indictment charges the making of false proofs of loss as to two insurance policies, in Springfield Fire & Marine Insurance Company and the Concordia Fire Insurance Company, respectively. * * * That R. C. Heinsch is the agent of the Springfield Fire & Marine Insurance Company, and issued their policy No. 424612. That N. T. Horton was the agent of the Concordia Fire Insurance Company, and issued their policy No. 30804. * * *

In *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521, the defendant was charged with the crime of obtaining money under false

pretenses. The appeal was taken from the judgment of conviction and the order denying defendant's motion for a new trial. He was charged with falsely representing himself to be an agent of the Fatherland Magazine, authorized to receive loans and subscriptions in its behalf, and with exhibiting a fictitious list of subscribers to induce persons to subscribe. In that capacity he was collecting money, and collected the sum of \$300 from the prosecuting witness. The court, in holding the information to be sufficient, said:

"The particular defect in this information, as urged by appellant, is that it does not show the causal connection between the false pretense and the parting with the property by the prosecuting witness, and therefore fails to state facts sufficient to constitute a public offense. We are of the opinion that, as against the defendant's general demurrer, the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the Fatherland Magazine, a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby."

The Attorney General cites section 4½, art. 6, of the Constitution in support of his argument that the defects in the indictment are not prejudicially erroneous. Respondent contends, on the other hand, that the provision does not apply to an appeal by the state from an order granting a motion in arrest of judgment. But, as we have reached the conclusion that the defects are fully covered by the statutes referred to, whose terms are in line with the constitutional provision, the question need not be considered.

[3] Respondent cites no authority, and we are aware of none, which supports his third contention, that the indictment is defective in not alleging that the contract of insurance was in force at the time the proof of loss was presented. This position is untenable. The act denounced by section 549 of the Penal Code is the presentation of false proofs in support of a claim on a contract of insurance for the payment of a loss. The statute does not provide that the contract must be operative at the time the claim of loss is made. The indictment does allege that the policies were in full force and effect at the time the fires occurred, and the court instructed the jury that it was necessary to a conviction that a false proof of loss be presented while the contract was in effect, and

within three years next preceding the filing of the indictment. It follows that the indictment is not defective in failing to allege that the contract was in full force and effect at the time the proof of loss was presented. To hold otherwise would be to lay down a rule that, where the loss occurs while the contract is in full force and effect, and the false proof of loss is not presented until after the period of coverage has expired, a case could not be made out under section 549 of the Penal Code. Such is not the law. Each count alleges that the policy was in full force and effect on a certain date, and gave the same date as the date of the fire. It was therefore unnecessary to allege that the policy was in full force and effect when the proof of loss was made, for as matter of law it remained operative for the presentation of proof of loss. It appears from the indictment that the proof of loss was filed in each case within two months from the date of the two fires.

It must be held that the indictment substantially alleged facts sufficient to constitute a public offense under section 549 of the Penal Code, and that respondent was not prejudiced by the defects of pleading complained of.

Order reversed, and cause remanded for further proceedings in contemplation of sections 1191 and 1202 of the Penal Code.

We concur: ANGELLOTTI, O. J.; WILBUR, J.; SLOANE, J.; LENNON, J.

187 Cal. 206

GOLDSTEIN v. HEALY. (S. F. 9414.)

(Supreme Court of California. Oct. 10, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Pleading ⚡214(1)—Demurrer admits only facts well pleaded.

A demurrer admits the truth of all facts well pleaded, but it does not confess any omitted circumstances, indispensable to the cause of action upon which the complaint is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity.

2. Pleading ⚡193(1)—Essentials of complaint stated.

A plaintiff is required, even as against a special demurrer, merely to allege the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source, and extent of his cause of action.

3. Innkeepers ⚡8—"Guest" defined.

A "guest" of an inn or hotel is one who receives accommodations or entertainment therein usually for compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guest.]

4. Innkeepers ⚡10—Required to exercise reasonable care toward invitees of guests.

A guest may, under such reasonable restrictions and regulations as the management of the hotel may impose, invite unobjectionable persons to visit him for lawful purposes and at proper times, and the hotel keeper is required to exercise reasonable care that such persons be not injured through defective condition of the premises.

5. Innkeepers ⚡10—Not liable for injuries caused by patent defects or structural insecurity.

Hotel keeper is not liable for injuries to persons invited to hotel by guests due to a patent defect or structural insecurity in the hotel premises or its equipment.

6. Innkeepers ⚡10—Complaint held to show that defect in premises was not patent.

In action against hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, complaint alleging that the decayed condition of the railing was unknown to the plaintiff, held sufficient to show that the defect was not patent.

7. Innkeepers ⚡10—Plaintiff's failure to discover defective condition of premises a matter of defense.

In an action against a hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, complaint was not required to allege that defective condition of railing could not have been discovered by plaintiff in the exercise of ordinary care; the failure to exercise such care being a matter of defense.

8. Innkeepers ⚡10—One on premises at invitation of guest not required to allege that he was rightfully there.

In action against hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, plaintiff was not required to allege that he was lawfully and properly upon the premises; the fact that he was not properly upon the premises being a matter of defense.

9. Innkeepers ⚡10—Complaint, not naming guest at whose invitation plaintiff was on premises, held not uncertain.

In an action against a hotel keeper for injuries caused by defective railing around tent in possession of hotel keeper's guest, who had invited plaintiff thereon, plaintiff's failure to allege name of guest did not render complaint uncertain, where the particular tent was identified, and the hotel keeper's tents were occupied by but one guest, since the hotel keeper could have ascertained the name of the guest without such allegation.

10. Pleading ⚡12—Less particularity required of complaint where defendant has full information concerning facts.

Less particularity is required in allegations of a complaint where the facts stated are such that defendant from their nature and his relation to them has full information concerning them.

11. Innkeepers — 10—Complaint for injuries from defective premises held to show causal connection between negligence and injury.

In an action against hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, complaint held sufficient as against contention that it did not show the causal connection between the negligence and the injury.

In Bank.

Appeal of Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by Mervyn Goldstein, by his guardian, Ben Goldstein, against W. Healy. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Hiram E. Casey and Casey & Lambert, all of Santa Rosa, and T. L. Breslauer, of San Francisco, for appellant.

J. R. Leppo, of Santa Rosa, for respondent.

SHURTLEFF, J. Plaintiff in his second amended complaint alleged:

That at the time of the commencement of the action he was a minor under the age of 21 years, and that Ben Goldstein was the duly appointed, qualified, and acting guardian of his person and estate; "that on or about the 5th day of July, 1919, the defendants (there being one fictitious defendant) * * * were conducting and maintaining at Monte Rio, in the county of Sonoma, state of California, a summer resort and hotel for the accommodation of the public. * * * That as a part of the said summer resort and hotel and as living quarters for its guests and their invitees the defendants maintained a tent set upon a wooden platform." That to prevent persons occupying, visiting, or being upon said platform from falling therefrom, and to protect persons who were thereon, the defendants erected, placed, and maintained on the outer edge thereof "a railing made of wood about three inches to four inches in diameter," which railing was "fastened upon the said platform about three or four feet above the floor of the said platform by means of timbers and braces." That said railing at all the times in the amended complaint mentioned "consisted of decomposed and rotten wood * * * negligently and carelessly maintained in said condition by the said defendants, all of which was unknown to the said plaintiff. * * * That on or about the 5th day of July, 1919, the plaintiff herein was present upon the said platform at the invitation and request of a guest of the said hotel and summer resort, to whom the tent on the said platform had been assigned by the said defendants as living quarters; and that while on said platform as aforesaid and while standing on said platform talking to the said guest of defendants and with his back to said railing around the said platform as hereinbefore described, and relying upon said railing as aforesaid as protection against falling over and off from the said platform, the said plaintiff rested his hands lightly upon the said railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said

wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below, a distance of about 20 feet and causing the plaintiff to strike upon his head and body."

It is further alleged that plaintiff, by reason of his alleged fall, sustained certain enumerated physical injuries, incurred numerous specified expenses, and lost one month's salary. The prayer of the complaint is for \$5,000 damages.

As we have said, there was one fictitious defendant who was never served, and for that reason, following the briefs, we will hereafter use the singular number.

The foregoing is a comprehensive statement of the allegations of the amended complaint which are material to this inquiry. To this complaint, defendant, Healy, demurred generally upon the ground that it failed to state a cause of action, and specially that it was ambiguous and uncertain, in that it was not alleged therein, and could not be ascertained therefrom, whether the decomposed and rotten condition of the railing "was apparent and patent, or concealed and latent"; "what caused said railing to give way and break"; "for what purpose was plaintiff present on said platform," or at whose invitation; what caused plaintiff to fall from the platform, or to fall upon or against the railing, or how "the giving way and breaking of the railing caused plaintiff to fall." The demurrer was sustained without leave to amend, and judgment entered in favor of defendant for costs. It is from this judgment that this appeal is prosecuted.

[1, 2] While it is well settled that a demurrer admits the truth of all facts that are well pleaded in the complaint, it does not, however, confess any omitted circumstance which is indispensable to the cause of action upon which it is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity. All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action.

A few general observations touching the relations of the parties and their corresponding duties and liabilities, as disclosed by the amended complaint, will conduce to a clearer understanding of the questions to be determined.

[3-5] A guest of an inn or hotel may be defined as one who receives accommodations or entertainment therein, usually for com-

pensation. *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325; *Manning v. Wells*, 28 Tenn. 746, 51 Am. Dec. 688; *Schouler's Bailments and Carriers* (3d Ed.) 282. While this definition seems simple of application, it is nevertheless not always easy to determine whether the person claiming such relation is in fact a guest within its meaning, but no such difficulty arises here, for it is clear from the complaint that plaintiff was not upon the hotel property of defendant in that capacity. The allegation of the complaint is that plaintiff was upon the platform, from which he fell, "at the invitation and request of a guest of the said hotel." Plaintiff makes no claim whatever in his pleading that he in any manner, as a guest, availed himself of the accommodations which the hotel afforded. He states he was at the defendant's inn in response to an invitation of a guest, who, we hold, in extending such invitation, was clearly acting within his rights, for, in the absence of a regulation or agreement to the contrary, a guest of a hotel may, as a matter of right, under such reasonable restrictions and regulations as the management may impose, invite unobjectionable persons to visit him at the inn for lawful purposes and at proper times. It is common knowledge that this right is universally accorded guests of hotels, and that it is a necessary public convenience. It is more than a privilege; it is, as we have said, a right which cannot be withheld except for good cause, as long as the relation of innkeeper and guest continues; it is one of the accommodations of the service which a hotel gives its patrons. To all such invitees, and such was the status of plaintiff, the innkeeper owes the duty of at all times maintaining his hotel premises in a reasonably safe condition, and of exercising reasonable care to protect them while in the hotel and in the part thereof open to the public, from personal injury through his negligence. But this duty does not obtain in cases where the injury to the invitee was due to a patent defect, or structural insecurity in the hotel premises or its equipment, so that, in the instant case, if the alleged "rotten and decomposed" condition of the railing was patent, the plaintiff cannot recover. As said by Hawley, District Judge, in *Ten Broeck v. Wells Fargo & Co. et al.* (C. C.) 47 Fed. 690, which was an action for damages for injuries received by a fall from steps leading to a platform connected with a hotel and not protected by a railing:

"In this case no presumption need be indulged in. The pleader has not only shown by his allegation that the injury was not received because 'anything gave way through the latent insecurity of the structure,' which was the ground upon which plaintiff might be entitled to recover, but has gone further, and affirmatively

shown 'that the accident arose from a patent defect,' for which, under the well-settled principles of the law, plaintiff is not entitled to recover."

[6-10] It is to the last-stated principle of law that defendant appeals in support of his contention that the complaint under review is uncertain and ambiguous, in that it cannot be ascertained therefrom whether the decomposed condition of the railing was "latent or patent." But we do not think the pleading is open to this criticism. Upon the contrary, in our opinion, the allegation that the decayed condition of the railing was "unknown" to plaintiff, which could not have been true had it been patent, is in effect a sufficient declaration that it was latent. If the defective condition of the railing was such that it would have been discovered by plaintiff in the exercise of ordinary care, the failure to exercise such care would be a defense which the plaintiff is not required to anticipate. It also sufficiently appears from the complaint that the plaintiff was upon the platform, from which he fell, at the invitation of the guest occupying the same, from which it follows *prima facie* that he was lawfully and properly there. If the reverse is true, it is likewise a matter of defense. Nor was it necessary for the plaintiff to state the name of the guest whom he was visiting; his omission to do so, under the peculiar facts of this case, does not render the complaint ambiguous or uncertain. It refers to but one tent as being upon the hotel premises, and describes it with sufficient particularity to render it easy of identification. Moreover, so far as the pleading discloses, but one person occupied such tent, and such occupant was the guest at whose request the plaintiff was upon the platform. This being the state of the pleadings, it was an easy matter for the defendant to ascertain the name of such guest who presumably registered and was assigned to the tent in question. Less particularity is required in the allegations of a complaint where, as here, the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them.

[11] Respondent makes the further claim that the complaint is insufficient in that it does not show the "causal connection between the negligence and the injury." With this contention we find ourselves unable to agree. In our opinion the following allegations amply comply with this elementary rule of pleading:

"That while on said platform * * * and while standing on said platform talking to the said guest of defendants and with his back to said railing * * * and relying upon said railing as aforesaid as protection against falling over and off from the said platform, the said plaintiff rested his hands lightly upon the said

railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below."

The quoted allegations are sufficiently comprehensive, and adequately disclose the "causal connection between the injury and the negligence," which the law demands must be present to justify a recovery in cases similar to the one under consideration, and are hence good as against both the general and special demurrer.

None of the cases, to which counsel for respondent directs our attention as bearing upon this branch of the case, in any manner conflict with the views herein expressed. Each of them was in the main disposed of upon the facts which it presented, which facts were not in all respects analogous to the facts of the present one. *Smith v. Buttner*, 90 Cal. 99, 27 Pac. 29, contains language which, when read apart from the facts, seems to support defendant's contention. The complaint in that case declared that the plaintiffs were tenants in possession of, and occupying, a dwelling house, while it was being raised, and that the defendants, who were the lessors, had failed to provide any safe and proper means of entrance to, or egress from, the same, which, if true, would be patent to any one. The court there said:

"As we have seen, it is entirely consistent with the allegations of this complaint to suppose the injury occurred because defendant neglected to provide any mode of egress whatever. We are not at liberty to suppose anything gave way through the latent insecurity of the structure; for it is not so alleged."

It will be seen at a glance that this case is distinguishable from the one we are considering, for here it appears that the defendant had in fact constructed a railing around the platform, which railing, when plaintiff placed his hands upon it, gave way by reason of a defect which, as we have pointed out, the complaint alleges in effect was latent.

For the foregoing reasons we think the learned judge of the trial court erred in sustaining the defendant's demurrer.

The judgment is reversed, and the lower court directed to overrule the demurrer and permit the defendant to answer the complaint within such time as it may deem reasonable.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

PEOPLE v. CLARKE. (Cr. 752.)

(District Court of Appeal, Second District. Division 1, California. Feb. 21, 1921. Hearing Denied by Supreme Court April 19, 1921.)

Parent and child $\Rightarrow$ 17(2)—Father not criminally liable for failure to furnish necessities for child cared for by wife's parents.

A father is not criminally liable under Pen. Code, § 270, for failure to provide clothing, food, and medical attention to a child, where the child was being supplied as far as was necessary by the wife's parents without demand on father for financial aid in the matter of support to whose house she had taken the child upon separating from her husband.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

George Dewey Clarke was convicted of failure to furnish necessities to a child, and appeals. Reversed in the District Court of Appeal, and hearing denied in Supreme Court.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. On August 13, 1920, an information containing two counts was filed against defendant. By the first count he was charged with the crime specified in section 270 of the Penal Code, and by the second he was charged with the crime of non-support of his wife, as defined in section 270a, Penal Code.

At the close of plaintiff's evidence, defendant's motion for a dismissal of the accusation contained in the second count of the information was granted, and thereupon the trial of the case proceeded upon the charge contained in the first count of the information, the result of which was the conviction of defendant; and from the judgment pronounced thereon he prosecutes this appeal.

Section 270 provides that—

"A parent of either a legitimate or illegitimate minor child who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his child, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both."

Of the several grounds for reversal urged by counsel for defendant, we deem it unnecessary to consider other than that of the sufficiency of the evidence to justify the verdict rendered by the jury.

On June 1, 1919, the defendant, then a young man of 21, was married to Ella Winn, who was of the age of 18. He was just out of the army, and his worldly goods consisted

of about \$150. In the latter part of August, 1919, prior to which time he had been engaged in odd jobs of work in San Diego, where they were married, he went to Oakland, where a few weeks thereafter his wife, at his request and with money sent by him, followed, and the two took up their abode with the husband's mother. The wife was then pregnant and expected the birth of a child the latter part of March. She appears to have been unhappy and dissatisfied with her environment, and so notified her parents in San Diego, who on October 20, 1919, went to Oakland, where, as a result of their persuasion and insistence defendant consented that his wife should return to the home of her parents in San Diego pending confinement, and at the same time they extended an invitation to him to accompany her, which defendant declined. It appears that about March 6th defendant received a letter from the district attorney of San Diego county, the contents of which, however, are not in evidence, but in response to which he sent his wife \$65. This money it appears, instead of being expended for clothing for the baby, born on February 27th, was applied in payment of a nurse who attended the wife during confinement. The mother, as contemplated when she left her husband in Oakland, and, after its birth, the child, made their home with her parents, who were well to do and able to and did provide her, as they insisted upon doing, with a home, food, and shelter; and although defendant, other than contributing the \$65 applied to the payment of her nurse and some small articles of clothing, supplied no money, the baby, as stated by the wife, had never been in want of necessities, but at all times had food, clothing, and medical attention when necessary, which were voluntarily provided by her father. The court properly instructed the jury that defendant's failure to make provision for the support of the child before its birth and before he knew of the birth of the child did not constitute a crime; hence the offense, if established, must be based upon defendant's neglect to supply the child with necessary food, clothing, shelter, and medical attendance during the first five months of its existence. The evidence touching this question is exceedingly meager. It cannot be said that, because defendant yielded to the persuasion of his wife's parents that she abide with them, such fact constituted neglect to furnish shelter; and, as to medical attendance, there is no evidence whatever that the child ever at any time required such attendance after its birth. As to food, the evidence is consistent with the fact that it was obtained from its mother, in accordance with nature. Prior to its birth, the child's maternal grandmother, at an expense of some \$25 or \$30, procured clothing upon her own account, charging defendant therewith, in

addition to which clothing, necessary articles of wearing apparel were given to the mother by her friends and relatives. Indeed, it cannot be said that, had the \$65 sent by defendant to his wife been applied to the uses of the child, it would not have been ample for its needs.

Conceding, however, that defendant neglected and failed to contribute any sum to meet the necessary requirements of the child, nevertheless it conclusively appears that it had everything in the way of shelter, clothing, food, and medical attention which it needed; and, conceding that these necessities were, as stated by the mother, furnished by her parents, and, in the absence of lawful excuse, not by the father, we are of the opinion that, whatever breach of legal or moral obligation arose from such omission, such neglect and failure does not constitute a criminal offense within the meaning of section 270, Penal Code.

The provisions of section 270, under which defendant was prosecuted, are substantially the same as those contained in section 270a, which make it a crime for a husband having sufficient ability so to do, to neglect to provide his wife with necessary food, clothing, and shelter. While section 270 makes the offense dependent upon want of lawful excuse, it has been held that want of financial ability to provide for a child is such lawful excuse. *People v. Forester*, 29 Cal. App. 460, 155 Pac. 1022. In *People v. Selby*, 26 Cal. App. 796, 148 Pac. 807, the defendant was charged with the offense designated in section 270a, and on an appeal the judgment pronounced upon his conviction was reversed for the reason, among others, that it was made to appear that his wife was received into the family of a relative and there cared for, and, moreover, had credit at a general merchandising store from which she was privileged to obtain goods on her own account. Quoting from the opinion, the court said:

"She did not, nor did any other witness, testify that, after the separation, she was at any time deprived of the necessities of life. The only proof upon that matter was that the defendant did not provide those necessities. While it was, of course, his duty to furnish her with such necessities, it was no crime for him not to do so if she was not actually in want of them, even though he might have abandoned her within the meaning of the statute."

In *State of Missouri v. Thornton*, reported in 232 Mo. 298, 134 S. W. 519, 32 L. R. A. (N. S.) 841, where the court had under consideration a charge preferred against a defendant under a statute similar to ours, it was held that one is not within the operation of a statute providing for the punishment of a father who neglects to furnish necessary food, clothing, and lodging to his infant child if the child is being supplied therewith as far as is necessary, by the wife's parents, to

whose house she had taken the child upon separating from her husband, the child's father.

It is the omission of the parent to furnish necessary food, clothing, etc., which is penalized, and such articles cannot be necessary to one fully supplied therewith by one other than the father who acts voluntarily and of his own accord in contributing the same. A necessary article is one which the party actually needs. The mere fact that the articles are necessary, however, is not enough. They must be such as the party without them actually needs. In the case at bar the child had food, shelter and clothing, and, while not provided by defendant, it was nevertheless not in need of that which it had.

While it is true that defendant was under obligation, both morally and legally, to furnish such necessities, rather than have the child dependent upon the grandparents therefor, nevertheless his omission so to do imposed no burden upon the state; nor was the welfare of the child, in which the state is interested, jeopardized or affected by such omission. In our opinion, the statute should not be construed as a law punishing a father for failure to perform his duty as such, but to secure to minor children, who in the future are to become citizens, the necessary food, clothing, and shelter, without which destitution would follow, and their lives and health be endangered, and thus protect the state from a burden which would otherwise devolve upon it. So long as they are properly cared for without intervention on the part of the state, it is not interested as to the source from whence the supplies come.

Under a similar statute, the Supreme Court of Georgia, in *Dalton v. State*, 118 Ga. 196, 44 S. E. 977, in reversing the judgment, said:

"The evidence adduced on the trial showed that the father was willing for the wife to leave him and return to her relatives. The child which she took with her was between four and five years of age, and was, of course, dependent. The evidence, however, does not disclose that the child was destitute at the time of the abandonment, or had even become destitute up to the time of the trial. So the case turns upon the question whether the father is guilty if he fails to provide for his child after the separation, even though the child may be abundantly supplied with all the necessities of life. While it is true that a father is under a moral and legal obligation to support his minor child, it is not also true that, if he fails to do his duty, he may be convicted under the above section of the Code, although the child is fully provided for by others. The father cannot be convicted unless it be shown that the child was not only dependent, but in a destitute condition. If it is not destitute, but is amply supplied with all necessities, the father cannot be convicted.

It is true he may have violated his moral and legal obligations in abandoning the child at all; but, as criminal statutes must be construed strictly, we are constrained to give this statute this interpretation."

A like question arose under an Ohio statute in *State v. Stouffer*, 65 Ohio St. 47, 60 N. E. 985, wherein, it appearing that the child was in the custody of its mother, who lived with her parents, and had a comfortable home, and necessary food and clothing, the court held that, while it was plainly the duty of the defendant to support the child, from which obligation he was not absolved by reason of the act of the grandparents in furnishing it with food and shelter, such obligation should be enforced in a civil action rather than by a criminal proceeding. As opposed to these and other like authorities, respondent cites *In re McMullen*, 19 Cal. App. 484, 126 Pac. 368, *People v. Schlott*, 162 Cal. 347, 122 Pac. 846, and *Hunter v. State*, 10 Okl. Cr. 119, 134 Pac. 1134, L. R. A. 1915A, 564, Ann. Cas. 1916A, 612, the latter case arising under an Oklahoma statute wherein, under the peculiar laws of that state, a father was held criminally liable, although his child was not in want, for the reason that its needs were met by another than himself. The reasoning upon which the decision in that case was reached is not convincing to us, and, since contrary to the weight of authority, should be disregarded. The question here involved was not considered in the other cases cited by respondent, and hence they do not apply to the facts in the instant case.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

The case shown by the opinion is apparently simply one in which the mother and child, during the first five months of the child's life, upon the invitation and insistence of the parents of the wife, resided with them as their guests and were fully supported and cared for by such parents without any request or demand on the father for financial aid from him in the matter of the support of the child. Certain general statements in the opinion as to the proper construction of section 270, Penal Code, which may not be exactly correct as mere abstract statements of law, must be considered in the light of the facts of this case, and, so considered, do not require revision by this court.

All concur.

54 Cal. App. 214

PEOPLE v. FLOWERS. (Cr. 764.)

(District Court of Appeal, Second District, Division 1. California. Sept. 14, 1921.)

1. False pretenses —31—Information held to show connection between false pretenses and effect.

An information alleging that defendant falsely and fraudulently represented that he owned a half interest in a printing plant and was lawfully entitled to sell and convey such interest, and prosecuting witness, believing the representations and pretenses as alleged, was deceived thereby and paid defendant a certain sum of money, etc., *held* not subject to the objection that it did not show "causal connection" between the alleged false pretenses and the effect attributed to them.

2. False pretenses —51—Fraudulent intent held for jury.

In a prosecution for obtaining property by false pretenses by selling an interest in a printing plant which defendant did not own, whether defendant sold the property fraudulently with intent to unlawfully deprive complainant of his property, *held* for the jury.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

J. M. Flowers was convicted of obtaining personal property by false pretenses, and appeals. Affirmed.

Cooper, Collings & Shreve and W. T. Helms, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

JAMES, J. The defendant was convicted under the charge of having obtained personal property of one Rinker by means of false representations and pretenses. He appeals from the judgment and from an order denying a motion for a new trial.

[1] It is first contended that the court was in error in overruling an objection to the introduction of evidence and in denying a motion in arrest of judgment. The point made in that behalf is that the information did not contain a statement of facts sufficient to constitute the public offense attempted to be charged. It is argued by counsel that no "causal connection" is shown between the alleged false pretenses and the effect attributed to them. In the information it was alleged that appellant represented and pretended that he was the owner of and possessed of the title to a certain printing plant; that he was lawfully entitled to sell and convey an interest therein; that Rinker, believing the representations and pretenses, as alleged, to be true, and relying upon the same, was deceived thereby, and paid to appellant the sum of \$130 in money, and delivered to him liberty bonds of the value of \$95 and an

automobile of the value of \$400. It was then alleged as follows:

"That in truth and in fact each and all of the said representations and pretenses, so made as aforesaid, by the said J. M. Flowers to the said Richard Rinker were then and there false, fraudulent, and untrue, as he, the said J. M. Flowers, then and there well knew. That in truth and in fact the said J. M. Flowers was not then and there, or at any time, or at all, the owner of, or possessed of the legal title to, or the owner of, or entitled to any interest whatsoever in and to that certain printing plant with the accessories thereof as hereinafter described, as he, the said J. M. Flowers, then and there well knew."

The information also contained allegations that the representations and pretenses were willfully, fraudulently, and feloniously made with intent to defraud the said Rinker. It also contained an allegation that appellant executed a written bill of sale whereby he pretended to convey to said Rinker an undivided one-half interest in the said printing plant. It appears then that the information clearly charged representations to have been made by appellant that he was the owner of the printing plant; that by reason of said representations Rinker was induced to deliver to appellant the money and property in exchange for a one-half interest in the plant; and that the representations as to ownership made by appellant were false, and that he had no interest whatsoever in the printing plant. Where representations detailed in the words of an information do not in themselves furnish a logical cause or inducement for a complainant's act in parting with his money or property; where their force in that direction depends upon some extrinsic meaning or understanding which is not alleged—it may then be said that the "causal connection" between the pretenses employed and the resulting loss is not made to appear. The information presented in this case is not deficient in the respect suggested. It is plain enough in its charging part to enable a person of ordinary understanding to comprehend that the defendant, by pretending to be the owner of property, procured another to deliver to him money and merchandise in exchange for an interest therein. It is clearer in its statement of the facts constituting the alleged offense than was the information considered in the case of *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521, which the Supreme Court sustained as against the precise contention that is now advanced.

[2] Insufficiency of the evidence to sustain the verdict is urged as a second ground for error. We have examined carefully the statement of the evidence and are satisfied that it must be held sufficient. It is clearly shown that appellant was not the owner of the printing plant when he attempted to sell

a one-half interest to the complainant; he had no title at all. He attempted to show that negotiations had been in progress looking toward the purchase by him of the property and attempted to show that he had in fact completed such a deal. The evidence fell short of establishing that fact and the most that can be said for appellant's side of the case is that the jury might have concluded, had it believed the testimony offered by the defendant, that, while he had not in fact obtained title to the printing plant, his assumption that he had completed the purchase of it furnished an excuse as relieving his acts and conduct from the charge that they were fraudulent and done with intent to unlawfully deprive complainant of his property. That question, however, was for the jury and was decided against the appellant, and with that decision upon the facts he must rest content.

In the concluding paragraph of appellant's brief it is asserted that there was error in the instructions, but there is no specification or argument to show wherein the charge as given by the court to the jury did not correctly declare the law. We find no error justifying the claim of appellant that a reversal should be ordered.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

54 Cal. App. 182

PEOPLE ex rel. FOLTZ v. GIFFORD et al.
(Civ. 2334.)

(District Court of Appeal, Third District, California. Sept. 8, 1921.)

1. Nuisance —82—Dismissal of action under Redlight Abatement Act against occupant held not to affect proceeding against owner.

Under Redlight Abatement Act, occupant and owner of building alleged to be used for prostitution are not such joint tort-feasors as prevent court from dismissing action against occupant and proceeding against owner.

2. Judgment —559—Dismissal of action for misdemeanor not applicable to abatement of nuisance.

Pen. Code, § 1387, providing that dismissal of action for a misdemeanor is a bar to any other proceeding for the same offense, is not applicable to equitable action to abate a nuisance under Redlight Abatement Act.

3. Nuisance —84—Amendment of description permissible.

In action under Redlight Abatement Act to abate as a nuisance buildings used for prostitution, an amendment of the complaint by correcting erroneous description of property is permissible, as Code Civ. Proc. § 473, relating to amendments, is applicable.

4. Appeal and error —236(2)—No complaint of amendment where additional time to plead was not requested.

Defendants in action under Redlight Abatement Act to abate as a nuisance buildings used for prostitution cannot complain of amendment correcting description of property where they did not request additional time to plead or secure evidence.

5. Appeal and error —740(2) — Assignment that court failed to find material allegations of answer too general.

An assignment of error that court failed to find all material allegations of the answer is too general for consideration.

6. Appeal and error —931(1)—Failure to find on allegations of answer presumed correct.

On appeal on judgment roll alone it will be presumed that court's failure to find on allegations of answer was on ground that they were not supported by the evidence.

7. Constitutional law —42—Party not injured cannot claim denial of due process.

In action under Redlight Abatement Act to abate as a nuisance buildings used for prostitution, occupant cannot complain that she was denied due process of law because suit as to her was dismissed and court then proceeded to judgment against the owner and decreed that she was the owner of the furniture therein, and that it should be removed, as she had her day in court and could have defended and was not prejudiced thereby, but escaping costs.

8. Constitutional law —251 — Federal Const. U. S. Amend. 5, does not apply to states.

Const. U. S. Amend. 5, relating to due process of law, has no application to the several states.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the People, on the relation of E. P. Foltz, against Olive E. Gifford and another. From judgment for relator, defendants appeal. Affirmed.

A. M. Armstrong, of Portola, for appellants.
Charles Light and H. C. Stanley, both of Stockton, for respondent.

BURNETT, J. The action was under the Redlight Abatement Act (Stats. 1913, p. 20), and resulted in a judgment of abatement as a nuisance of certain buildings used for prostitution in the city of Tracy in the county of San Joaquin. The appeal is here upon the judgment roll alone, and we can see no merit whatever in the position of appellants.

[1] It appears that after the evidence was heard the action was dismissed as to the occupant of the building, and it seems to be the claim of appellants that thereby the plaintiff lost the right to prosecute the cause any further; in other words, that the action must be prosecuted to judgment against both the owner and occupant, if prosecuted at all.

There are certain cases of joint tort-feasors where this principle would probably apply, but such is not the situation herein. In considering the question, it is well to remember that the principal purpose of the action is to abate and prevent a nuisance; it being a proceeding in rem, primarily against the property because it is maintained and used in violation of the law. The statute contemplates that the owner and occupant shall be made parties to the action to afford them an opportunity to meet the accusation and protect their property interests, but, when it has been shown that the building is used for such immoral purposes, the owner cannot resist the abatement of the nuisance simply because the court has seen fit to dismiss the action as to the occupant. It is manifest that he is not prejudiced in any manner by such dismissal, however erroneous it may be. The case is entirely different from those instances of joint personal liability where there may be the right of contribution. Besides, the record does not show upon what ground the action was dismissed nor upon whose motion. We may assume that it was done at the instance and according to the request of appellants. If so, they would not be heard to question a righteous judgment upon the ground that it was irregularly rendered by reason of an error committed at their own solicitation. For be it said that, according to the findings, the court committed error in dismissing the action against Jessie Green. As to her it may be said, in addition, that she has no ground for complaint, since her property was not sold, as might have been done under the evidence. It was ordered removed from the building, but this is a necessary incident to the judgment closing the building for a year, and the result was really more favorable to her than she had the right to expect.

[2] There is no room for the application of section 1387 of the Penal Code, providing that the dismissal of an action for a misdemeanor "is a bar to any other prosecution for the same offense," etc. That refers to criminal proceedings, while here we are dealing with an equitable action for the abatement of a nuisance. *McCarthy v. Gaston Ridge Mill, etc., Co.*, 144 Cal. 542, 78 Pac. 7. The civil action is entirely distinct from the criminal, and the prosecution of one does not prohibit the prosecution of the other. We may add that there is no evidence in the record that any criminal proceeding has been instituted against either of the defendants.

[3, 4] Equally without merit is the claim that the amendment to the complaint, allowed by the court after the cause was set for trial "set up an entirely new cause of action, leaving the court with no jurisdiction to proceed further in the summary proceeding." It seems that a mistake was made in the description of the property, it being design-

nated in the original complaint as lots 9 and 10, whereas it was really lots 7, 8, and 9; and the court permitted the correction to be made. We can conceive of no reason why the court should not allow such amendment. In that respect this class of actions stands upon the same footing as other proceedings. The amendment was in furtherance of justice and was authorized by the Code and the decisions of the courts. Code Civ. Proc. § 473; *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962. Of course, the court did not lose jurisdiction of the cause by reason of said amendment, nor is there anything to show that appellants were at all prejudiced thereby. If they had desired additional time in which to plead or to secure further evidence in consequence of said amendment, they should have requested it. Manifestly, though, the amendment was of such nature as to require no continuance of the trial.

[5, 6] It is claimed that the court failed to find upon "material allegations of the answer." The specification is too indefinite to demand particular notice. However, we find no material allegation that did not receive attention in the findings. Moreover, if there be any such allegation, "it must be presumed, in the absence of a contrary showing in the record, that there was no evidence which would have sustained a finding" in their favor on such issue. *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844.

[7, 8] The only other objection worthy of notice is that the court—

"after having already acquitted the occupant of the building, Jessie Green, of the charge of maintaining a nuisance then proceeded in the same action to find her guilty of the same charge and inflicted upon her the penalty of such unwarranted conviction, to wit, eviction from the accused building, confiscation of her lease, and removal of all her personal property therefrom, * * * contrary to the express mandates of amendments 5 and 6 of the Constitution of the United States of America."

This objection erroneously assumes that the court acquitted said Green of the charge of maintaining a nuisance. The fact is that the court found:

"That said Jessie Green is the owner of the furniture, fixtures, and musical instruments and other movable property situated in said building, and that the same are used in conducting, maintaining, aiding, and abetting said nuisance."

It is true, as already seen, that for some undisclosed reason the action as to her was dismissed, but this was after she had her day in court and the opportunity to defend the action. The dismissal was apparently an unwarranted favor granted to her and saved her the payment of costs of suit.

That said amendments have no application to the case is quite apparent. The only pro-

vision therein that could possibly be regarded as bearing upon the controversy is the one prohibiting the taking of one's property "without due process of law."

But she was afforded the benefit of every privilege that the law contemplates, and it was only after full hearing that the court concluded that said nuisance existed and was being maintained by the defendants.

Of course, there can be no question that the state has authority to provide for the abatement of nuisances, whether they exist by the fault of individuals or not. Cooley's Constitutional Limitations (7th Ed.) p. 849.

It may be added that our Supreme Court has held that the Sixth Amendment to the Constitution of the United States has no application to proceedings in our state courts. *People v. Nolan*, 144 Cal. 75, 77 Pac. 774.

We can see no merit in the claim of appellants, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

54 Cal. App. 157

MEYERS v. BRADFORD et al. (Civ. 2292.)

(District Court of Appeal, Third District, California. Sept. 6, 1921. Hearing Denied by Supreme Court Nov. 3, 1921.)

1. Municipal corporations ☞705(1) — Trial ☞194(15)—Instruction that driver should always have automobile under control and not assume that road was clear held proper.

In an action for damages to an automobile from collision on a city street, an instruction that it is the operator's duty to keep his motor vehicle always under control, so as to avoid the collision with others using the highway, and that he has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant, and must anticipate and expect the presence of others, and that the fact that he did not know that any one was on the highway did not excuse conduct amounting to recklessness, had he so known, *held* proper and not to invade the jury's province.

2. Damages ☞39—For loss of use of automobile recoverable.

Where defendant's negligence caused an automobile wreck, plaintiff could recover damages for the use of his machine while it was being repaired.

3. Damages ☞106—For loss of use of automobile wrecked by defendant's negligence would be the cost of use of other machine whether one hired or not.

Under Civ. Code, § 3333, the measure of plaintiff's damages for loss of the use of his automobile while being repaired, after injury from collision through defendant's negligence, would be the cost of hiring another machine for his use, whether he hired one or not.

4. Appeal and error ☞1068(4) — Defendant may not object to measure of damages in matter for which damages were not allowed.

In an action for damages to an automobile caused by defendant's negligence resulting in a collision, defendant may not complain as to measure of damages for plaintiff's loss of use of his machine, where the jury undoubtedly allowed nothing therefor.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by J. S. Meyers against Mrs. George B. Bradford and others. Judgment for plaintiff, and the defendants appeal. Affirmed.

Downey & Downey, of Sacramento, for appellants.

P. H. Johnson, of Sacramento, for respondent.

BURNETT, J. Plaintiff recovered judgment on a verdict in his favor for \$400 for damages to his automobile received through a collision with the car of appellants at the intersection of Twenty-Fourth and U streets in the city of Sacramento, and the appeal is from said judgment. It is not disputed that the evidence is sufficient to support the verdict and judgment in respect to the negligence of defendants, the want of contributory negligence on the part of plaintiff and the amount of damages awarded. Indeed, there seems to be no substantial conflict as to any of these elements involved in the case, and even the testimony of defendants showed them to be chargeable with actionable negligence.

[1] Two points, however, are made by appellants: First, that the court erred in instructing the jury that "it is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that any one was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway." And, second, that the court was not warranted in authorizing a recovery for the value of the use of the machine while it was being repaired.

That said instruction demands the proper attitude of an operator in the situation referred to can hardly admit of doubt. It suggests a fundamental principle that must be observed in order to avoid illegal injury to another. The basis of the instruction is that in the enjoyment of a common right the participant must exercise constant care that

the correlative right of others may not be unnecessarily impaired or destroyed. The highways are, of course, established and maintained at public expense for the use and benefit, for lawful purposes, of all the citizens, and it cannot be claimed that the drivers of automobiles have any special right or privilege in the use or enjoyment thereof. The law indeed imposes upon them a degree of care commensurate with the peculiar hazard attending the operation of these modern vehicles.

If said instruction does not contain sound doctrine, then the converse of the propositions therein contained may be adopted as the right rule for the guidance of automobile drivers. The court would then declare the law to be that—

"It is *not* a part of the duty of an operator of a motor vehicle to keep his machine always under control, or that it is his duty to keep it under control only a *part* of the time; that he has the right to assume that the road is clear, and under no circumstances and at no time must he be vigilant or anticipate or expect the presence of others; and if he does not know that any one else is on the highway he is excusable for conduct that would amount to recklessness if he did know that another was using it."

The absurdity of such a rule is, of course, apparent. Even the undertakers, whose business would be greatly promoted thereby, would hesitate to indorse it. But it is due the learned counsel for appellants to say that their stricture is really confined to the last part of the instruction. It must be plain, however, that the driver is not excusable for reckless conduct because he does not know that another may be using the highway. From the very nature of the situation he is chargeable with knowledge and he must anticipate such contingency as arose in this case. It may be true, as suggested by appellants, that in out of the way places, or at late hours of the night, or in extremely stormy weather, the rule is not so strict, and it would not be so unreasonable for him to assume that the highway is more or less deserted. But the collision herein occurred before dark, in the heart of the residence district of the city, at the intersection of two highways in constant use, and the fact that it was raining emphasized the duty of the driver to be careful and vigilant. Citation of authorities is hardly needed for a proposition so obvious, but we may refer to these cases noted in respondent's brief: *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Thies v. Thomas* (Sup.) 77 N. Y. Supp. 276; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30.

In giving the instruction the court did not invade the province of the jury. It

stated merely a recognized principle of law that was involved in the case, and it left to the jury the determination of the question of fact whether the conduct of appellants fell within the contemplation of such principle. Indeed, the instructions were full and accurate as to the doctrine of negligence, and they have escaped the criticism of appellants, save in the instance to which we have referred.

[2, 3] As to the other question, it is apparent that, by reason of the negligence of defendants, plaintiff was deprived of the use of his machine while it was being repaired. This is a thing of value, and it is difficult to understand why it should not be considered a part of the detriment suffered by plaintiff in consequence of the accident. The general rule applicable to the situation is found in section 3333 of the Civil Code as follows:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The only difficulty is in determining the financial measure of the use of the machine; in other words, how much money would compensate for the loss of its use during the time it was being repaired. If the plaintiff had hired another machine, what he paid for it, if the rental value, would furnish a practicable and reasonable measure of his loss. But he suffers an equal detriment if he chooses to do without a machine while his is being repaired, and there seems to be no sound reason why the rental value of such machines should not be taken in either case as a fair measure of his loss. Upon this subject the authorities are not altogether uniform, but we think the better view is with respondent.

In *Detmar v. Burns Bros.*, 111 Misc. Rep. 189, 181 N. Y. Supp. 146, it was held:

"1. Damages for loss of use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure, and not for rent or profit.

"2. Evidence of the rental value of an automobile is admissible upon the question of the compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it or use it for profit.

"3. Evidence of rental value is admissible not as furnishing the exact measure of damages, but as one of the facts to be considered in ascertaining the extent of the injury."

Other cases to the same effect are *Perkins v. Brown*, 132 Tenn. 294, 117 S. W. 1158, L. R. A. 1915F, 723, Ann. Cas. 1917A, 124; *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319; *Banta v.*

Stamford Motor Co., 89 Conn. 51, 92 Atl. 665; Universal Taxi Co. v. Blumenthal (Sup.) 143 N. Y. Supp. 1056. See, also, Sedgwick on Damages (9th Ed.) § 243b.

It is clear that this element is a part of the general damages suffered by plaintiff, and it is not subject to any special provision of the statute, as was the case in *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044. It is rather analogous to *Linforth v. S. F. G. & E. Co.*, 156 Cal. 58, 103 Pac. 320, 19 Ann. Cas. 1230, wherein a building was injured, and in discussing the elements of damage, the court said that the plaintiff was entitled to the cost of the repairs and that "compensation for the loss of the use of the property is in precise accord with section 3333 of the Civil Code."

[4] But if we were to concede that the trial court took an erroneous view of this feature of the case, it should be held that it was without prejudice, for the jury undoubtedly allowed plaintiff nothing for the loss of the use, since the evidence shows without conflict that the damage to the machine exceeded the sum of \$400. Under such circumstances we would presume that the general verdict was based upon those elements of damage that were unquestionably involved, rather than upon one of doubtful propriety.

We see no merit in the appeal and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

54 Cal. App. 177

Ex parte THOMPSON. (Cr. 1013.)

(District Court of Appeal, First District, Division 1, California. Sept. 7, 1921.)

Habeas corpus ⚡54—Prisons ⚡15—Petition for habeas corpus insufficient; credits for good behavior available only if accorded by board.

Under the Indeterminate Sentence Law, credits for good conduct are available to reduce a prisoner's time of confinement only if accorded by the state board of prison directors and not forfeited by them; hence a petition for habeas corpus by a prisoner, claiming to be held in custody after expiration of the time when, after allowance of credits earned, his term of imprisonment expired, was insufficient, where it did not appear therefrom that the board had accorded petitioner any credits or that they had not forfeited any which had been given.

Application by Fleet E. Thompson for writ of habeas corpus. Writ denied.

Fleet E. Thompson, in pro. per.

PER CURIAM. In the verified petition for a writ of habeas corpus, filed in this matter, it is alleged that the petitioner is unlawfully held in custody by the warden of the state prison at San Quentin, after the expiration of the time when, with the allowance of credits earned, his term of imprisonment expired. His allegation is that he has "earned" all the credits provided for by the rules regulating the government of prisoners at the prison, and that none have been forfeited.

The petitioner's contention is based upon an erroneous theory of the present law governing such matters. Formerly a prisoner in one of the state's penal institutions was entitled, as of right, to certain fixed credits earned by good behavior while under restraint. By the enactment of the indeterminate sentence law, which went into effect July 27, 1917 (Stats. 1917, p. 665), the Legislature did away with the plan theretofore in force by which these credits for good behavior were given. In re Lee, 177 Cal. 690, 695, 171 Pac. 958. Following the decision of the Supreme Court in the Lee Case, the state board of prison directors adopted a comprehensive system under which, as we understand it, the matter of the good behavior of a prisoner, and the recognition to be given to such conduct, becomes a matter of consideration and affirmative action by the board in each particular case.

The petitioner was received at the prison February 15, 1919. Thereafter, according to his petition, the board of prison directors fixed his term at three years from and after the date on which he was received by the warden, and provided there should be deducted from the time of his confinement the aggregate of all credits provided by the board, which the prisoner should have earned and not forfeited. He alleges he has earned certain credits which have not been forfeited. But under the decision in the Lee Case, and according to the rules and usage in vogue at the prison, as we understand them, the allegations are not sufficient. It is not made to appear that the board of prison directors, by any act on its part, has accorded the petitioner any credits for good conduct, or, if any have been given, but that they may have been declared forfeited by the board. In view of the fact that petitioner was released on parole, which was later revoked by the board, and the prisoner only recently returned to the prison, we may safely infer that he is a "parole violator," who has lost the good standing, if any, he may have previously attained.

The application for the writ is denied.

53 Cal. App. 775

CLARKSON v. MOIR (two cases).
(Civ. 3685.)

(District Court of Appeal, Second District, Division 1, California. Aug. 8, 1921.)

1. Appeal and error ⇨694(1)—Sufficiency of evidence not reviewable, where bill of exceptions does not specify insufficiencies.

Where the bill of exceptions contains no specifications of particulars wherein the evidence is claimed to be insufficient to sustain the findings, its sufficiency cannot be considered on appeal from the judgment, and the rule extends to review of proceedings on motion for new trial, where the record is brought up by bill of exceptions.

2. Parties ⇨95(3)—Error as to initial of party named is subject of amendment.

Where action was brought against Lydia F. Moir, when Lydia M. Moir was intended, the error is subject to correction by amendment.

3. Limitation of actions ⇨121(2)—Amendment as to name of party relates back.

Where an amendment is filed correcting the name of defendant by changing an initial, the action should be regarded as having commenced against such party at the time the original complaint was filed.

4. Judgment ⇨818(2)—Of foreign country as to liability of stockholders here binding without notice served in such country.

Proceedings in the Supreme Court of Ontario, Canada, finding a corporation insolvent and listing the amount for which stockholders residing here are liable, is binding and enforceable here, though notice of the proceedings was not served on them within the jurisdiction of that court; the only notice had being served here.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Geoffrey Teignmouth Clarkson, as Liquidator of the Sovereign Bank of Canada, against Georgianna Esther Moir, and action by same plaintiff against Lydia M. Moir. Judgment for plaintiff, and defendants appeal. Presented on one bill of exceptions and record. Affirmed.

Williams & Williams, of Los Angeles, for appellants.

Donald Barker, of Los Angeles (Wm. H. Nebbett, of Los Angeles, of counsel), for respondent.

CONREY, P. J. Separate actions were brought against appellants, and judgments rendered against each of them, from which judgments they have appealed. In accordance with stipulations of the parties, the appeals are presented on one bill of exceptions and record. Each of the defendants was held liable to pay to the plaintiff, as liquidator of the Sovereign Bank of Canada, an amount equal to the par value of the shares held

by her in that bank, a corporation which became insolvent. The recovery was based upon the insolvency of the corporation and resulting proceedings and judgment of the Supreme Court of Ontario, in the Dominion of Canada, as set forth in the amended complaint. The proceedings in the Supreme Court of Ontario were conducted under the "Winding-Up Act," and amendment thereto, of the Dominion of Canada. In the judgment rendered in those proceedings, each of the defendants were designated as contributory, and settled upon the list of contributories for a stated amount, and a call was thereby made for the full amount for which the contributory named was settled upon the list of contributories.

The present actions were commenced on the 26th day of January, 1916. The answers of the defendants, in addition to denials of some of the allegations in the complaints alleged that the bank became insolvent on or about the 18th day of January, 1908, and that the actions were barred by the provisions of section 359 of the Code of Civil Procedure. Under the provisions of that section, an action brought against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the liability was created. In *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139, which was an action similar to those now under consideration, it was held that—

"The liability was created, at the latest, upon the beginning of the status of insolvency, and the three-year period of limitation began to run then."

[1] In the present actions, the court found that all of the allegations of the amended complaint are true; and that the bank did not become insolvent until 90 days after the 30th day of June, 1913. Appellants contend that the corporation, in fact, became insolvent at the time stated in their answers. We must decline to examine the evidence for the purpose of questioning the findings of fact. The bill of exceptions contains no specifications of particulars wherein the evidence is claimed to be insufficient to justify any of the findings. In the absence of such specifications, the question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from the judgment. This rule extends to the review of proceedings on motion for a new trial where the record is brought up by a bill of exceptions. *Mills v. Brady*, 196 Pac. 776; *Beeson v. Schloss* (Sup.) 192 Pac. 292; *Millar v. Millar* (Sup.) 175 Cal. 799, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

[2, 3] On behalf of appellant, Lydia M. Moir, it is claimed that the action against her is barred for the additional reason that the action was originally commenced against

another party, and that this appellant was not made a party defendant until May, 1917; also that the court erred in permitting substitution of appellant in place of the original sole defendant in the action. For the reasons hereinabove stated, we can consider this point only to the extent that the facts appear in the judgment roll. As shown by the original complaint, the action was commenced against Lydia F. Moir. In the amended complaint, the defendant is named as Lydia M. Moir (sued herein as Lydia F. Moir). The second amended complaint begins thus:

"Comes now the plaintiff and by leave of court amends his complaint herein and for cause of action against the defendant, Lydia M. Moir (who was originally sued herein as Lydia F. Moir), alleges."

In her answer, appellant alleged that she has never been known as Lydia F. Moir, and that the person originally sued herein under that name is her mother. But the court found that the person sued and intended to be sued herein was and is the defendant, Lydia M. Moir; that there was no substitution of one defendant for another, but that by mistake and inadvertence the middle initial of the defendant was erroneously inserted in the original complaint and summons as "F" instead of "M," and that the complaint was amended accordingly when said mistake was discovered. We have no doubt that an error of this kind may be corrected, and that the action should be regarded as having been commenced against appellant at the time when the original complaint was filed. *Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89. In 15 Ann. Cas. 117, numerous cases are cited in support of the proposition that—

"The weight of authority seems to be that, in civil proceedings, a mistake made in the middle initial of a name by the insertion of an erroneous initial for the correct one is immaterial, and should be disregarded."

Appellants next suggest that the insolvency of the bank as early as 1911 is established by the finding of the court that certain circular letters to shareholders were sent out by the general manager of the bank as alleged in the answer of appellants. But the findings of the court that certain specified allegations of the answers are untrue included the alleged facts concerning the laws of Canada, upon which appellants relied. Since these findings must be accepted as establishing the facts of the case, the only law by which the question of insolvency of the bank may be tested consists of the statutory provisions contained in the complaint. It must therefore be accepted to be true, as found by the court, that the bank did not become insolvent until 90 days after the 30th day of June, 1913.

[4] Finally, it is claimed that the proceed-

ings, orders, and judgment in the insolvency matter in the Supreme Court of Ontario were without jurisdiction as against appellants because appellants were not served with notice of those proceedings at any place within the jurisdiction of that court. Appellants claim the benefit of the rule that jurisdiction to render a judgment personally enforceable against the defendant must be founded upon personal service of process within the state or country to which the jurisdiction of such court is confined. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, *Belcher v. Chambers*, 53 Cal. 635, and numerous other decisions. In the cases at bar the court found that it is true that, as to whatever notices, summons, processes or pleadings mentioned in the complaints as having been served upon the defendants, such services were made upon them while they were residents of and within the state of California, and not while they were residents of and actually within the Dominion of Canada.

The rule relied upon by appellants is not applicable to proceedings of the nature of those here in question. Such seems to be the effect of the decisions in which the subject has been considered. So far as we are advised, the question has not been determined by the courts of California. A leading case is *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. That was an action brought in a court of Massachusetts by the plaintiff as receiver of a bank in the state of Washington, to recover the amount of an assessment levied by the superior court of the state of Washington upon the defendant as a stockholder. Defendant had not been personally served with process in the state of Washington in the proceedings there in which the assessment was made. The principles governing the matter of jurisdiction in such cases were extensively discussed in the Massachusetts decision, and were applied to the particular case as follows:

"In the case at bar a receiver of the Traders' Bank has been appointed, the amount of its assets and liabilities has been judicially determined, the necessity for an assessment upon stockholders and the amount of the required assessment have been ascertained, an assessment upon all stockholders has been made, and the receiver who is to hold this fund in trust for creditors has been directed to collect it. We see no injustice to the defendant in holding him here to the performance of the obligation which he voluntarily assumed in another state.

"The question arises how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the

court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that, if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share, up to the amount of their subscriptions, to the trustee of this additional fund, for the benefit of creditors. The determination of the questions involved is a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability, such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. [Citing cases.] That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided."

The same subject was considered in *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. That was an action originating in the circuit court of the United States for the southern district of New York, wherein the receiver of a corporation of the state of Minnesota sought to recover upon the alleged stockholder's liability under the Constitution and laws of the state of Minnesota. The action was based upon an order made at the instance of the receiver in the Minnesota court having jurisdiction of the receivership. This order fixed the amount of assessment declared to be necessary against each and every share of the capital stock, and authorized the receiver to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the state of Minnesota or elsewhere. Notices of hearing of the receiver's petition had been published, mailed, and served, as required by order of the court, but had not been personally served upon the stockholders, who were defendants in the action brought by the receiver in the federal court. The matter having been brought before the Supreme Court of the United States on writ of error, that court sustained the judgment of the cir-

cuit court, and upheld the validity of the proceedings declaring the assessment. Referring to the proceeding in the action wherein the assessment was made, the court said:

"The proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts. *Howarth v. Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888. And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. Rep. 739; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 336, 40 L. Ed. 986, 990, 16 Sup. Ct. Rep. 810."

In *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292, referring to proceedings under the laws of the state of Minnesota wherein a court there, at the instance of the receiver, had levied an assessment against stockholders who were not made parties to the sequestration suit, and were not notified otherwise than by publication or by mail of the applications for the orders levying the assessments, the Supreme Court of the United States said:

"The constitutional validity of chapter 272 has been sustained by the Supreme Court of the state, as also by this court; and this because: (1) The statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or equity he is entitled to set off against the assessment, or has any other defense personal to himself; and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts."

In *Johnson v. Libby*, 111 Me. 204, 88 Atl. 647, Ann. Cas. 1916C, 681, it was likewise held that—

"When, in proceedings for the liquidation of the affairs of a corporation, and for the payment of its debts and engagements, an assessment is necessary to be made upon unpaid stock subscriptions and upon the additional liability which its shareholders have assumed by becoming members of the corporation as shareholders, the court may make such assessment in proceedings therefor against the corporation without the presence of, or personal service upon, the individual shareholders. In such proceedings the representation which a shareholder has by virtue of his membership in the corporation is all that he is entitled to."

In the cases at bar, no attempt was made by either of the defendants to show that she was not a stockholder, or that she was not the holder of the alleged number of shares, or that she had any claim against the corporation which in law or equity she was entitled to set off against the assessment, or that there was any other defense personal to herself. Appellants therefore are not in a position to claim that they were denied any of the rights to which they might have been entitled under the most favorable construction of the law as stated in the foregoing decisions.

The judgments are affirmed.

We concur: SHAW, J.; JAMES, J.

52 Cal. App. 172

BACON v. TRADERS' OIL CORPORATION.
(Civ. 3673; L. A. 6417.)

(District Court of Appeal, First District, Division 1, California. April 4, 1921. Hearing Denied by Supreme Court June 3, 1921.)

1. Corporations §123(12)—Holder of note waived rights under pledge of corporate stock by bringing action in attachment.

Holder of note secured by a pledge of corporate stock waived and abandoned his rights under the pledge by bringing action against the pledgor and others on the note and procuring an attachment to be levied on the shares of stock pledged to him, under Civ. Code, § 324.

2. Corporations §114 — Stock transferable without delivery of certificate; "personal property."

While shares of corporate stock are "personal property" under Civ. Code, § 324, a certificate of stock is merely written evidence of the ownership thereof, and hence, where stock was pledged as security for a note, the certificate being indorsed, a transfer by the debtor of the stock to a third person by a separate instrument was effectual to convey title in the shares of stock to the third person, no transfer of the stock having been made on the books of the corporation to the pledgee, notwithstanding section 3440.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

3. Corporations §122—Purchaser of stock at execution sale held not to acquire title.

Where certificate of shares of corporate stock was indorsed as security for a note, but no transfer was made on the books of the corporation, and thereafter debtor transferred the stock by a separate instrument to a third person, and such transfer was noted on the books of the corporation, and the pledgee of the stock brought action on the note and attached the shares of stock as belonging to the debtor, and purchased the same at an execution sale with knowledge of the conveyance of the stock to the third person, he acquired no title to the stock, under Civ. Code, §§ 324, 3440.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Frank P. Bacon against the Traders' Oil Corporation. Judgment for defendant, and plaintiff appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Adams, Adams & Binford, of Los Angeles, for respondent.

WASTE, P. J. The plaintiff, claiming to be the owner of 300 shares of preferred capital stock of the Traders' Oil Corporation, defendant in this action, made demand for a transfer of the shares to himself on the books of the company, and that the corporation issue to him a new certificate therefor. The demand was refused, whereupon the plaintiff brought this action for the recovery of damages, alleging the wrongful conversion of the stock by the defendant to its own use. Judgment was entered for the defendant, and plaintiff appeals.

The facts are few and are practically agreed upon. Harry Jackins, together with other parties, whose connection with the matter is not material here, indorsed the promissory note of the Leasehold Company, a corporation, which note was delivered to the appellant. Subsequently Jackins became the owner of 300 shares of the preferred capital stock of the Traders' Oil Corporation, his ownership being represented by certificate No. 249. Thereafter Jackins and M. V. McQuigg, for value, executed and delivered to appellant their promissory note for \$18,500. As collateral security for its payment Jackins indorsed and delivered to appellant the certificate for the 300 shares of the stock of the defendant so owned by him. Appellant did not have this transaction noted on the books of the corporation. A few days later, by a separate instrument in writing, and consideration of McQuigg assuming Jackins' liability on the promissory note for \$18,500, and other consideration, Jackins transferred to McQuigg all his right, title and interest in and to said stock certificate No. 249, and directed the corporation to transfer the stock

to McQuigg, waiving and relinquishing all interest that he had in the stock, and all dividends arising thereunder. Immediately after the execution and delivery of this agreement to McQuigg, Jackins and McQuigg together went to the office of the Traders' Oil Corporation, and orally informed the assistant secretary of the corporation that the ownership of the shares of stock had been transferred to McQuigg. The latter thereupon requested that the proper entries be made on the stock ledger of the corporation, showing the change of ownership of the stock. This request was complied with. An indorsement was entered on the page of the stock ledger containing Jackins' account, which clearly indicated that the shares of stock in question had become the property of McQuigg, and that the dividends thereon were thereafter to be paid to him.

A short time after this transfer, the note of the Leasehold Company not being paid, appellant brought suit thereon, making Jackins and his coindorsers on the note parties defendant with the corporation. He procured an attachment to be issued, which was served upon the respondent, and under which the sheriff attached all stock, or shares, or interest in any stock or shares in the Traders' Oil Corporation belonging to Jackins. Appellant obtained a judgment against the Leasehold Company, Jackins, and others. Execution was duly issued and levied upon the stock of the Traders' Oil Corporation claimed to belong to Jackins. At the execution sale which followed the appellant bid the sum of \$1,500 for this stock, and received a sheriff's certificate of sale therefor. This he presented to the Traders' Oil Corporation, with a demand that it issue to him a new certificate representing the shares of stock so purchased, and make the proper entry upon its books, showing the transfer. He did not surrender, nor offer to surrender for cancellation, certificate No. 249, which had theretofore been delivered to him. Upon refusal by respondent to comply with the demand appellant brought this action.

It was admitted in the court below that the value of the stock was \$16,500; that presentation of the original certificate, No. 249, with the sheriff's certificate, was unnecessary, and would have been futile in so far as influencing respondent to issue the stock to appellant. It was also stipulated that at the time of the execution sale the appellant had notice of McQuigg's claim that the stock had been sold and transferred to him.

[1] Appellant is not here claiming any rights under the provisions of section 324 of the Civil Code, relating to the transfer of shares of stock in corporations. He admits that when he brought his action against Jackins and the others on the promissory note of the Leasehold Company, and procured the attachment to be levied on the shares of stock which Jackins had pledged to him, he

waived and abandoned his rights under the pledge. This was undoubtedly true. *Latta v. Tutton*, 122 Cal. 279, 283, 54 Pac. 844, 68 Am. St. Rep. 30; *Clafin Co. v. Bretzfelder*, 69 Ark. 271, 279, 62 S. W. 905. He bases his attack on the judgment upon other grounds. At the time of the sale and transfer of the stock by Jackins to McQuigg, the certificate for the stock was, and remained, in the possession of appellant. Consequently it was not delivered by Jackins to McQuigg, or surrendered by the latter to the Traders' Oil Corporation for cancellation and reissue. Placing his reliance therefor upon the provisions of section 3440 of the Civil Code, relating to the transfer of personal property other than a thing in action, appellant contends that the sale from Jackins to McQuigg was void as to him, a creditor of Jackins, for the reason that it was not, he claims, accompanied by an immediate delivery and followed by the actual and continued change of possession of the stock transferred.

[2] We do not believe there is merit in this contention. While the shares of stock in the Traders' Oil Corporation, acquired and owned by Jackins, were personal property under section 324 of the Civil Code, the certificate of stock was merely written evidence of the ownership thereof. 14 Corp. Jur. p. 478, par. 698; *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 12, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; *Williams v. Ashurst, etc., Co.*, 144 Cal. 619, 625, 78 Pac. 28. Consequently, while the section of the Code, *supra*, provides that shares of stock of a corporation may be transferred by indorsement and the delivery of the certificate, but that such transfer is not valid except as to the parties thereto until entered upon the books of the corporation, we find nothing in the section declaring that a transfer without such indorsement and delivery of the certificate, may not be made. In fact, the accepted doctrine appears to be otherwise. *Thompson* in his work on Corporations (2d Ed.) vol. 4, par. 4326, lays down the rule that the correct method of transferring the full legal title of corporation stock is by an assignment, *either by a separate instrument* (italics ours), or by an indorsement on the certificate to the purchaser, duly signed by the holder of such certificate and by the actual registration of the transfer on the books of the corporation, when this is required either by statute or charter or by a valid by-law.

"It may be said in a general way," says this author, "that any assignment, by delivery or otherwise, which is finally entered and transferred on the books of the corporation, according to its rules, is a transfer of the legal title. The very purpose of the transfer on the books is to pass the legal title to the transferee."

We think the rule thus laid down is in entire accord with the provision of section 324 of the Civil Code. The execution and delivery

of the separate instrument by Jackins to McQuigg in the instant case was as effectual as an assignment of the certificate as if that document itself had been actually indorsed and delivered.

[3] Plaintiff was but a purchaser at an execution sale. While one who purchases at execution sale shares of stock of a corporation, standing on the books in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if at the time of the purchase he acts in good faith, and without notice that the outstanding certificate has been assigned, and that the ownership of the stock has passed to some other person (*Security Com. & Savings Bank, etc., v. Imperial Water Co.* [Sup.] 192 Pac. 22), that rule has no application here. In the instant case appellant admits that he had notice at the time of the execution sale of the fact that the stock had been transferred by Jackins to McQuigg by a sale which we hold to be valid. He therefore acquired no title to the stock. *Blakeman v. Puget Sound Iron Co.*, 72 Cal. 321, 13 Pac. 872.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

Opinion of Supreme Court in Bank denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division One, is denied.

We would say, however, that we do not understand the opinion of the District Court of Appeal as holding that section 3440, Civil Code, does not apply to a transfer of stock whose ownership is evidenced by stock certificates. We understand the opinion as going upon the fact that the transfer had been made on the books of the corporation, and thereby the requirements of section 3440, Civil Code, had been complied with.

All concur.

54 Cal. App. 50

ALBERTSON v. MacFARLANE. (Civ. 3593.)

(District Court of Appeal, First District, Division 2, California. Aug. 20, 1921. Hearing Denied by Supreme Court Oct. 18, 1921.)

1. Estoppel §68(3)—Defense in former action held an election to treat deed as mortgage.

Where defendant in action to quiet title set up a defense that a deed given to plaintiff was intended as a mortgage, such election to treat the conveyance as a mortgage precluded him from later attempting to treat the deed as a trust deed and to proceed in another action to enforce the trust.

2. Judgment §744—Matter determined in former suit not again considered.

Where defendant in suit to quiet title set up defense that deed to plaintiff was intended as a mortgage, and the judgment was in favor of plaintiff, defendant could not in a later action claim that the deed was intended as a mortgage.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by Rasmus H. Albertson against M. MacFarlane. Judgment for defendant, and plaintiff appeals. Affirmed in the District Court of Appeal and hearing denied in Supreme Court.

Sawyer & Sawyer, of San Francisco, for appellant.

H. L. Breed, of Oakland, for respondent.

STURTEVANT, J. On December 31, 1917, the plaintiff filed a complaint in the trial court, asking that the trial court adjudge him to be the owner of, and that the defendant was holding, a certain piece of property in Alameda county as trustee for the plaintiff. The defendant filed an answer in which he denied the allegations stated in the complaint, and as a second defense he pleaded a certain judgment in bar, and he also filed an amendment to his answer in which he set forth the statute of limitations. A trial was had, in which all the issues so made by the pleadings were fully tried out. In other words, the judgment of the trial court did not turn solely on the statute of limitations, nor solely on the plea of a judgment in bar, but rested on all of the issues. The judgment of the trial court was in favor of the defendant. The plaintiff has appealed, and has appeared in person during a part of the proceedings, and latterly Sawyer & Sawyer, attorneys at law, did, as a matter of charity, prepare and present to this court a brief on behalf of the appellant. The appellant's brief makes four separate points: (1) That appellant is the owner of the land; (2) that the deed to MacFarlane is a mortgage; (3) that it has never been foreclosed; and (4) that the prior judgment was made and entered against the appellant at a time when he was actually insane and actually an inmate of a state hospital, and therefore is not a bar. The respondent, in reply, makes three separate points: (1) That all the material allegations in the complaint were tried out by the trial court, that the evidence perchance may be said to be conflicting, but that all of the allegations of plaintiff's complaint were found against the plaintiff, and that such findings are conclusive on this court; (2) that the question of title to the lands in dispute was tried out in a former action between the same parties, and that the judgment in the former case is a bar; and (3) that the plaintiff's cause of

action, if any he has, is barred by the statute of limitations. Among other things, the court found that on, and long prior to, the 6th day of February, 1913, plaintiff was the owner in fee of the lands described in plaintiff's complaint; that on February 6, 1913; plaintiff sold said lands to the defendant, who has ever since been in possession thereof, claiming to own the same; that the deed of conveyance was absolute in form, and was not intended to be a mortgage, nor to be a conveyance in trust; that prior to the commencement of this action, the plaintiff never demanded of defendant an accounting, nor did he ever tender to the defendant \$1,240, together with interest thereon from the 6th day of February, 1913; that on the 6th day of February, 1913, and at the time of the trial, the property in dispute was of the value of \$1,500, and no more; that subsequent to the execution of the deed dated February 6, 1913, the defendant gave to the plaintiff an option to purchase said property on, or before, the 6th day of April, 1913, and the plaintiff never exercised said option; that on May 27, 1913, plaintiff made a deed, absolute in form, conveying said lands to John W. Striker, and thereafter John W. Striker made a quit claim deed to this defendant; that plaintiff's action herein is barred by a certain judgment rendered on the 17th day of December, 1913, by the superior court of Alameda county, in an action therein pending wherein this defendant, M. MacFarlane, was the plaintiff, and this plaintiff, Albertson, was the defendant, wherein the title of this defendant, M. MacFarlane, was quieted, and this plaintiff, Albertson, and all persons claiming under him subsequent to the 29th day of August, 1913, were forever barred and enjoined from claiming any right, title, interest, or estate, of, in, or to, said real property, or any part thereof, or lien thereon, adverse to this defendant; that said judgment was duly given and made in the superior court of Alameda county, and was entered on the 19th day of December, 1913; that plaintiff's action herein is barred by the provisions of subdivision 1 of section 337, and the provisions of subdivision 1 of section 339, and by the provisions of section 343 of the Code of Civil Procedure of the state of California.

[1] The plaintiff's complaint hints at fraud. The hint is predicated upon what purports to be a secret oral agreement that the deed from the plaintiff to the defendant was intended to be a conveyance in trust. On conflicting evidence the court found against the plaintiff. The finding was in accordance with the great weight of the evidence. If any fraud was committed, the plaintiff was advised of the defendant's contentions as early as August 29, 1913, the date of the filing of the complaint in the first action. The claimed fraud was a matter which could have

been and should have been litigated in that action. True it is that in that case this plaintiff claimed that his deed to this defendant was intended as a mortgage. He was bound to elect which theory to advance. In making the election to proceed upon the mortgage theory he precluded himself from the right to claim thereafter that the deed was intended to be a trust deed. The two theories are inconsistent. The election in 1913 to treat the conveyance as a mortgage precluded this plaintiff from later attempting to treat a bargain and sale deed as a trust deed. *Parke, etc., Co. v. White River L. Co.*, 101 Cal. 37, 40-41, 35 Pac. 442.

[2] As we have stated above, in his brief, as distinguished from his pleadings, the plaintiff now claims that his deed to the defendant was intended as a mortgage, and that the mortgage has never been foreclosed. But, that theory was expressly advanced in the prior action, and was expressly determined adversely to the contention of this plaintiff. As to this last contention the prior judgment has become a bar, and the courts are not at liberty to again consider the question.

Something is said in the briefs regarding the fact that during a part of the time that the first action was pending this plaintiff was being confined pursuant to a judgment of lunacy. No claim is made that summons was not duly served. No facts are shown which indicate that the incarceration for insanity prevented a full presentation of the plaintiff's case in the first action; and, even though such facts existed, they would not be a proper subject for consideration under the pleadings in this case.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for hearing in this court after decision by the district court of appeal of the first appellate district, division two, we wish to state that we are not prepared to approve what is said with relation to the matter of the alleged insanity of the plaintiff at the time the former action was instituted, pending and decided. This matter, however, was material only on the issue of bar by former judgment. The finding on this issue is not essential to the judgment here in view of the findings on the other issues which sufficiently support the judgment in favor of defendant, regardless of the finding on the issue of former judgment.

The application for a hearing in this court is denied.

All concur except SHAW, J., absent,

(51 Cal. App. 517)

RAMSEY v. CALIFORNIA PACKING CORPORATION et al. (Civ. 2269; Sac. 3087.)

(District Court of Appeal, Third District, California. Feb. 23, 1921. Opinion of Supreme Court in Bank, Denying Hearing, April 19, 1921.)

1. Appeal and error ⇨659(3)—Original complaint made part of record on appeal.

Where answer denied certain allegations of complaint on information and belief by specific reference to the numbered lines and pages of the original complaint, but not to the complaint, as to the paging and the numbering of the lines thereof, as printed in the transcript on appeal, a suggestion of diminution of record, with the object of bringing before the appellate court, the original complaint, should be allowed.

2. Chattel mortgages ⇨136 — Removal of crop with consent of mortgagee not tortious, and lien is lost.

If mortgaged crops are removed with the consent of the mortgagee, they are not wrongfully or tortiously removed, and the lien of the mortgage on removal ceases by operation of law, under Civ. Code, § 2972.

3. Acknowledgment ⇨20(2), 53 — Chattel mortgages ⇨150(1)—Execution of chattel mortgage before joint beneficiary not notice to third persons when recorded.

Every instrument required to be recorded, with the exception of those belonging to the class mentioned in Civ. Code, §§ 1159, 1160, 1202, 1203, cannot be recorded, unless execution is acknowledged by the person executing it, and an acknowledgment taken before a grantee or one standing in the position of a beneficiary under a conveyance or other instrument is void, and does not entitle an instrument to be recorded, and a chattel mortgage executed before a notary public, who was a partner and joint beneficiary in the notes and mortgage, while in full force and binding between the parties, did not impart any notice to third persons of the mortgagee's right under it, though recorded.

4. Chattel mortgages ⇨229(3) — Mortgagee must rebut presumption that he consented to removal of crops.

In an action by mortgagee against purchaser of mortgaged tomatoes, where it appeared in evidence that the tomatoes had been removed from the premises before the purchase, the burden was on the plaintiff to rebut the presumption that the lien had been extinguished by showing that the tomatoes were removed without his knowledge and consent, and that it was therefore a tortious removal.

5. Chattel mortgages ⇨229(3) — Mortgagee, suing purchaser of crop, must show knowledge of tortious removal from premises.

In action by mortgagee of crop of tomatoes against third person, who had purchased the same after they had been tortiously removed from the premises by the mortgagors, burden was on the plaintiff to show that the purchaser had knowledge of the wrongful removal of the crop from the premises.

6. Chattel mortgages ⇨136—Permitting mortgagors to remove crop and sell same substitution of personal obligation.

An agreement of mortgagee, allowing mortgagors to sell mortgaged crops and turn over the proceeds to mortgagee, amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage.

7. Pleading ⇨355—Refusal to strike out denials in answer on information and belief proper.

In an action by mortgagee of crop against third persons, purchasing the same from mortgagors, court properly refused to strike out from answer denials on information and belief relating to allegations of complaint, which referred to execution of notes, mortgage, good faith thereof, acknowledgment and recordation of the mortgage, and that no part of the note was paid; the mortgage not being recorded as required by law, in that it was executed before a joint beneficiary of the note and mortgage.

8. Appeal and error ⇨1047(3)—Striking lease from evidence in action on chattel mortgage held not prejudicial.

In action by mortgagee against purchasers of mortgaged crop, tried on the theory that mortgagors were owners of the crop and tortiously removed the same, it was not prejudicial error, if error at all, to strike from the evidence a lease of the land from mortgagee to mortgagors, wherein it was provided that title to crop should remain in mortgagee; it being immaterial whether or not mortgagors were tenants of the plaintiff.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by W. C. Ramsey against the California Packing Corporation and others. From a judgment of nonsuit, plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

A. H. Carpenter, of Stockton, for appellant.

R. C. Minor and Nutter, Hancock & Ruth-erford, all of Stockton, and Pillsbury, Madison & Sutro, of San Francisco, for respondents.

HART, J. This is an appeal by plaintiff from a judgment of nonsuit granted at the end of plaintiff's case on the motion of the defendants California Packing Corporation and E. Powers, who interposed their respective answers to the complaint. The defendants Kim and Hahn did not file an answer or answers to the complaint. The appeal is supported by a bill of exceptions. The facts, in summary, may be stated as follows:

Plaintiff was the owner in fee of 320 acres of ranch property which he leased to the defendants Kim and Hahn on the 1st day of November, 1917, for the term of one year

wherein, plaintiff asserts in his brief, there was a stipulation that "the title to the crops shall remain in the party of the first part [plaintiff] until the entire rental is paid and the work performed." The complaint alleges on the 18th day of March, 1918, the same defendant lessees gave to the plaintiff two promissory notes, one for \$3,000, and the other for \$2,000, and, to secure the payment thereof, at the same time gave to said plaintiff and owner of said real property a crop or chattel mortgage on all crops of sugar beets, tomatoes, beans, Egyptian corn and similar products "being, standing, and growing" on the land described in the mortgage at that time, namely, March 18, 1918, when the chattel mortgage was signed. The note for the smaller amount was subsequently paid in full by the makers, who, also, before this suit, paid \$500 on the other note. At the close of the harvest season of 1918, the answering defendants, California Packing Corporation and E. Powers, purchased and received possession from the said mortgagors (Kim and Hahn) of all the said crops of Egyptian corn and tomatoes and applied the same to their own use. Shortly after such sale and delivery of said crops by Kim and Hahn, the plaintiff demanded the aforesaid crops from said purchasers, or enough of the proceeds thereof to satisfy his mortgage claim. The said answering defendants refused to return the crops so sold and delivered as aforesaid, or to pay or satisfy said mortgage note. This action is for damages in the sum of \$2,622.50; the said damages being equal to the balance due on said note, for the tortious removal of the mortgaged chattels from the land described in the mortgage and the wrongful conversion of said property. The case was tried by the court without a jury.

The court, upon the close of the plaintiff's case, and on motion of counsel for the answering defendants, struck from the record the lease whereby the premises described in the mortgage were demised to Kim and Hahn. Immediately following the making of that order, the motion of the defendants California Packing Corporation and Powers for a nonsuit was granted upon the following grounds and reasons:

"First, that the crop or crops, the value of which plaintiff is suing for, were not crops included in the mortgage; second, because the mortgage itself is invalid, as the execution of the instrument was before a person who was one-half interested in the proceeds of these crops; third, the general principle of law, of course, is that cited in the section, that the crops when severed—the old law was when severed from the soil—the crop mortgage became extinguished, and later the statute went one step further and stated they had to be removed from the premises; in other words, so long as the crops are on the premises, of course, the mortgage still exists, but, when removed, the

mortgage becomes extinguished—here are the exceptions, and the plaintiff must show we are in the excepted class—that the goods were moved tortiously, and that there was some act or thing done by the defendant himself that caused that removal; fourth, the law says there must be some testimony of diligence on the part of the mortgagee of a crop mortgage. He cannot sit by, and wait for a season to pass, and allow those crops to leave the lands, or to be taken therefrom, and then afterwards, when an innocent purchaser buys the property, go to the man for the crops, or go to the man for the money."

[1] Before taking up for consideration the points involving the merits of this controversy, it is proper that we should first dispose of the suggestion of a diminution of the record on appeal made and filed by the respondent California Packing Corporation. The answer of said respondent denied certain allegations of the complaint on information and belief by specific reference to the numbered lines and pages of the complaint as they were numbered in the original draft of that pleading. Counsel for the plaintiff moved in the court below that so much of the answer as denied the allegations thus referred to "on information and belief" be stricken out, on the ground that the matters as to which, by its denials, the Packing Corporation disclaimed knowledge were presumptively within its knowledge, and should therefore have been directly denied. Typical of the allegations thus denied were those relative to the execution of the mortgage and the promissory notes by the nonanswering defendants, Kim and Hahn. It appears, however, that the denials of the answer to said allegations of the complaint on information and belief, while so conforming to the original complaint as it was numbered by page and lines as that no possible misunderstanding could arise as to the particular allegations of the complaint to which such denials were addressed do not conform to the complaint, as to the paging and the numbering of the lines thereof, as it is printed in the transcript on appeal. The object, therefore, of the suggestion of the diminution of the record was to bring before this court the original complaint, so that this court would be afforded enlightenment upon the point urged by the appellant that the court below erred in refusing to grant his motion to strike from the Packing Corporation's answer the denials referred to. We think the suggestion should be allowed, and it is therefore the order that the record certified to this court on the suggestion be and the same is incorporated into the record as a part thereof. Whether the court erred in refusing to strike from the said answer the denials referred to will be considered herein later on.

Upon the merits, we first remark that the

ground of the nonsuit first above stated, to wit, that "the crop or crops, the value of which plaintiff is suing for, were not crops included in the mortgage," is, to the mind of the writer of this opinion, not only very technical but of doubtful validity. The argument supporting that position is, in effect, that the language of the mortgage describing the property to which it was intended the lien should attach, being in the present tense, or having reference to crops then (at the time of the execution of the mortgage) growing and standing on the land, and that the crops, the value of which the plaintiff is suing for, not having been planted, and not "being or growing or standing" on said land, until several months after the mortgage was executed, the crops involved herein are not and could not be held to be affected by the mortgage lien.

The judgment, however, must be affirmed for other reasons, as presently we will show, and therefore, while it is not necessary and we will not attempt to construe the mortgage for the purpose of ascertaining its just scope and effect, we will nevertheless suggest that it is very doubtful (at least in the mind of the writer) whether the language of the mortgage referred to, although in the present tense, is required to be so construed as to compel the conclusion that the mortgage does not include, nor was intended by the parties to cover, any crops of the kind specifically mentioned in the instrument (beans, tomatoes, corn, etc.) whenever seasonably produced upon the land within the year during which the notes and mortgage were to run (year 1918), it being shown, and, indeed, a matter of common knowledge, that at the date of the execution of the notes and mortgage it was not the season of the year to plant and grow such crops. That the mortgage was intended and is sufficiently definite to include the crops involved herein would certainly be not only the just, but the equitable construction of the mortgage, and the view that a court of equity would be strongly inclined to take in such a case before it would deny to the mortgagee the only security he in good faith believed his mortgage afforded him for the payment of a just and honest debt, in the event that the case reached that forum by proceedings in foreclosure, as thus it could properly be taken there (Civ. Code, § 2967; Code Civ. Proc., §§ 726-729), the remedy by foreclosure being of equitable cognizance, albeit the right to make and to take a chattel mortgage to secure an indebtedness is purely of statutory origin. But as stated, it is not necessary to decide the question here, and it is to be understood that the suggestions we offer are wholly gratuitous and do not involve a definite, or, indeed, any construction of the scope and meaning or in-

tent of the mortgage in the particular mentioned. We will, however, in considering the remaining questions, assume that the mortgage is not susceptible to the construction to which the respondents subject it.

[2] The other three grounds and the reasons upon which the nonsuit was presumptively granted practically involve the same ultimate propositions, viz.: Whether the crops were tortiously removed from the freehold and sold, and, even if so, whether the respondents were parties to those tortious and unlawful acts. Obviously, if the crops were removed by and with the consent of the plaintiff, then they were not wrongfully or tortiously removed, and in that case the lien of the mortgage ceased upon such removal by operation of law. This proposition follows from the terms of section 2972 of the Civil Code, which reads as follows:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor."

It is in order first to inquire whether, assuming for the purposes only of such inquiry that Kim and Hahn wrongfully removed the crops from the land, the answering defendants knew, before or at the time they purchased the crop, that such removal was tortious, and the first step to that end is to ascertain whether they had either actual knowledge or legal notice of the existence of the mortgage at the times designated. As to actual knowledge, it is to be said that there is no evidence showing, or even remotely tending to show, that they had any such knowledge of the mortgage, and if, therefore, they are to be charged with any wrong in the transaction culminating in the sale of the tomatoes and corn to them, they can only thus be bound because there must be imputed to them the notice of the mortgage constructively imparted to them by reason of the recordation of said mortgage as required by law.

[3] The contention of the respondents is, and so the court below expressly held in its decision of the motion for the nonsuit, that the mortgage was not legally recorded, and, consequently, did not impart constructive notice of its existence to third parties, for the reason, so it is asserted, that the evidence shows that T. F. Emerson, the notary public before whom the instrument was acknowledged, was a partner and joint beneficiary with the plaintiff in the notes and mortgage securing the same at the time of and subsequent to the execution of those instruments.

The law is, as is well understood, that every instrument required to be recorded, with the exception of those belonging to the class mentioned in sections 1159, 1160, 1202, and

1203 of the Civil Code, cannot be recorded unless its execution is acknowledged by the person executing it, "or if executed by a corporation, by its president or secretary, or other person executing the same on behalf of the corporation," etc. Civ. Code, § 1161. But it is the settled law in this state, as well as in other jurisdictions, "that an acknowledgment taken before a grantee, or one standing in the position of a beneficiary under a conveyance, or other written instrument, is void, and does not entitle an instrument to be recorded." *Greve v. Echo Oil Company*, 8 Cal. App. 275, 284, 96 Pac. 904; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; *Lee v. Murphy*, 119 Cal. 364-370, 51 Pac. 549, 955; *Murray v. Tulare Inv. Co.*, 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; *Henrici v. Land Co.*, 177 Cal. 442, 446, 170 Pac. 1135. While, as between the parties to a mortgage so acknowledged, the mortgage is in full force and binding efficacy, the record of the instrument does not impart any notice to third persons of the mortgagee's right under it. *Lee v. Murphy*, supra, 119 Cal. 370, 51 Pac. 955, and cases there cited.

The evidence in this case shows, without conflict, that at the time of the execution of the notes and mortgage, and in fact at all times, Emerson was not only a partner of the plaintiff in the real estate business in the city of Stockton, but was interested as a partner of and beneficiary with plaintiff in the notes and mortgage in question here. The plaintiff, testifying on his cross-examination, stated that—

"T. F. Emerson, the notary public who took the affidavit of W. T. Kim and C. H. Hahn to the crop mortgage pleaded in the complaint, and who also took the acknowledgment of W. T. Kim and C. H. Hahn to the crop mortgage, is the owner of a half interest in the land described in the complaint; that he and Emerson were partners in business; that Emerson owned one-half interest in all the crops that were growing on the premises on the day the mortgage in question was executed; that Emerson's interest in the said crop was similar to his (plaintiff's)—that is, each of them had a like interest in the crops."

Emerson, while denying that he had any interest in the land described in the mortgage, did not deny owning an interest in the crops grown thereon and the notes and mortgage. From his testimony generally, however, the inference appears to be justified, if not irresistible, that he was interested in the crops to the extent of the mortgage lien thereon. It was Emerson who personally prosecuted efforts to secure the payment of the note secured by the mortgage after the tomatoes and corn had become ready for harvesting. He testified that he saw said crops while they were growing, that he saw them after they had been harvested, and that he kept in such touch with the situation as to

know that portions of said crops had been severed from the land and sold to the two answering defendants. He talked with Kim and Hahn about the crops, and told them that they (plaintiff and himself) desired to secure payment of the note from the sale of said crops; that after he found out that the crop of tomatoes had been sold to the defendant Packing Company he—

"talked with Mr. Kim about it, and he was to make some payment upon the note for rent—this mortgage note; and I had been after him on that right along, because we wanted to get it fixed up. I asked him how soon he could pay something, and he said that he could pay just as soon as they remitted to him—the cannery company."

He further testified that, after considerable effort to obtain an interview with Mr. Davis, the local manager at Stockton of the Packing Corporation, after the latter had purchased the tomatoes and before paying for them, he met him (Davis) in the month of October, 1918, when—

"I told him that Mr. Kim owed us some money, and we had been after Mr. Kim for it, and he (Kim) said that Mr. Davis, or the company, was to pay the money. I said [to Davis]: 'How soon will that be?' He said they would all be in in a little bit and it would be fixed, if possible—they were always glad to fix up anything of that kind, and didn't want any trouble about the matter. I said we are anxious about it, just as much as you are. * * * Mr. Davis said to me: 'I will take the matter up with the company. I will get in correspondence with them, and you will hear from them later.' I did say that we wanted our money for our goods."

And this was the trend of all of Emerson's testimony, and from it, as stated, it is clearly to be inferred that he was a partner of and joint beneficiary with the plaintiff in the notes and the mortgage in controversy. In view of the fact that there was not a direct or even inferential denial by Emerson of the positive statement of plaintiff that he (Emerson) was interested in the note and mortgage equally with plaintiff, and of the further fact that Emerson at all times in his testimony in effect referred to the indebtedness evidenced by the note described in the mortgage as being due to him and plaintiff jointly, and there being no testimony upon that proposition, other than that of plaintiff and Emerson, there is, it is manifest, clear justification for our statement, above made, that the evidence without conflict, appears to show that plaintiff and Emerson were and are partners and joint beneficiaries in the note and mortgage described in the complaint. Indeed, it seems to us that no other conclusion can follow from the testimony introduced by the plaintiff. It, of course, results that the mortgage was and is, as to third parties, illegal and void. And it is to be noted that there is a marked distinction be-

tween the case where there are several grantees or mortgagees, each taking or having a separate and defined interest in the grant or mortgage, and the case we have here. In the former it has been held that the deed or mortgage should be treated as if made separately to each of such grantees or mortgagees, and that therefore the acknowledgment should be held good to all of them except the party taking it. *Murray v. Tulare Inv. Co.*, 120 Cal. 311, 314, 49 Pac. 563, 52 Pac. 586.

In the present case, as will be observed, the evidence shows that the mortgage was, in fact, though not eo nomine, to the plaintiff and the party taking the acknowledgment as copartners—in point of fact, joint mortgagees. There was no "separate and defined interest" in either of the two parties constituting the partnership for and in behalf of which the acknowledgment was taken. It follows that the mortgage, being void in its effect upon third parties because of the defective acknowledgment, or in fact, for the reason that in law there was no acknowledgment at all of the execution thereof which would entitle it to be recorded, imparted no notice of its existence to the answering defendants herein by the mere act of its having been recorded. In other words, the act of placing the mortgage of record was without legal force or effect so far as the respondents were concerned, and did not, as to them, operate as constructive notice of its existence. Nor was there any evidence showing that respondents had knowledge of any facts sufficient to put them on inquiry which, if followed up with reasonable diligence, would have discovered to them the existence of the mortgage.

Obviously, if the answering defendants had no actual knowledge or any notice of the existence of the mortgage at the time they purchased the crops in question, they were innocent purchasers, and cannot be bound by the acts of Kim and Hahn in removing the crops from the freehold, even if such removal was tortious and unlawful.

But, aside from the above considerations, it is very plain that the nonsuit was properly granted for the reason that the evidence clearly shows that the understanding between the parties was that Kim and Hahn were to remove and sell the crops and with the proceeds pay their mortgage indebtedness to plaintiff and Emerson. From the testimony of Emerson, some of which is referred to in connection with the above consideration of the question of the validity of the acknowledgment of the mortgage, it is clear that he knew, before the removal of the crop, that Kim and Hahn intended to remove and sell the same. Emerson admitted that he knew that certain portions of the crop had been removed from the premises and sold, and that the mortgagors intended to remove and sell the remainder; yet neither the

plaintiff nor his partner took any steps to prevent such removal and sale. But there was, evidently, according to Emerson's uncontradicted testimony, no intention on the part of plaintiff and Emerson to object to such removal and sale—that, indeed, the removal and sale of the crops by the mortgagors they sanctioned—for, having been asked by counsel for the Packing Corporation the following question:

"It was your understanding, was it not, throughout this transaction, from Kim, that he should sell the tomatoes?"

—he replied:

"Yes, sir, and pay the rent to us; that he should have the power to sell them and deliver them to whomsoever he chose."

He further testified, referring to a conversation he had with Kim at the premises on which the crops were grown, on the 25th day of October, 1918:

"Yes; I had been talking with Kim at that time, and then right along after. Kim said (addressing Emerson): 'You will get all your money, because Egyptian corn is good. * * * There will be plenty of money, with the tomatoes and the Egyptian corn, to pay for rent.' * * * He assured me that just as quick as the crops were cut off and sold we would get the money. That was satisfactory to me."

The plaintiff did not contradict that testimony, nor, as stated, is there any testimony in the record contradictory thereto. Indeed, the plaintiff himself testified:

"I am familiar with farming in this location, and I know when tomatoes generally ripen and are ready for delivery at Manteca (near which place are situated the premises on which the crops involved herein were grown); they commence to ripen along in September and October; I knew they were ripening in those months, but I did not know that they had been sold; I did not know what Kim was doing with them, or where they were being delivered; I judged that they were, but I could not have told to whom they were delivered or to whom they were sold."

Every act and movement of Emerson in the transaction seems to corroborate the foregoing testimony. Emerson, as between himself and Ramsey, appeared to be the most active in looking after their interests in the crops and in securing, after the maturity of the crops, a satisfaction of the mortgage debt, and furthermore, after the sale of the tomatoes to the Packing Corporation, it does not appear that he complained to Kim and Hahn for removing and selling the crops. He did not tell them that they had done wrong in doing so, but by his general conduct of quiescence as to such removal and sale, very clearly appeared to have regarded their acts as within the power and the rights of Kim and Hahn. His only concern about the matter then seemed to be as to the pay-

ment by the Packing Corporation for the tomatoes; his purpose being to obtain such payment direct to him and the plaintiff, instead of to the mortgagors. Certainly, if the understanding was not such as Emerson positively testified that it was, to wit, that Kim and Hahn were vested with full power to remove the crops from the premises and sell the same, and thereupon pay the money to plaintiff and Emerson in extinguishment of the mortgage, the latter were, according to their own testimony, culpably negligent in the matter of the preservation of the integrity of their security. As to the tomatoes, they knew, as everybody knows, that that vegetable is of the perishable kind, requiring immediate preservation very soon after being harvested. Emerson said he visited the premises very often, and, of course, he knew from that fact, if not from his general acquaintance with the seasonal characteristics or peculiarities of the tomato—that is, the time for planting the same and the time when, in the ordinary course of nature, it has so developed as to require that it be harvested—when the time for harvesting was reached, and still, as before declared, he and the plaintiff themselves made no move looking to the disposal of any of the crops. It would thus seem that there was no other course left to Kim and Hahn, if anything was to be realized from said crops, but to dispose of them themselves.

[4-6] Even if it were necessary to concede here that there was no other showing of an abandonment of the mortgage security by the plaintiff and Emerson, but the circumstances to which we last above refer, it is very clear that the judgment of nonsuit would have to stand; for, at the time of the purchase of the tomatoes by the Packing Corporation and the corn by Powers, the lien of the mortgage had prima facie been extinguished by the removal of those crops from the land on which they were grown (*Horgan v. Zanetta*, 107 Cal. 27, 30, 31, 40 Pac. 22; *Gates v. Tom Quong*, 3 Cal. App. 443, 446, 85 Pac. 662), and it rested upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to rebut that presumption by showing that the crops were removed without his knowledge and consent, and that it was therefore a tortious removal; and, as before declared, even if it had been shown that the mortgagors had wrongfully removed the crops and sold the same to a third party, it would still be necessary, to bind the latter in an action for damages for such wrongful removal or for the conversion of the crops, further to show that such removal was tortiously effected with his knowledge or by connivance on his part with those wrongfully removing the crop to effect such removal. There is not only no such showing here, but, to the contrary, as has been stated, even without regard to the positive testimony that Kim was authorized by plaintiff and

Emerson to remove and sell the crops, the circumstances of the whole transaction, as shown by the testimony of both plaintiff and Emerson, very clearly strengthen and sustain the presumption that the crops were removed from the premises and sold by Kim under a specific understanding and agreement with the plaintiff and Emerson that he was thus to dispose of the crops upon their maturity. This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage. *Minneapolis Thresh. Machine Co. v. Calhoun*, 37 S. D. 542, 159 N. W. 127.

The authorities cited by the appellant have to do with cases in which the evidence clearly disclosed a tortious removal of the mortgaged crop, and, of course, are not in point here.

The other assignments to which attention will be given involve objections to the action of the court in refusing to strike from the answers certain denials contained therein and heretofore referred to, and in striking from the record the lease, previously received in evidence whereby the premises on which the crops in question were grown were demised to Kim and Hahn by plaintiff.

[7] 1. As stated above when considering the matter of the suggestion of the diminution of the record, the particular denials of the answer to which the motion to strike out was addressed were upon information and belief, and related to those allegations of the complaint which referred to the execution of the notes, the execution of the mortgage, the good faith thereof, the acknowledgment and recordation of the mortgage, that no part of the promissory note described in the mortgage has been paid, except a certain specific amount, and other like averments.

The disallowance of the motion to strike out the denials referred to was proper. The matters in the complaint to which said denials were addressed involved private transactions between private individuals, and it is not the law that such matters are presumed to be within the knowledge of third persons, unless the same are required by law to be made a public record, or are of such common notoriety that all persons must know of them. As to the mortgage, which, of course, cannot be binding upon third persons unless it is recorded as required by law, we have already shown that, in law, it was not recorded, and therefore the answering defendants were not to be charged with constructive notice thereof.

[8] 2. The lease, which was received in evidence and subsequently stricken from the record, was, as seen, from the plaintiff to Kim and Hahn, and demised to the latter, for a certain specified consideration, the

premises upon which the crops in question were grown. That lease, however, had been modified or changed in vital particulars, and was, consequently, not the lease under which Kim and Hahn were holding the property at the time that the said crops were removed from the premises and sold. But, waiving a consideration of that proposition, we cannot perceive wherein the order of the court striking the lease from the record, even if in any view erroneous, can be held prejudicial. The only purpose the lease could have served as evidence in the case would be to show that Kim and Hahn held possession of the land thereunder as tenants of the plaintiff. If it was important under the issues that this fact should be known, the reply is that the answering defendants conceded at the trial that the land was held by Kim and Hahn under a lease from plaintiff. But it seems to us that whether Kim and Hahn held possession of the land as tenants of the plaintiff, or held such possession as tenants of some other person, or themselves were the owners of the land, is wholly without significance here, if, as is conceded by all parties hereto to be true, and which is the theory upon which the complaint was framed and the issues were joined and tried, they owned the crops which are referred to in the mortgage. The question whether the mortgagors of the crops held possession of the land could have no bearing on the case, unless their ownership of the crops and right to mortgage them was made an issue, and no such question was raised in the case either by the pleadings or the proof. Therefore, as we have shown, the only questions in the case were whether Kim and Hahn, having mortgaged the crops to plaintiff, tortiously removed the same from the land on which they were grown and sold them to the answering defendants, and, if so, whether the latter purchased the said crops with knowledge before and at the time of the purchase that the crops were under mortgage and had been removed and sold wrongfully, or without the knowledge and consent of the mortgagee.

The cases mentioned by appellant as in support of his position that the ruling striking out the lease from the record was error and prejudicial to his rights promulgate very sound and wholesome rules, but, while applicable in proper cases, have no application to the instant case upon the theory upon which its issues were framed and tried.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the Dis-

trict Court of Appeal or the Third Appellate District is denied, without reference to or intimation of view on our part relative to the correctness of the discussion in the opinion on the question of the proper construction of the chattel mortgage as covering the personal property here involved, and the question of the validity of the notary's acknowledgment in the matter of such chattel mortgage. The opinion shows that the non-suit was properly granted in that the removal and sale of crops here involved was not tortious, and also that the trial court did not err in denying motion to strike out certain denials of the answer, or in striking out the lease theretofore received in evidence.

(187 Cal. 144)

McEWEN v. NEW YORK LIFE INS. CO.
(L. A. 6533.)(Supreme Court of California. Sept 27, 1921.
On Application for Rehearing, Oct. 27, 1921.)**1. Insurance** ⚡291(7)—Answer omitting mention of accidents held answer that no accidents were sustained.

Answer of applicant for insurance in medical examination to the question, "What illnesses, diseases, or accidents have you had since childhood?" which omitted all mention of accidents was in effect an answer that no accidents had been sustained, and, if applicant had been seriously injured in an accident, such answer was false.

2. Appeal and error ⚡1195(1)—Statement of law on appeal law of case.

A statement of law by District Court of Appeal on second appeal became law of case, and was binding on trial court on third trial.

3. Evidence ⚡377—Witnesses ⚡255(1), 258—Memorandum held not admissible, nor proper to be used in refreshing memory.

A witness cannot refresh his memory or testify from a memorandum, unless it is made to appear that it complies with the qualifications specified in Code Civ. Proc. § 2047, and court did not err in sustaining objections to the offer of a memorandum in evidence, or the use of such memorandum to refresh memory of witness who had no independent recollection of the fact, where the only fact disclosed in connection with the memorandum was that it was signed by the witness; there being no showing that the witness wrote or dictated it, or that it was written at a time when it was fresh in his memory, or that he knew the fact was correctly stated therein, especially where it was dated nine years after the happening of the event.

4. Evidence ⚡77(6)—No presumption against insurance company failing to call physician as witness.

In action on life policy, defended on ground that insured made false statements in medical examination, no presumption arose that the examining physician's testimony would have been adverse to defendant from the fact that defendant failed to call the physician as a witness, and objected to plaintiff's counsel questioning the physician, under Code Civ. Proc. § 1963, subds. 5, 6, particularly in view of the fact that physician was unable to recall the medical examination, and it did not appear that there was any legally competent memorandum which he might use to aid him in testifying.

On Application for Rehearing.

5. Tender ⚡26—Directed verdict held not to deny plaintiff's right to recover fund deposited by defendant in court.

In an action by beneficiary on life policy, where defendant set up fraud on the part of the insured and deposited the amount of premiums paid in court, on the theory that de-

fendant had a right to rescind, a directed verdict and judgment for defendant held not to deprive plaintiff of a right to the money deposited in court; the verdict and judgment necessarily carrying the implication that such money should be given to the party entitled thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Rachel A. McEwen against the New York Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 183 Pac. 373.

Murphey & Poplin, of Los Angeles, for appellant.

Meserve & Meserve and Paul H. McPherrin, all of Los Angeles, for respondent.

LENNON, J. This action was instituted for the recovery of the amount of a life insurance policy issued by the defendant, New York Life Insurance Company, in July, 1910, to plaintiff's son, Charles B. McEwen, who died in November, 1910. Defendant resists payment of the policy upon the ground that the decedent procured the issuance of the policy by means of fraud, concealment and misrepresentations in answering written questions propounded to him by defendant's medical examiner on June 29, 1910, and that defendant accepted the application and issued the policy in reliance upon the truth of these answers. The present litigation has been pending for over 9 years, and this is the third appeal which has been taken. The first trial resulted in a verdict in favor of plaintiff, but judgment thereon was reversed by the District Court of Appeal upon the ground that the trial judge had submitted to the jury the issue of the materiality of the questions claimed to have been falsely answered (McEwen v. N. Y. Life Ins. Co., 23 Cal. App. 694, 139 Pac. 242); likewise a judgment entered upon a verdict rendered in plaintiff's favor upon the second trial was reversed by the District Court of Appeal (McEwen v. N. Y. Life Ins. Co. [App.] 183 Pac. 373). On the third trial the judge directed a verdict for the defendant, and plaintiff appeals, claiming that a directed verdict was unwarranted by the facts of the case.

[1] The only answer of decedent in the medical examination which is of importance for the purposes of this appeal is the following:

"What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.) Name of disease: Typhoid pneumonia. Number of attacks: One. Date: 1891. Duration,

Severity: Severe. Results: Complete recovery."

The above-quoted question was asked for the purpose of ascertaining information concerning the condition of decedent's health in certain particulars deemed deserving of especial consideration in connection with the issuance of a life insurance policy. The question is neither ambiguous nor misleading. It calls for facts in regard to accidents suffered since childhood, as well as illnesses and diseases, and an answer which omits all mention of accidents is, in effect, an answer that no accidents have been sustained. *Malicki v. Chicago Guar. Fund Life Soc.*, 119 Mich. 151, 77 N. W. 690. At the close of the written questions and answers the insured certified:

"That I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true."

It was proven by the defendant company, and is conceded by plaintiff, that in July, 1909, just a year prior to the application for the policy, the decedent Charles B. McEwen was injured by being struck or kicked in the chest by the foot of a mule, as a result of which his chest was injured, his back strained and one rib broken; owing to temporary total disability caused by the injury he received from an accident insurance company the sum of \$25 per week for a period of 16 weeks, amounting in all to \$400. The injury received for the time being rendered him unfit for any business whatsoever and seriously impaired his health. Notwithstanding the serious consequences ensuing from the accident sustained by decedent in July 1909, which disabled him for a period of nearly 4 months, he failed to set forth the accident in his answers to the questions asked by the defendant company in an examination held on June 29, 1910. Inasmuch as decedent made no mention of accidents in answer to a question calling for disclosures of accidents, and since, on the third trial, it was conceded that decedent has sustained the above-described accident less than a year before answering the said question, the conclusion is inescapable that the question was falsely answered.

[2] Upon the second appeal of this case the District Court of Appeal held that it was error for the trial judge to submit to the jury the question whether or not the accident tended to affect the longevity of the decedent, that the only question to be passed upon by the jury was the truth or falsity of decedent's answers, and that a determination of this point would settle the rights of the parties. This statement of the law by the District Court of Appeal became the law of the case and was binding upon the trial court upon the third trial.

"The doctrine [of the law of the case] means simply this: That the court having once decided the law, and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, this court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy." *Brett v. S. H. Frank & Co.*, 162 Cal. 735, 739, 124 Pac. 437, 439.

Since the evidence conclusively shows the answer to the question concerning "illnesses, diseases, and accidents" was untrue and, according to the law laid down for the guidance of the trial court, the truth or falsity of the answers was the determining factor and the only question to be submitted to the jury, it was proper for the judge to direct a verdict for defendant upon the theory that a material question had been falsely answered by decedent. *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Estate of Baldwin*, 162 Cal. 471, 123 Pac. 267.

[3] It is claimed that, on the third and last trial, the court erroneously sustained objections to certain evidence offered by plaintiff. This evidence, plaintiff contends, tended to show that decedent informed defendant's medical examiner of the said accident, and that the examiner thought the accident unimportant, and for that reason did not include it in the written answer. We may assume, without deciding, that, had that been shown to be the fact, the company, and not decedent, would have been responsible for the failure to mention the accident in the written answers to the medical examination, and therefore that it would have been error to exclude competent evidence on this point. We are of the opinion that no competent evidence in support of this contention was proffered by the plaintiff. The only evidence sought to be introduced on this point was the testimony of the physician who examined decedent on June 29, 1910. The physician testified that he had no independent recollection whatever of his examination of the decedent. It appears that the witness was seriously ill in September, 1919, and that the trial at which he testified took place in November, 1919. Plaintiff's attorney sought to have the witness refresh his memory from, or testify from, a written memorandum. Defendant's counsel objected to the witness testifying from this memorandum, and the court sustained the objection. Section 2047 of the Code of Civil Procedure provides that a witness may refresh his memory respecting a fact from a written memorandum or "may testify from such a writing, though he retain no recollection of the particular facts." A witness cannot, however, refresh his memory or testify from such a memorandum un-

less it is made to appear that the memorandum complies with certain qualifications specified in said section 2047 of the Code of Civil Procedure.

In the present case the only fact disclosed in connection with the memorandum, aside from the fact that it was dated July 19, 1919, nine years after the medical examination, is the fact that it was signed by the witness; there was no showing that the witness wrote or dictated the memorandum, or that it was written at a time when the fact was fresh in his memory, or that he knew the fact was correctly stated therein. It would, therefore, have been improper for the court to have permitted the witness to testify from the memorandum in question. *Morris v. Lachman*, 68 Cal. 109, 112, 8 Pac. 799; *Stone v. S. F. Brick Co.*, 13 Cal. App. 203, 109 Pac. 103. Furthermore, the memorandum itself, which is set forth in the bill of exceptions, furnishes evidence of its own unreliability. It purports to have been made 9 years after the happening of the event, and states that the physician examined decedent in 1908, and found no evidence of injury from the accident; whereas, the examination with which the parties are concerned in the instant case is one held in 1910, and the accident occurred in 1909.

[4] Counsel for plaintiff further contends that, since defendant objected to plaintiff's counsel questioning the physician who examined decedent for the defendant and itself failed to call the physician, the presumption arises that the physician's testimony would have been adverse to defendant. Code Civ. Proc. § 1963, subds. 5 and 6. However, defendant was under no obligation to call the physician as its own witness or to permit him to testify for plaintiff, particularly in view of the fact that the physician was unable to recall the medical examination at all, and it does not appear that there was any legally competent memorandum which he might use to aid him in testifying.

Defendant, by its answer, alleged a cancellation of the policy and deposited in court the sum of \$347.10, the amount of premium paid on the policy. It is claimed that plaintiff is entitled to this sum and that she was deprived of it by the directed general verdict in favor of defendant. The testimony of plaintiff in the case shows that the money necessary for the payment of this premium was advanced by plaintiff to decedent as a loan, and thereafter repaid by him to her. It is evident, therefore, that plaintiff is not entitled to receive the returned premium in her own name and as her own property, but

that the money is the property of the decedent's estate. Nor does it appear that there has ever been an administrator of the estate of said Charles B. McEwen, or any other legal representative to whom payment could be made. In the absence of any such showing, there is no person to whom such payment could be made, even in the event that the plaintiff expressed a willingness to accept the same and rescind the contract.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; SLOANE, J.; WILBUR, J.

On Application for Rehearing.

PER CURIAM. The opinion heretofore rendered in the above-entitled cause is hereby modified as follows: By striking out the last paragraph thereof, and in lieu thereof inserting the following:

[5] Defendant, by its answer, alleged the cancellation of the policy and deposited in court \$347.10, the amount of premium paid on the policy. It is claimed that plaintiff is entitled to this sum, and that she was deprived of it by the directed general verdict in favor of defendant. We are entirely satisfied that such is not the effect of the verdict or judgment given. The request of the defendant for an instruction directing a verdict in favor of defendant was based on its claim that the policy was voidable on the ground of fraud on the part of the insured in obtaining the policy, and that therefore the defendant had a right to rescind. This was the position of the trial court in directing a verdict for the defendant, and this result carried with it necessarily the implication that the money paid into court should be restored to the party entitled thereto. There was uncontradicted evidence sufficient to support a finding of a gift of the policy by the insured to the plaintiff, and the directed general verdict in favor of the defendant necessarily implied that the plaintiff was entitled to the premium money paid into court by the defendant for the purpose of effecting a rescission. The judgment given in this case upon the directed verdict does not preclude the plaintiff from recovering this money. Neither does our affirmance of such judgment have any such effect.

The application for rehearing is denied.

ANGELLOTTI, C. J., and LENNON, SHURTLEFF, LAWLOR, WILBUR, and SLOANE, JJ., concur.

187 Cal. 260

PARSONS v. SEGNO. (L. A. 6256.)

(Supreme Court of California. Oct. 14, 1921.)

1. **Contracts** $\S$ 111—Contract to pay attorney percentage of property received from defendant husband in divorce action held void as against public policy.

A contract to pay an attorney a percentage of all the property received by plaintiff in a divorce action, under a property settlement with her husband, is void as against public policy, being a contract for a contingent fee in a divorce action.

2. **Appeal and error** $\S$ 931(4)—Assumed in favor of judgment for plaintiff that court decided defendant did not misunderstand purport of plaintiff's statement of account.

In an action on an account stated, it must be assumed in favor of a judgment for plaintiff that the court decided from the evidence, if sufficient to support such a conclusion, that defendant did not misunderstand the import of statements of account and letters sent her by plaintiff, and that she realized he was demanding the amount of the balance shown by the statement sued on, to which she made no objection.

3. **Account stated** $\S$ 19(3)—Evidence held sufficient to show account stated.

In an action on an account stated, evidence held sufficient to support a finding that an account was rendered, consented to, and became an account stated.

4. **Account stated** $\S$ 18(2)—To falsify for fraud or mistake, facts must be pleaded, reopening asked for, and proof confined to allegations.

To surcharge and falsify an account stated on the ground of fraud or mistake, such facts must be pleaded, a reopening of the account asked for, and the proof confined to such allegations.

5. **Account stated** $\S$ 18(1)—Defendant's allegations of fraud held insufficient.

In an action on an account stated, allegations of a counterclaim and cross-complaint that the original agreement was void, and praying for recovery of an amount paid plaintiff thereunder, held insufficient to allege fraud or facts on which a finding thereof could be predicated.

6. **Account stated** $\S$ 19(3)—Evidence held to show repudiation of void contract and substitution of new contract.

In an action on an account stated, evidence held to show that the original contract between the parties, which was void, was repudiated by them, and a second contract substituted.

7. **Appeal and error** $\S$ 728(3)—Assignment to exclusion of evidence insufficient where no particular evidence referred to nor any offer to prove stated.

On appeal from a judgment for plaintiff in an action on an account stated, an assignment of error in not allowing defendant to prove an amount paid to plaintiff was the basis of all the accounts rendered, and was included in the ac-

count stated, was insufficient, where no particular evidence was referred to as having been improperly excluded, and no offer of proof stated.

8. **Appeal and error** $\S$ 757(3)—Assignments not considered where rulings not printed in briefs nor errors shown.

Under Code Civ. Proc. $\S$ 953c, assignments of error to findings "on the ground that the court would not allow any evidence on those issues," merely referring to the transcript for certain rulings on the admission and rejection of testimony, without printing the same in the briefs, or showing wherein the errors lie, and a contention that "there are other questions involved in this appeal particularly set forth in the assignment of errors to which we beg leave to refer without reprinting," cannot be considered.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by S. J. Parsons against Annie Dell Segno. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred E. Putnam, and Will D. Gould, of Los Angeles, for appellant.

S. J. Parsons, of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for \$3,509.11 and costs, being the full amount demanded in an action in three counts to recover the sum of \$250, with interest, on each of two promissory notes signed by the defendant, as maker, and the sum of \$2,160.61, with interest, on an alleged account stated.

[1] In June, 1911, appellant retained respondent as her attorney for the purpose of bringing an action for divorce against her husband, A. Victor Segno, effecting a property settlement with him, and looking after other legal business for her. The divorce was granted and the property divided. In the course of handling her affairs, aside from the divorce action and the property settlement, respondent appeared as her attorney in the trial of certain other cases, organized a corporation for her, and otherwise assisted in the conduct of her affairs. At the time appellant retained respondent, they entered into an agreement in writing whereby appellant agreed to give respondent 7 per cent. of all the property she received from her husband under the settlement. According to the evidence, the value of this property was never definitely ascertained. It is not disputed that this contract was void as against public policy, being a contract for a contingent fee in a divorce action (*Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548), but both parties testified they were unaware of the illegality of the contract at the time. Re-

spondent testified that this contract was repudiated, and a new agreement arrived at after the divorce was granted, whereby he was to receive \$5,600, or 7 per cent. on \$80,000, which he asserted they both agreed should be assumed to be the value of the property received from the husband. Appellant testified respondent made an offer to her of such a proposition, but that she never agreed to it. It is this asserted second contract which respondent contends is the basis of his claim.

Respondent charged appellant additional sums for the services he performed for her after the divorce was granted and the property settlement concluded. From time to time she paid him varying amounts of money to apply on the total bill. In June, 1913, she gave him the two notes for \$250 each, one payable to respondent, and one to his wife, to apply on the account, on which notes it was agreed respondent was to borrow money.

Respondent sent appellant several statements of account and letters asking her to make him payments. On November 1, 1913, he sent her a statement of account, the first item of which was: "Bill as per agreement, \$5,600.00"—and according to the account the total amount due on that date was \$1,286.21. This balance was never objected to by appellant prior to the trial. Ten months later, September 1, 1914, he sent her another account which he insists constituted an account stated. The first item of this account was the balance of \$1,286.21 shown by the account of November 1, 1913. Then followed charges and payments showing a balance of \$2,160.61 due on September 1, 1914. To this statement of account respondent received no reply, although he wrote appellant on December 19, 1914, inclosing a copy thereof, and on February 1 and 12, 1915, concerning it.

In 1915 respondent assigned the notes referred to, and the account as represented by the statement of September 1, 1914, to one Fred O. Ricketts, who commenced suit on them. According to the testimony of Neil S. McCarthy, respondent's attorney in that action, while the suit was pending appellant promised to pay the amount demanded, and to give her note for it. A demurrer was interposed and sustained. On June 30, 1915, on motion of plaintiff, the case was dismissed. After the dismissal the notes were re-assigned to respondent by Ricketts, and this action followed. The notes constitute the causes of action in the first two counts, and the statement of account of September 1, 1914, alleged to be an account stated the cause of action in the third count.

As defenses to the notes, appellant pleaded the statute of limitations; that the action brought by Ricketts was a bar to this one; that the notes were for the purpose of enabling respondent to borrow money, which he failed to do; that as a result of such failure appellant was not liable on them; and that

there was no consideration for the note given to respondent's wife. As a defense to the alleged account stated, appellant pleaded the statute of limitations, the action by Ricketts as a bar, and specifically denied the allegations of the complaint that the account was stated. In a cross-complaint appellant alleged respondent had received \$3,318.86 for the use of appellant and in trust for her, and prayed judgment for that amount. In a counterclaim appellant alleged that the agreement between herself and respondent was void, and set it out in *hæc verba*. She also alleged that she had paid respondent \$4,512.36, \$3,318.86 of which was paid under the void agreement before she knew it was void, and prayed judgment for the latter amount.

The court found in favor of respondent on all three counts, that the allegations of the answer, counterclaim and cross-complaint were untrue, and that the amounts respondent demanded were due and owing to him.

Appellant states:

"If this court should hold that the plaintiff rendered an account stated and thereby bound his client, we shall not expect a reversal of the judgment, however harsh and unjust it may be. * * * Mrs. Segno, the defendant, is not learned in the law, and was not informed by the plaintiff that he was presenting to her an account stated, and she was not informed of her rights and privileges in the matter; and we think sufficient objection was made to the account when presented."

It is also stated:

"In this case the attorney cannot bind his client by giving to her an account stated of which she had no knowledge as to its legal effect or as to any formal requirements of objections."

Respondent insists there was a valid account stated, that the evidence supports the finding to that effect, and that there was no error in the rulings of the court.

1. We shall first consider the question of whether there was an account stated. In support of his position that respondent could not bind appellant by an account stated, appellant cites no authority.

In *Auzerais v. Naglee*, 74 Cal. 63, 15 Pac. 372, it was said:

"A stated account is an agreement between both parties that all the items are true; but this agreement may be implied from circumstances, as where merchants reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time. *Stebbins v. Niles*, 25 Miss. 267; 1 *Wait's Actions and Defenses*, 191-198.

"In such cases, the action is based upon the agreement, which has all the force of a contract. The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account; nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such grounds must be, according to the weight of au-

thority, set forth in the pleadings. [Citing cases.] * * *

"The term 'stated account' is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note, or other contract, having a like consideration for its support."

In *Terry v. Sickles*, 13 Cal. 427, the court declared:

"In support of an action upon an account stated, it is necessary to show that there was a demand in favor of the plaintiff, which was acceded to by the defendant. But the admission of the correctness of the demand need not be expressed and in terms. If the account be sent to the debtor and he do not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. * * * The evidence in relation to the amount of the account was properly excluded. It is not alleged in the answer that there was any fraud or mistake in the original accounting."

In *Crane v. Stansbury*, 173 Cal. 631, 161 Pac. 7, the plaintiff sued as the assignee of an attorney upon an account based on charges for professional services rendered. It was contended by the defendant that the fees of an attorney could not be the subject of an account stated. The court said:

"The bill of an attorney for services, like any other bill, may under proper circumstances and conditions be the subject of an account stated."

The court continued:

"The court instructed the jury that when an account was rendered it became the duty of the recipient to make his objections thereto within a reasonable time, and that, if he did not do so, the account became an account stated and the foundation of an independent cause of action based upon the account stated; also that silence and nonobjection under the circumstances of this case for six months would constitute an unreasonable time. Exception is taken to these instructions. But the complaints made against them are not well founded. They are unimpeachable in point of law."

It was also held that—

"While all questions of fraud and mistake in combating the force of an account stated are questions of fact for the jury, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes, by virtue of the recipient's failure to object, an account stated, is one of law for the court."

In *Lane & Bodley Co. v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924, an attorney sought to reopen an account stated. The court declared:

"When an attorney makes a charge for services, and the same is accepted by the client, it becomes an account stated between them, and may be sued upon as such by him. *Wilcox v. Boothe*, 19 Ark. 684; *Pulliam v. Booth*, 21 Ark. 421."

See, also, 1 C. J. 696, 703; *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156; *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84; *Beals v. Wagener*, 47 Minn. 489, 50 N. W. 535; *Gruby v. Smith*, 13 Ill. App. 43.

According to the evidence, after the account of November 1, 1913, was rendered, appellant paid respondent several amounts, for which he gave her credit; that following this the account of September 1, 1914, was mailed to her, the first item of which was the balance shown by the statement of account of November 1, and that to this statement of account of September 1 appellant made no objection. When appellant was under cross-examination by respondent, she testified:

"After that [referring to the divorce action and the property settlement] you had some seven or eight actions for me, and that account included what you did for me for a number of years. I didn't dispute the correctness of the bill; I thought the contract was high, Mr. Parsons."

Neil S. McCarthy testified:

"Mrs. Segno came to the office, introduced herself, and to the best of my recollection said you [respondent] had sent her in there. This was after the suit was filed. She said she couldn't pay up at that time, but would give a promissory note for it for the entire amount. I told her that if she would give some security for the promissory note that it would be satisfactory to you. I do not recall what answer she made. However, she never gave the note to me, nor the security, nor anything else."

The evidence also shows that the relationship of attorney and client had existed between the parties from 1911 to 1915—the year the Ricketts action was brought; that during that period they discussed his compensation and had some correspondence concerning it; that they agreed he should receive for his services in the divorce action and property settlement \$5,600; that he reported to her the various expenses he incurred for filing fees, traveling expenses, and the like, and charges for services; that she made no objection; that the statements of account of November 1, 1913, and September 1, 1914, and the two letters of February 1 and February 12, 1915, were clear and explicit as to his claim; that between the rendering of the two statements of account she made payments without in any way questioning the correctness of the account; that appellant had a great deal of experience in business; that she conducted an enterprise—the "American Institute of Mentalism"—which yielded at one time, according to her own testimony, "anywhere from five to twenty-five hundred gross per month"; and that she had figured in litigation besides the divorce action and the case at bar.

[2, 3] We must assume in favor of the judgment that the court decided from the evidence, which is amply sufficient to support

such a conclusion, that appellant did not misunderstand the import of the statements of account and respondent's letters, and that she realized he was demanding the amount of the balance shown by the statement of account of September 1, 1914. As shown by the evidence there was a lapse of several months after this statement of account was rendered, during which time respondent received no word from appellant; that she never disputed the correctness of the account, and that after the amount claimed to be due was demanded she said she would settle and offered to give her note for it. In our opinion it cannot be maintained that there was not evidence from which the court could have found that an account was rendered, assented to, and became an account stated.

[4] 2. Appellant next contends:

"We submit that an attorney cannot receive money in a divorce case, on a void agreement against public policy, and keep the money in fraud of his client, and cover his tracks by presenting an account stated to his client for further demands, and in this case, plead an account stated and thereby bind his client."

In *Gruby v. Smith*, supra, the court held:

"The fact that the relation of attorney and client subsisted between the parties, at the time of this alleged assent to a grossly exorbitant bill and promise to pay such a balance, should have had an important, if not controlling, effect upon * * * the point of permitting an investigation by him into the merits of the several items of that bill."

It was said in *Beals v. Wagener*, supra, that—

"The court would probably scrutinize such an agreement [an account stated between an attorney and his client] closely, to see that there was no overreaching, and that the client acted with as full and candid information as the attorney can give him."

But in order to surcharge and falsify an account stated on the ground of fraud or mistake the facts constituting the fraud or mistake must be pleaded, a reopening of the account asked for, and the proof must be confined to the allegations of fraud or mistake. *Auzerais v. Naglee*, supra; *Terry v. Sickles*, supra; *Branger v. Chevallier*, 9 Cal. 353; 1 *Encyc. of Evidence*, 147.

[5] The answer here is a general denial, and neither mistake, fraud, nor any other ground touching the account stated is alleged. The counterclaim merely alleged that the original agreement was void; that the sum of \$3,318.86 was paid thereunder; and prayed for a recovery of that amount. The cross-complaint alleged only that said amount had been paid by appellant to respondent to his use and for his benefit, and prayed for judgment accordingly. It is clear, therefore, that there is no direct allegation of fraud, nor

are any facts pleaded upon which a finding of fraud could be predicated.

[6] However, assuming that the asserted fraud was pleaded, that the reopening of the account stated was asked for, and that evidence was offered to support such a charge, still there is ample evidence from which the court could have concluded that the void contract was repudiated by the parties, and the second contract for compensation substituted. No claim is made that the latter contract was invalid. Appellant testified:

"I had conversation with him after this matter was concluded in regard to his compensation for the work he had done. He asked me what I thought would be fair as a settlement, and I said, 'Mr. Parsons, I don't know.' He asked me if I thought 7 per cent. on a value of \$80,000 would be equitable, and I said I didn't know, because I could get no basis of value on the properties that I received; it was left open that way."

On the other hand, respondent testified:

"Q. The account you rendered included what this contract called for up to the point that it was paid for, did it not? A. No, that is not true.

"Q. Does not the account on its face show—A. After the settlement with her husband in which she obtained, as she claimed, \$150,000 or \$200,000 worth of property, she repudiated that contract, and said that she would not settle on the terms of it, but that she would—I finally asked her what she would pay me, and she said that she would give me seven per cent. on \$80,000 and that she was perfectly satisfied to call the amount for that particular service \$5,600, and we settled on those terms. She repudiated the contract entirely."

At the trial the following colloquy occurred:

"Mr. Putnam: When you were first sued on the assignment made here to Mr. Ricketts, Ricketts v. Segno, they sued on the contract, didn't they; the same contract?

"Mr. Parsons: I object to that as calling for a conclusion, if your honor please; the record is the best evidence.

"The Court: You repudiated it then, didn't you? A. No, your honor.

"Mr. Putnam: The court found it void.

"The Court: She pleaded the invalidity of it. It just goes to show how much effect you get out of testimony that a thing is or is not repudiated. Now, the witness has testified that she never repudiated that contract. I find that she did, because she pleaded its invalidity."

The first item in the account is the charge of \$5,600 for the original service, and this is the amount respondent testified was agreed upon for such service after the original contract was repudiated. The fact that this sum was included in the statement of account of November 1, 1913, suggests that the court, as indicated by the remark it made during the above colloquy, concluded that the original contract was repudiated by appellant. In

other words, such a finding is to be implied from the finding that an account was stated. That the second contract was a new agreement and that the old one was repudiated by both parties is further borne out by the fact that appellant testified that Mr. Segno, in the trial of another action, stated that the property appellant received from him was actually worth from \$150,000 to \$200,000. As already pointed out, appellant's only assignment of fraud is the alleged inclusion by respondent in the account stated of the demand based upon the void contract. Since this was the only assignment of fraud, and there was evidence from which the court could have found the void contract was repudiated by the parties, and a new one entered into in lieu thereof, appellant's claim of fraud cannot be sustained.

[7] 3. Appellant further contends that—

"The court erred in not allowing defendant to show that \$4,512.36 paid to the plaintiff was the basis of all accounts rendered, and was included in the purported account stated, and in finding (finding 3) that the defendant became indebted upon an open account, etc., while the evidence shows that there was a written agreement which was against public policy and void."

No particular evidence is referred to under the first point as having been improperly excluded, and it is not stated that appellant made any offer to prove that the said sum formed the basis of all the accounts upon which the balance shown by the account stated was struck. Concerning the asserted error in finding 3, we have already stated there was evidence from which the trial court could have found the original contract to have been repudiated and another substituted. The evidence shows the account to have been open and current, for items were added and credits given from time to time.

Error is assigned to finding 7 upon the ground that it is not supported by the evidence. This finding is to the effect that the sum of \$2,660.61, with interest and costs, is owing to respondent. As heretofore stated, the evidence on the subject of the account stated was sufficient to support the findings, and upon this hypothesis the amount of \$2,160.61 is correct. Appellant does not object to the findings as to the promissory notes, which make up the other \$500. These notes were admitted in evidence, thus supporting the finding of the court as to the amount due thereon. Error is assigned to the conclusions of law, which are to the effect that the said amount of \$2,660.61, with interest and costs, was owing to respondent, but from what we have already said it follows there is no merit in this contention.

[8] Appellant assigns error to findings 4, 5, and 6 "on the ground that the court would not allow any evidence on those issues." On this assignment of error we are merely re-

ferred to the transcript on appeal for certain rulings of the court on the admission and rejection of testimony, but no attempt has been made to print in the briefs these portions of the record, or to show wherein the errors, if any, lie. Such an assignment of error does not conform to the requirements of section 953c of the Code of Civil Procedure, and hence does not call for consideration. The same disposition is to be made of appellant's further contention that—

"There are other questions involved in this appeal, particularly set forth in the assignment of error to which we beg leave to refer without reprinting."

This has reference to some 17 specifications of error in appellant's motion for a new trial. Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.; SHURTLIFF, J.

187 Cal. 235

SMITH et al. v. BLODGET et al. (L. A. 6628-6631.)

(Supreme Court of California. Oct. 14, 1921.)

1. Vendor and purchaser ⇨3(3)—Intention controls as to whether contract is an agency or an option.

Whether an agreement giving "an option on our land" to another to "handle and sell" created the relation of principal and agent or that of vendor and purchaser depended on the intention of the parties; the words "handle and sell" not conclusively showing agency.

2. Contracts ⇨170(1)—Parties' construction may be considered.

Where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous, and requires interpretation, it is permissible to take into consideration a construction placed thereon by the persons concerned.

3. Vendor and purchaser ⇨44—Evidence held to show contract was intended as an option, and not an agency.

Evidence held sufficient to show that a contract granting to plaintiffs an option on the land of another to handle and sell was intended as an option, and not merely an agency to sell.

4. Estoppel ⇨78(6)—Party held estopped to deny validity of contract under which he had acted.

Where defendants had treated a contract by landowners giving an option to plaintiff as a valid contract, and had procured an assignment thereof to plaintiff, and had made a sale thereunder, they were estopped to deny that it was a valid contract because not signed by a trustee for some of the owners.

5. Account ⇐7—Will lie for fraud.

Action for accounting is within the jurisdiction of equity in cases of fraud, as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one, as the court, having assumed jurisdiction, will retain it to grant the relief demanded by the situation.

6. Principal and agent ⇐78(2½)—Third person conspiring with agent to defraud principal may be held jointly liable in an accounting.

Where plaintiff obtained an option on the lands of another and employed one of the defendants as his agent to dispose of the lands, and the other defendants joined the first in a scheme to obtain an assignment of the option from plaintiff to themselves and complete a sale thereunder, in fraud of the plaintiff, plaintiff might bring an action against all for an accounting and recover a joint judgment, as those fraudulently aiding in the attempt of fiduciaries to obtain profits may be held liable regardless of sharing in the profits.

7. Appeal and error ⇐1011(1)—Finding of trial court on conflicting evidence conclusive.

Though the trial court might have drawn a different inference from conflicting evidence, it being possible to draw conflicting inferences therefrom, the appellate court will not disturb the conclusion.

8. Principal and agent ⇐78(6)—Evidence held sufficient to show certain defendant conspired with agent to defraud principal.

In an action by principal against agent and others for an accounting for profits from a fraudulent conspiracy, evidence held sufficient to show that a certain defendant joined therein.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Frank H. Smith, Jr., and another against R. B. Blodget and others. On judgment for plaintiffs, defendants appeal. Affirmed.

Charles J. Kelly, D. A. Stuart, Blodget & Blodget, N. P. Moerdyke, John C. Stick, Rosecrans & Emme, and E. F. Crawford, all of Los Angeles, for appellants.

Fred N. Arnoldy, of Los Angeles, for respondents.

LENNON, J. From the following facts the present litigation arose: Plaintiffs were the owners of certain land in Kern county, Cal., and desired to dispose of the same. In June, 1918, plaintiff Frank H. Smith, Sr., held a conversation with defendants R. B. Blodget and T. E. Commins, dealers in real estate, wherein defendant Blodget stated that the Associated Oil Company was interested in purchasing 1,000 contiguous acres in said county at \$150 an acre, and that plaintiffs' land was in the contemplated area. The necessity of securing united action on the part

of the several owners of the land in the tract under consideration was discussed, and plaintiff Smith, Sr., stated that his son, Frank H. Smith, Jr., could obtain a written option on 160 acres thereof which was owned by several persons jointly, to wit, C. H. Plummer, Emelie H. Smith, and certain others represented by Leslie S. Smith as trustee. The subsequent dealings concerning this particular parcel of land, called the "Plummer quarter section," gave rise to the present controversy. Pursuant to the above conversation, Smith, Jr., obtained a written instrument reading:

"Los Angeles, July 15th, 1918.

"This agreement witnesseth that we herewith give to Frank H. Smith, Jr., an option on our land S. W. ¼ section 18, T. 11 N., R. 22 W., S. B. M., to handle and sell for us at a net price to us of \$100.00 per acre. This option good for 60 days from date except that it may be revocable by a 10 days' notice to him or to his last P. O. address. C. H. Plummer. Emelie H. Smith."

This authorization plaintiffs immediately intrusted to defendant Blodget, under an agreement that Blodget should act as their agent in finding a purchaser for the said land at \$150 per acre, in which event Blodget was to receive a commission of \$2,000. Later, on August 10, 1918, plaintiffs agreed that Blodget's commission should be raised to \$2,500. In the meantime defendant Blodget had discussed the proposed sale with defendants Potter and Fickeissen, each of whom owned a quarter section in the 1,000-acre tract. After learning of the contemplated deal, defendant Potter engaged Smith, Jr., in a conversation and discovered that he was about to leave town on a 30-day vacation. Shortly thereafter defendant Potter succeeded in inducing the owners of the Plummer quarter section to give plaintiffs a 10 days' notice of the cancellation of their option, to take effect on August 27, and to give defendant Potter an option on the same property commencing on the day on which the plaintiffs' option expired. Smith, Sr., who was not on friendly terms with the owners of the Plummer property, received the notice of cancellation on August 17, during the absence of his son on a vacation at a point where it would be difficult to reach him by mail or telegraph.

About the same time that the notice of cancellation was delivered word was received that the Associated Oil Company was not interested in the purchase of the lands. Defendant Blodget then assured plaintiff Smith, Sr., that he would be able to dispose of the Plummer property to other purchasers prior to the expiration of the plaintiffs' option. In these representations he was joined by defendants Commins and Fickeissen, the latter having met Smith in the meantime.

All three defendants mentioned one Patterson and Graham as prospective purchasers of the land. As a matter of fact, Patterson and Graham never had any intention of buying the property, and were never considered by any of the defendants to be likely purchasers. Finally, on August 26, the last day of the life of plaintiffs' option, a meeting was held at the office of defendant Commins at which defendants Commins, Blodget, and Fickeissen met plaintiff Smith, Sr., by appointment. Defendants then stated that, as the option was about to expire, it would be necessary to furnish the sum of \$250 to be paid to the grantors of the option in order to secure a 30-day extension. The sum was advanced by the three defendants present, defendant Fickeissen making a statement to the effect that, as she was putting up half the money, she wanted half the proceeds. This money was paid to the grantors as a deposit on the exercise of the option and to apply on the payment of the purchase price, and the parties were thereupon given 30 days in which to complete the purchase.

At the time this payment was made, defendants Blodget, Commins, and Fickeissen represented to Smith, Sr., that they had found a purchaser by the name of Gross, an old friend of defendant Fickeissen, who resided in St. Louis, Mo., and was taking a trip to California. Later, on September 3, defendant Blodget induced Smith, Jr., who had then returned, to execute and deliver to said Blodget an assignment of the plaintiffs' option. This assignment was procured without consideration upon the representation that it constituted a mere agency authorization, and that its sole purpose was to afford written evidence of Blodget's authority to represent plaintiffs in selling the land to Gross. Defendants dated this assignment "August 9, 1918." Various representations were made by the said defendants to plaintiffs from time to time to the effect that Gross had been communicated with, had arrived in town, and that a sale to him was under way. However, on September 23, Smith, Sr., discovered that the dealings with Gross were purely mythical. If any such person existed, defendants never communicated with him, and he was never a prospective purchaser of the land in question. Upon this revelation, plaintiffs demanded the return of their option, but defendant Blodget had delivered it to defendant Fickeissen, who refused to surrender it. The evidence reveals that on September 18, without plaintiffs' knowledge, Blodget had executed an option to purchase the property in question in favor of one Graham, and on the following day Graham executed a similar option to defendant Potter. A few days later, as a result, and by means of the assignment to defendant Blodget of plaintiffs' option and Blodget's option to Graham and the

latter's option to Potter, a sale of the land was consummated by defendant Potter to the Chanslor Canfield Midway Oil Company for the price of \$125 an acre, or over \$20,000. Previous to this sale, defendant Potter had effected sales to said Chanslor Canfield Company of at least three other quarter sections in the vicinity of the Plummer property, including the quarter sections belonging to himself, defendant Fickeissen, and a third person not involved in this controversy. The four defendants retained the proceeds of this sale of the Plummer land over and above the sum paid to the owners of the property (about \$16,000) and incidental expenses amounting to a few hundred dollars. Plaintiffs instituted the present action for the sum thus retained, and the trial court rendered a judgment against all the defendants jointly for the sum of \$3,945.50. The four defendants have appealed separately, but since each appeals on the same grounds as the others they have joined in the preparation of briefs, and the briefs filed by each are identical in content.

According to defendants' theory, the written instrument executed by C. H. Plummer and Emelie Smith in favor of Smith, Jr., is not an option to purchase, but merely an authorization to sell the property as agent of the owners. If this be so, defendants affirm that the said instrument was inadmissible under the issues raised by the pleadings, and that defendants' objection to its introduction in evidence should have been sustained, for the reason that in the present suit plaintiffs seek to recover the portion of the proceeds of the sale retained by defendants, not as agents and on behalf of the vendors of the land, but as owners of the said funds by virtue of rights arising under an option to purchase the land.

[1] The fact that the agreement conferred the option to "handle and sell" the property for a certain sum, rather than to "purchase," does not, as defendants contend, necessitate the conclusion that the contract is merely one of agency. Whether an agreement permitting a person "to sell" land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties. James, *Law of Option Contracts*, § 114. Where there was a revocable authorization to a firm of real estate agents to sell land for \$10,000 net to the owners, with an agreement to pay "a commission of all over said sum of \$10,000 net, for which they may sell said property with our consent," it was held in this state that a sale by the firm under this agreement was effected in the capacity of vendor on its own account, and not as agent of the owners of the land. *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167. The determining factor in that case was the di-

rect interest in and right to a part of the proceeds of the sale which was granted to the persons making the sale. The written instrument in the case at bar contains no express provision that plaintiffs shall retain that portion of the purchase price which exceeds the specified selling price. However, Smith, Jr., is given the right to sell "at a net price to us [the owners] of \$100 per acre." Had the contract stated that Smith was authorized to sell the property for not less than \$100 per acre net to the owners, it might be held that the provision was purely one of limitation, and that the intent was fairly clear, that the person bringing about the sale should have no interest in the proceeds as such. *Allen v. Clopton* (Tex. Civ. App.) 135 S. W. 242. But the broad and unrestricted provision giving Smith the right to effect a sale at a net price to the owners of \$100 per acre is susceptible of sundry interpretations. It may mean that all net proceeds above the specified price belong to him, the owners of the property agreeing to part with all interest in the property, whatever the price may be, provided they receive the sum of \$100 per acre free from all deductions, in which case Smith would be in the position of a vendor selling on his own account; it may mean that the owners of the property are entitled to receive all of the net proceeds of the sale and that Smith cannot look to them for any compensation for services unless he obtains for them a net price in excess of \$100 per acre, and in that case he would be a mere agent. *Ford v. Brown*, 120 Cal. 551, 52 Pac. 817; *Wolverton v. Tuttle*, 51 Or. 501, 94 Pac. 961, 963.

[2] The provisions of the contract are not clear in this respect. If this were a case where the parties had plainly failed to make any provision for compensation, a simple agreement to pay the reasonable value for the services of an agent would be implied (*Ford v. Brown*, *supra*; *Kennedy v. Merickel*, 8 Cal. App. 378, 383, 97 Pac. 81), but the case here presented is one where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous and requires interpretation. It was therefore permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. *Mitau v. Roddan*, 149 Cal. 2, 14, 84 Pac. 145, 6 L. R. A. (N. S.) 275.

[3] Taking into consideration the dealings previously set forth, the various assignments of the option and the manner in which the sale was conducted by all the persons involved, the evidence must be held sufficient to support the finding of the trial court "that the said instrument was acted upon and construed by the grantors thereof and all the parties to this action as an option, and not as a mere agency authorization." It follows, therefore, that the plaintiffs were en-

titled to that portion of the net proceeds in excess of \$100 per acre.

[4] On this appeal, defendants raise the objection for the first time that the instrument in question was not signed by Leslie Smith, trustee for some of the owners of the land sold. This objection is of no avail to defendants in this case in view of the fact that a sale of the land was consummated by defendants under the said option and the terms of the option were observed and complied with without question by all of the owners of the land. Whether or not the written instrument was of value at the time it was first acquired by plaintiffs, it subsequently attained value, and defendants cannot now attack it upon this ground after having assumed a fiduciary relation to plaintiffs in regard to it and realized financial profit by means of it.

[5, 6] The complaint sets forth two causes of action, one for money had and received and one for an accounting. The case was tried and decided under the latter count. Defendants claim that the action was in reality an equitable action for an accounting against defendant Blodget for failure to carry out his agency agreement, and not one for damages for fraud, and therefore that it was error for the trial court to render a judgment against all four defendants jointly for the amount found to be due from defendant Blodget.

An action for an accounting lies within the jurisdiction of equity, among other instances, in cases of fraud as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one. *Pomeroy's Equity Jurisprudence*, vol. 2, § 910; vol. 4, § 1421. Having once taken jurisdiction, the court will grant further relief demanded by the situation and necessary to complete justice. If through fraud and conspiracy other defendants assisted the defendant Blodget in violating his obligation to his principal by effecting a sale without plaintiffs' knowledge and retaining the proceeds, they, as well as the agent Blodget, are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the profits obtained by them. It is the civil wrong, not the conspiracy, which constitutes the cause of action, and therefore the plaintiff may bring his suit along any lines which he deems most likely to afford him redress for the particular injury which he has sustained, and, if successful in proving an injury of the nature claimed, may recover judgment in that action against all those who have united or co-operated in inflicting that injury. *Revert v. Hesse*, 193 Pac. 943. And where, after the violation of a fiduciary obligation, an accounting is had and an amount found to be due from the agent or trustee, judgment for the same amount may also be

rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries and receive no share of the profits. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106.

It is not, and, in view of the evidence, cannot, be argued that defendants Blodget, Commins, and Fickeissen did not enter into and succeed in a conspiracy to effect a sale under plaintiffs' option without plaintiffs' knowledge, and to retain the proceeds thereof. It is, however, contended that there is no evidence to sustain the finding that defendant Potter was involved in these dealings.

[7, 8] The trial court might have drawn the inference from the evidence before it that defendant Potter did not act in conjunction with the other defendants in this matter. However, the conclusion reached was that said defendant was implicated in the conspiracy, and, in view of the fact that the evidence was conflicting, and that it was possible to draw conflicting inferences from that part of the evidence which was not itself conflicting, the conclusion cannot be disturbed on appeal. Defendant Potter's participation in the conspiracy was more veiled than that of the other defendants, and it is difficult to ascertain the exact point of time at which he came within the orbit of the conspiracy. However:

"The law recognizes the intrinsic difficulty of proving a conspiracy. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators and other circumstances." *Revert v. Hesse*, supra; *Woodruff v. Hughes*, 2 Ga. App. 361, 58 S. E. 551.

When we consider that the climax in which the conspiracy culminated was an act consummated by defendant Potter, namely, the sale of the property to the Chanslor Canfield Oil Company; that during the negotiations herein set forth the said defendant was actively engaged in selling to the same company other land in the vicinity; that Patterson, Graham, and defendant Fickeissen, all of whom seem responsible for considerable and effective negotiating between the various parties, were close friends or former business associates of defendant Potter—we believe the circumstances proven were such as to support the conclusion of the trial court that defendant Potter, if not the instigating and moving force behind the whole transaction, was at least implicated in the conspiracy. Defendants claim that it is absurd to hold that defendant Potter had any part in keeping alive plaintiffs' option by paying \$250 on deposit on August 26, and that it would have been to defendant Potter's interest to have permitted the option to expire

and proceed under his own option, which he had obtained from the owners of the property. However, it may very well be that his own option was less favorable in its terms than plaintiffs' option, and that defendant Potter's only object in procuring it was to enable the other defendants to more easily get control of plaintiffs' option by curtailing the life of the latter option. But, even assuming that defendants Blodget, Fickeissen, and Commins were acting adversely to defendant Potter in extending the plaintiffs' option on August 26, by raising the sum of \$250, nevertheless "it was not essential to liability on his part that he should have been a party to the scheme from its inception." *Lomita Land & Water Co. v. Robinson*, supra. The evidence is sufficient to warrant the inference that, subsequent to that time, Potter did wrongfully aid and abet in securing and withholding the profits from the plaintiffs, and, the trial court having drawn that inference, he is equally liable with the other defendants.

Defendants contend that on August 26, at the time defendants advanced the \$250 to be paid as a deposit on the option, Smith, Sr., entered into an agreement with the said defendants as to the division of profits, and therefore plaintiffs cannot now claim all of the profits from the sale. However, any agreement which said plaintiff Smith, Sr., might have made at that time was not freely made, but was induced by the fraudulent representations and conduct of the defendants, and the agreement is thereby vitiated and not binding against the plaintiffs.

The judgment is affirmed.

We concur: SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.

187 Cal. 228

CHAMBERS, State Controller, v. MUMFORD et al. (L. A. 6616.)

(Supreme Court of California. Oct. 14, 1921.)

1. Taxation ⇨878(1)—Heir to whose trustee was distributed part of proceeds of note in settlement of claim against estate, acquired interest, not as heir, but as beneficiary under contract with trustee.

Where the proceeds of a note were assigned and distributed by agreement of certain heirs of an estate to the trustees of other heirs, in settlement of their claim against the estate, the interest thereby created passed to the latter, not as heirs, but as beneficiaries under the contract with their trustees.

2. Courts ⇨95(2), 97(6)—Decisions of foreign state courts and United States Supreme Court, construing foreign statutes, not controlling in determining what property subject to inheritance tax.

The decisions of the courts of other states, and of the United States Supreme Court, con-

struing the statutes of other states, are not controlling in determining what constitutes property subject to inheritance tax in California.

3. Taxation 867(1)—Choses in action subject to inheritance tax at creditor's domicile; "property."

All tangible personal assets of nonresidents are subject to inheritance tax in the state where located at the time of succession, but since in view of Const. art. 13, § 1; Pol. Code, § 3607, subjecting "all property in this state" to taxation for revenue, there is no distinction in the definition of "property" as used in the Inheritance Tax Act of 1913 and the general property tax laws, an interest in the proceeds of a promissory note, being a mere chose in action, attends the person of the creditor and is taxable at his domicile.

[Ed. Note.—For other definitions, see Words and Phrases. First and Second Series. Property.]

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Action by John S. Chambers, as Controller of the State of California, against Rose Skeel Mumford and another. Judgment for plaintiff, and the named defendant appeals. Reversed.

Newlin & Ashburn, of Los Angeles, for appellant.

John W. Carrigan and E. H. Pennock, both of Los Angeles, for respondent.

SLOANE, J. This appeal involves the liability to an inheritance tax in the state of California of certain property interests passing to the defendant and appellant, Rose Skeel Mumford, under the last will of her deceased husband. Both the decedent and the appellant were at the time of the former's death nonresidents of the state of California, having their domicile in New Jersey. The property interest involved consisted of a contractual interest held for the testator by trustees, also nonresidents of California, in the proceeds of a promissory note executed by a resident of California to the defendant, Title Insurance & Trust Company of Los Angeles, in its capacity as administrator of the estate of one Arcadia B. De Baker, deceased. The Trust Company is a California corporation, and the note at all times was held, owing, and payable in the state of California, and was secured by a mortgage on California real estate.

The interest of testator, appellant's husband, in the proceeds of this note arose under the following conditions: He with other persons claiming to be interested as heirs in the De Baker estate, in order to prosecute their claims advantageously, assigned their respective interests growing out of such claims to trustees, who were empow-

ed to act for them. These trustees have likewise at all times involved in this proceeding been nonresidents of the state of California.

These claims of heirship were litigated in the superior court in the county of Los Angeles, but met with an adverse ruling from which an appeal was taken to this court. During the pendency of this appeal a contract of settlement was entered into with the De Baker heirs, or most of them, whereby these heirs agreed to procure a complete assignment of this note and a distribution thereof from the De Baker estate to these trustees. Such was the status of the transaction at the time respondent succeeded to her husband's interests at the time of his death. This contract was thereafter carried out, and the note was distributed to these nonresident trustees, and subsequently the amount of the note was collected by the Title Insurance Company, which continued to hold the note after distribution, as the agents of the nonresident trustees. The principal sum of the note was \$704,439.50, of which amount Mumford's interest was an undivided one-sixth. At the time of the commencement of this action the note had been collected, and sufficient of the amount due the respondent from her husband's share remained in the hands of the defendant Title Insurance Company to satisfy the inheritance tax demanded. No question is raised as to the amount of or liability for this tax, if it is a proper charge against the interest which passed to respondent under her husband's will.

[1] In determining the liability of this interest under the inheritance tax laws of California, the matter may be simplified without at all changing the legal aspect of the case by eliminating from consideration all facts involving the nonresident trusteeship, and the De Baker estate. The contract with the trustees was for the sole use and benefit of the beneficiaries of that trust, and the interest thereby created did not pass to them as heirs of the De Baker estate, but by virtue of the contract in settlement of the litigated claim.

The fact that the property interest in question was acquired by assignment from the De Baker heirs and afterwards vested in the assignees by virtue of a decree in the De Baker estate presents no different condition than if the rights had been created by contract and assignment from the original payee of the note. Neither is there any different situation created by the fact that the Mumford interest was held by a trustee than if the entire transaction had been carried on directly with Mumford in person.

The note was executed by a resident of California to a resident of California, and secured by mortgage on California real es-

tate. The note itself was at all times retained in California in the hands of the payee, who afterwards became the agent of the assignee, and who collected the money due on the note, and retains it in the state of California for the benefit of the appellant.

[2, 3] There is no dispute as to the facts, and the sole question involved is whether or not the interest of the nonresident testator acquired under the contract to assign constituted "property within this state," under sections 1 and 2 of the California Inheritance Tax Act of 1913 (Stats. 1913, p. 1066). It is conceded that the succession to the property is subject to the inheritance tax only in the event that the interest passing to appellant is property within the state of California. There has been in several of the states in the matter of fixing the situs of personalty for purposes of taxation under the inheritance tax laws a far departure from the common law rule, and commonly accepted rule that such property follows the domicile of the owner. It is impracticable to trace the modification of this rule through all its ramifications, but it may be said that as to all tangible personal assets it has become the settled law that they are subject to inheritance tax in the state where they are located at the time of the succession, under statutes imposing such tax upon property of a nonresident owner situated within the state. *Blakemore & Bancroft, Inher. Taxes*, p. 143; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *McDougald v. Lillenthal*, 174 Cal. 698, 164 Pac. 387, L. R. A. 1917F, 267; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372; *In re Rogers*, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. Rep. 677. Some of the authorities may be said to have gone further, and for the purposes of such taxation to have fixed the situs of intangible property interests such as contract debts and other mere choses in action, within the jurisdiction where the debtor resides and to which the creditor must come to enforce his claim.

The rule supported by these authorities, as applying to choses in action against nonresidents of the state where the inheritance tax is claimed, is that if the owner must invoke the laws of that state to reduce his claim to possession, or secure the beneficial enjoyment thereof, and particularly if the security and evidences of indebtedness are in that state, the property interest is one within the state and subject to the local tax. *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094, L. R. A. 1916A, 901; *Blackstone v. Miller*, *supra*; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *State ex rel. v. District Court*, 41 Mont. 357, 109 Pac. 438; *Matter of Houdayer*, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St. Rep. 642; *In re Rogers*, *supra*; *State v. St. Louis*, etc.,

Ct., 128 Minn. 371, 150 N. W. 1098, L. R. A. 1916A, 901; *State v. Ramsey County Prob. Ct.*, 124 Minn. 508, 145 N. W. 390, 50 L. R. A. (N. S.) 262, Ann. Cas. 1915B, 861.

In re Blackstone's Estate is a leading case arising in the New York courts, and affirmed by the Supreme Court of the United States (69 App. Div. 127, 74 N. Y. Supp. 508, affirmed, 171 N. Y. 682, 64 N. E. 1118, affirmed, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439). In that case the decedent was a resident of the state of Illinois. At his death he left deposits of money in a trust company in the city of New York, and also in a New York bank. The deposits were subject to payment on demand of the Illinois creditor. They constituted choses in action, as the relation between the bank and its depositors is merely one of debtor and creditor. These claims were held on contested hearing in the Supreme Court of New York to be property in that state. This decision was affirmed by the Court of Appeals in a memorandum opinion, and again by the Supreme Court of the United States on writ of error to that court.

It may be said, however, for these decisions holding that bank deposits are property in the state where the bank account is created, that they rest to some extent upon the popular fiction that the bank deposit represents actual money in specie. It would require a further and somewhat advanced step to apply this construction to any ordinary contract debt.

It may be admitted that there is much reason and perhaps sound policy for accepting a rule which recognizes as the situs of contract debts the place where the debtor resides, and to which the creditor must come to enforce his claim. It may be said with truth that everything which gives value to such a claim exists at the domicile of the debtor. The adopting of such a rule in California, however, would be a reversal of the common-law doctrine of *mobilia sequuntur personam* which has prevailed in this state, and which has been followed by our courts in determining the situs of choses in action. The decisions of the courts of other states, and of the Supreme Court of the United States construing the statutes of other states, may be suggestive, but are not controlling in determining what constitutes property within the state of California.

No distinction is apparent in the use of the word "property" in our inheritance tax law to differentiate it from the same term in the laws governing the levy and collection of an ordinary property tax. Under section 1, article 13, of the Constitution, and section 3607 of the Political Code, "all property in this state" subject to certain exemptions is made subject to taxation for revenue. The term under consideration in the inheritance tax law is "property within this state." There seems to be no room under our stat-

utes for the distinction as to definitions of property which exists in many jurisdictions between the property tax and the tax upon succession to property.

The California rule as to property taxes is stated in *Estate of Fair*, 128 Cal 612, 61 Pac. 186, as follows:

"As to corporeal chattels such as live animals, manufactured goods, and the like, it is doubtless the rule that they are taxable in the state where they have local situation, though the owner may reside elsewhere. * * * The general rule is that debts attend the person of the creditor, and are taxable at his domicile." *San Francisco v. Lux*, 64 Cal. 481, 483, 2 Pac. 254; *Mackay v. San Francisco*, 113 Cal. 398, 399, 45 Pac. 696; *People v. Park*, 23 Cal. 139.

In *Mackay v. San Francisco*, 128 Cal. 681, 61 Pac. 382, it is said:

"The weight of authority is that a debt so due or to become due should be taxed at the place of residence of the creditor or owner, and that the situs of the debt is that of its owner, and that it is not property in the state of the debtor."

A concession has been made under the decisions of this court in the right to modify the application of the maxim, *mobilia sequuntur personam*, in the matter of certificates of stock in a domestic corporation. It has been held for purposes of the inheritance tax law the situs of stock in a corporation is in the state of the incorporation. *McDougald v. Low*, 164 Cal. 107, 110, 127 Pac. 1027; *Murphy v. Crouse*, 135 Cal. 19, 66 Pac. 971, 87 Am. St. Rep. 90; *McDougald v. Lillenthal*, supra, 174 Cal. 701, 164 Pac. 387, L. R. A. 1917F, 267. A reason for making a distinction between certificates of stock, and ordinary choses in action is in the fact that the former represent an interest in and derive their value from the tangible assets of the corporation. Beyond this the California decisions have shown no disposition to limit or modify the common-law rule that the situs of mere choses in action follows the domicile of the owner.

The nearest adjudication of this point as applied to the inheritance tax law we have in California is in the *Estate of Hodges*, 170 Cal. 492, 150 Pac. 344, L. R. A. 1916A, 837, where it was held that certain bonds and securities, deposits in bank and other chattels, held in the state of Massachusetts, but owned by a resident of California, were subject to an inheritance tax in this state. Discussing the application of the maxim, *mobilia sequuntur personam*, Mr. Justice Lorigan, writing the opinion, says:

"That maxim, universally applied in the jurisdictions of all civilized nations, is that the personal estate of a decedent, wherever it may in fact be located, is, for the purposes of succession and distribution, deemed to have no other locality than the domicile of the decedent. As a

general rule, the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual situs may be at the time of his death, and the distribution of it is governed and controlled by the laws of succession existing at the place of the domicile of the decedent. The courts of the various states have had frequent occasion to pass upon the power of a state having jurisdiction through its courts over the estate of a domiciled decedent to impose an inheritance tax upon the personal property of such decedent located outside of the state, and the authorities are uniform in holding that though personal property may be actually located in another state than that of the residence of the decedent at the time of his death, its situs for the purpose of imposing an inheritance tax upon it is in the state which was the domicile of the decedent, and where the primary administration of his estate is being had. *Ross on Inheritance Taxation*, pp. 221, 229; *Blakemore and Bancroft on Inheritance Taxes*, §§ 207, 225; *Dos Passos on Inheritance Tax Law* (2d Ed.) § 29; *Estate of Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; *People v. Union Trust Co.*, 253 Ill. 168, Ann. Cas. 1913D, 514, 99 N. E. 377; *In re Bullen's Estate*, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109; *Mann v. State Treasurer*, 74 N. H. 345, 15 L. R. A. (N. S.) 150, 68 Atl. 130; *In re Dingam's Estate*, 66 App. Div. 228, 72 N. Y. Supp. 694; *In re Hartman*, 70 N. J. Eq. 664, 62 Atl. 560; *State v. Probate Court*, 124 Minn. 508, 50 L. R. A. (N. S.) 262, 145 N. W. 390; *Commonwealth v. Williams*, 102 Va. 778, 1 Ann. Cas. 434, 47 S. E. 867; *Estate of Bittinger*, 129 Pa. St. 338, 18 Atl. 132.

"All of these cases were decided in favor of the right of the state having control of the primary administration of the estate through the application of the maxim *mobilia sequuntur personam*; the well-established general rule that the personal property of a decedent wherever situated is governed by the law of the domicile of the owner both as to distribution and the right to succession."

Such application of this rule has been established by a line of decisions antedating the inheritance tax, and as there is nothing in the enactments creating the inheritance tax to limit or change such application of the rule, it must be held under familiar rules of construction that in the use of the term "property in this state" the Legislature intended it to have the same meaning as had already been given to practically the same expression in the laws governing property taxes.

This rule of construction has been in force so long and has been so consistently followed that if it is to be changed or modified it should be by the Legislature and not by the courts.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SHURTLEFF, J.

(187 Cal. 245)

McNUTT v. CITY OF LOS ANGELES (two cases). (L. A. 6579, 6577.)

(Supreme Court of California. Oct. 14, 1921.)

1. Municipal corporations ⚡269(3)—Could change grade of streets under Street Improvement Act of 1913 to conform to previously established grades; "improvement."

A city, under Street Improvement Act 1913, §§ 1, 2, 5, could change the grade of a public street to make it conform to previously established grade, it being unnecessary that the grade be concurrently established, in view of section 46, defining term "improvement" to include "establishment, change or modification of grade, if any," and the legislative history of the act, notwithstanding section 1 of the amendatory act of 1915.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

2. Municipal corporations ⚡269(3)—City authorized to establish grade for tunnel to be used as public thoroughfare.

Street Improvement Act 1913, § 1, providing for improvement of public street by establishment, change, or modification of the grade of the street, *held* to authorize the city to establish a grade for a tunnel to be used as a public thoroughfare.

3. Municipal corporations ⚡293(2)—Resolution of intention held to sufficiently designate work to be done.

Resolution of intention providing that grade of streets shall be altered as shown on various plans and specifications on file in city engineer's office, referred to for more particular description, *held* sufficient under Street Improvement Act of 1913, requiring the resolution to designate the proposed grade, in absence of a showing that all the data required to be shown was not contained in the plans and specifications referred to.

4. Municipal corporations ⚡294(8)—Requirement that city clerk make and file affidavit as to mailing notice of passage of resolution of intention to property owners mandatory.

Street Improvement Act 1913, § 3, requiring city clerk, immediately on passage of resolution of intention, to mail notice thereof to proper owners, and to file affidavit that he has mailed notices, *held* mandatory, the making and filing of affidavit being a jurisdictional fact.

5. Municipal corporations ⚡294(8)—City clerk's affidavit as to notice to property owners must show notice in compliance with statute.

City clerk's affidavit that he has mailed postal cards notifying property owners of passage of resolution of intention under Street Improvement Act 1913, § 3, must show that the notice was mailed in compliance with requirements of the statute, to give city council jurisdiction to proceed with the work.

6. Municipal corporations ⚡294(8)—City clerk's affidavit conclusive evidence that notice was properly directed, mailed, and delivered to property owners.

City clerk's affidavit that he mailed postal cards giving notice of passage of resolution of intention to property owners under Street Improvement Act 1913, § 3, in compliance with the statute, is conclusive evidence that the notice was properly directed, mailed, and delivered.

7. Municipal corporations ⚡294(4)—City clerk's notice of passage of resolution of intention held insufficient for failure to designate the improvement.

City clerk's notice to property owners under Street Improvement Act 1913, § 3, of the passage of the resolution of intention "for the improvement of B. tunnel," giving ordinance number thereof, *held* insufficient to give city council jurisdiction to proceed with an improvement other than B. tunnel, provided for in the resolution of intention, the reference to the resolution of intention being insufficient, in view of section 44.

8. Eminent domain ⚡283—Owner held not estopped from claiming damages for change in grade of street by attempted proceedings under Street Improvement Act.

Owner of lot abutting on street was not estopped from claiming damages for change in grade because of attempted proceedings by city under Street Improvement Act of 1913 where city council had no jurisdiction to proceed with the improvement because of insufficiency of city clerk's notice to property owners of passage of resolution of intention under section 3.

9. Judgment ⚡256(7)—Plaintiff not entitled to interest though order directed judgment in accordance with prayer of complaint claiming interest, where findings showed plaintiff not entitled thereto.

Order granting plaintiff's motion under Code Civ. Proc. § 663, to vacate judgment for defendant, and directing entry of judgment for plaintiff upon the court's findings of fact, in accordance with the prayer of complaint, did not entitle plaintiff to amount claimed under complaint with interest, though complaint demanded such amount with interest from specified date, where, under the findings, plaintiff was not as matter of law entitled to interest on such amount.

10. Appeal and error ⚡1071(2)—Erroneous conclusion of law no ground for reversal if judgment is right.

An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right.

11. Eminent domain ⚡302—Plaintiff suing for damages for change in grade of street not entitled to interest.

Owner of land abutting on street suing city for damages for change in grade of street could not recover interest before judgment, the claim being unliquidated.

12. Interest $\S$ 19(1)—Not recoverable before judgment on unliquidated claim.

Plaintiff suing on an unliquidated claim cannot recover interest on amount claimed before judgment, even as against an individual defendant.

13. Municipal corporations $\S$ 1002—States $\S$ 171—Interest not recoverable against state or municipality in absence of statute.

As against the state or a municipality, interest cannot be recovered except under special statutory authorization.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Harry W. McNutt, substituted in the place and stead of J. H. Smith, against the City of Los Angeles, a municipal corporation. Judgment for plaintiff for less than amount claimed, and both parties appeal. Affirmed.

Charles S. Burnell, W. P. Mealey, and J. H. O'Connor, all of Los Angeles, for appellant.

J. C. Cross, Chas. S. Conner and Herbert Cutler Brown, all of Los Angeles (Delphin M. Delmas, of Los Angeles, of counsel), for respondent.

SLOANE, J. The plaintiff in this action recovered judgment against the city of Los Angeles, the defendant, in the sum of \$5,000 for damages resulting from changing and lowering the grade of streets bordering on plaintiff's lot. Both parties have appealed from the judgment.

The defendant appeals on the ground that the street work complained of was done in conformity with the Street Improvement Act of 1913, and that plaintiff, having failed in such proceedings to make his claim for damages as required by the act, was not entitled to recover in this action.

The plaintiff appeals on the ground that he was entitled to interest upon the amount of his recovery, which was not included in the judgment.

The appeals will be considered together in this opinion.

It is conceded by the defendant that the plaintiff was entitled to recover damages unless the city of Los Angeles had jurisdiction to carry on the work complained of under the Street Improvement Act of 1913 (St. 1913, p. 954).

The plaintiff was the owner of a city lot at the northwest corner of the intersection of California street and Broadway. A tunnel for street purposes had been constructed on Broadway in the year 1908 through a steep hill lying northerly from the intersection of the streets named. The southerly opening of the cut to the entrance of this tunnel, as originally established and constructed, appears

to have been approximately upon the grade of plaintiff's lot.

The change for which damages are claimed consisted of cutting down the grade at the southern entrance of the tunnel and along plaintiff's land to a depth of upwards of 18 feet. This tunnel was originally constructed under an act of the Legislature approved March 19, 1889, and acts amendatory thereto, and in accordance with plans and specifications adopted by the legislative body of the city, and was accepted and thereafter used as a public way by the city for many years. There seems to have been no formal establishment of the grade for the floor of the tunnel at the time it was constructed.

It is alleged in the third amended complaint, the averments of which are stipulated and held by the findings to be true, that "on the 9th of July, 1912, the council of the city duly adopted an ordinance changing and establishing the grade of California street and of North Broadway," and that the grades thus established are the grades to which Atkinson (the contractor with the city) reduced these streets by the work hereinabove mentioned. The complaint also alleges that on the 25th of March, 1913, the council adopted an ordinance establishing the grade of the Broadway tunnel, in conformity to the grade thereafter used and conformed to by said contractor.

At any rate, if any authority existed for changing the physical grade of the streets and tunnel adjacent to plaintiff's lot under the proceedings thereafter had, it was by action of the city council taken prior to and independently of the proceedings under the act of 1913.

Plaintiff states his grounds of objection to the work complained of as follows:

"1. (a) The legislative body of the city of Los Angeles had no power under the Street Improvement Act of 1913 to order the grading and improvement of California Street, or North Broadway tunnel, because the official grade of these streets, highways or thoroughfares had already been established before the passage of the ordinance of intention to order such grading and improvement (passed October 9, 1913), and, as appears upon the face of said ordinance, the grading and improvement of said streets, highways, or thoroughfares was ordered to conform to the official grade thus theretofore established.

"2. The ordinance adopted by the legislative body of the city of Los Angeles on March 25, 1913, purporting to establish the grade of the Broadway tunnel, was illegal and void. Thus, for the following reasons:

"(a) There was, at that time, no law of this state, and no provision of the charter of the city, which authorized that body to establish the grade of a tunnel used for purposes of public travel.

"(b) As appears by the facts found, the grade of the Broadway tunnel had been officially es-

tablished in the year of 1898. In accordance with the official grade thus established the tunnel had been constructed, and upon that grade the public travel had passed for 12 years and more. No ordinance changing that grade could legally be adopted under the pretense of originally establishing an official grade, even if it were assumed that power existed either to establish or change the grade of such tunnel.

"3. The Street Improvement Act of 1913 has no application to such underground tunnels as was the Broadway tunnel; and, therefore, all the proceedings set forth in the findings of fact, so far as they affect that tunnel, are illegal and void.

"4. Were it conceded that under the Street Improvement Act of 1913 the legislative body of the city of Los Angeles was invested with the power to order done the improvements described in its ordinance of intention adopted on the 8th day of October, 1913, that body had no power, under the facts here found, to pass the ordinance ordering said work to be done. And this for the following reasons:

"(a) The city clerk never made or filed the affidavit required by section 3 of said act.

"(b) The affidavit which the clerk did make shows upon its face that the notices which he mailed did not conform to the requirements of said act."

[1] A debatable question arises under the first objection above stated. Does, or does not, the Street Improvement Act as adopted in 1913 authorize the physical improvement and change of grade of a public street independently of a concurrent establishment, change or modification of the official or paper grade in the same proceeding?

The language of such act as it stood when the work here was undertaken, so far as it has any bearing on this point, and eliminating for the sake of clarity portions of the text which have no relation to the point at issue, is as follows (Stats. 1913, p. 954 et seq.):

Section 1. "Whenever the public interest or convenience may require, the legislative body of any city is hereby empowered to *establish or change or modify the grade of any public street, lane, alley, court, place, or right of way in said city, * * * and * * ** to order the whole, or any part, * * * of such public street * * * to be improved to conform to *such official grade.*"

Section 2. "Before ordering any establishment, change or modification of grade or any improvement described in section one herein, the said legislative body shall pass an ordinance or resolution, declaring its intention so to do, * * * *designating the proposed grade*, describing the proposed improvement, fixing a time and place for the hearing of protests * * * and specifying the exterior boundaries of the district of land to be benefited by said improvement."

Section 5. "If no protests are filed, * * * or if protests are filed, and after hearing are denied, * * * the legislative body shall have jurisdiction to order the establishment, change or modification of grade *and* the improvement described in the ordinance or resolution of intention. Having acquired such jurisdiction, it

shall by ordinance or resolution order the establishment, change or modification of grade *and* such improvement to be made."

Section 46. "The term 'improvement' includes the establishment, change or modification of grade, if any, and all of the improvements mentioned in section one of this act."

The title to this act declares it:

"An act to provide for the establishment and change of grade of public streets, * * * and providing for the improvement thereof, in cases where any damage to private property would result from such improvement."

The italics used in the foregoing quotations are supplied to emphasize the construction contended for by plaintiff.

In defining the scope and purpose of this act it is apparent that all references to change of grade and improvement work are made conjunctively. The only constructive basis for a different interpretation is the use of the term "if any," in section 46, referring to the preceding words "establishment, change, or modification of grade."

Counsel for the appellant argue that, if a concurrent establishment or change of grade was an essential and prerequisite condition in every instance to any physical improvement of a street, under this act, the expression "if any" could find no place or significance in the application there given to the word "improvement." There is force in the suggestion. The word "improvement," as used in the act, is defined to cover proceedings which authorize the physical grading of the street, and a concurrent change of the official grade, "if any."

But a more potent reason for such construction comes from a consideration of the history of this act. The Legislature of 1909 enacted two separate measures for street improvement, one known as the Change of Grade Act (Stats. 1909, p. 1018), which provides a procedure for changing the official or paper grades of streets, without any concurrent physical work thereon, and the other known as the Hammond Act (Stats. 1909, p. 1042), which established a proceeding for actual street work where the grades were already established. But no provision was made in either act for a condition where it might be desirable to change or establish a grade and authorize the work of improvement concurrently.

Construed as appellant contends for, the Street Improvement Act of 1913 here under consideration very sensibly remedies this omission by permitting in the same proceeding the governing body of a city to take proceedings for the physical grading and improvement of a street, and at the same time where there is no official grade, or a change of grade was desired, to establish such grade.

The act of 1913, it will be seen by comparison, while it repeals the Hammond Act of 1909, is a substantial re-enactment thereof,

with the incorporation of the provision for establishing or changing the grade concurrently where such need exists; and the manner in which the amendment of the statute is made and the obvious reasons therefor, would indicate that it was not intended to change the operation of the law in cases where grades were already established, but merely to supplement the former provision by allowing concurrent changes of grade where required, without the necessity of a separate and independent proceeding.

It is true that the act of 1913 is at least open to the criticism of being ambiguous and uncertain as to its interpretation in this respect. The Legislature has apparently fallen into the error so common in legal parlance of using the conjunctive article "and" where the disjunctive "or" is intended. But this can be disregarded if the obvious purpose of the act and the intention indicated by other phraseology justify it.

It is strongly insisted by respondent that the subsequent amendments to section 1 of this act show the legislative interpretation to have been that the statute did not in its original form authorize actual grading work, except where the official grade was changed or established in the same proceeding.

Section 1 of the act of 1913 was amended in 1915 (Stats. 1915, p. 1217) by adding a proviso:

"That wherever the official grade of any such public street * * * has been theretofore established, changed or modified in any manner authorized by law, the legislative body of said city may order * * * such public street * * * to be improved under the provisions of this act."

The conclusion urged by respondent does not necessarily follow. It is often the function of an amendment to remove just such uncertainty and ambiguity as it is claimed exists here, by expressing the point involved in obscurity in language that cannot be misunderstood (*Independent School District v. Kelley*, 120 Iowa, 119, 94 N. W. 284; *Alexander v. Mayor of Alexandria*, 5 Cranch, 1, 3 L. Ed. 19).

It is obviously the part of reason and common sense that the Legislature should have intended by the original enactment of the act of 1913, to supplement the law as announced in the Hammond Act of 1909, by extending its scope to apply to the improvement of streets where an establishment of grade has not already been made, by providing a concurrent procedure for that purpose where needed, rather than to limit its application alone to streets where such concurrent change of grade is required, that every intentment of the statute should be applied to the broader construction.

We are of the opinion, therefore, that the city council had jurisdiction to proceed under

this statute with a view to contracting for the work complained of in conformity to previously established grades.

There is no sufficient justification for the collateral attack in this action upon the regularity and validity of the proceedings under which the official grades of the Broadway Tunnel and California street and North Broadway were established. The complaint itself alleges that the grades on California street and North Broadway to which the contractor conformed were duly adopted by an ordinance of the council on the 9th of July, 1912. As we gather from the record, no part of the tunnel proper was upon or contiguous to the property of plaintiff. That part of the street lying along the North Broadway side of plaintiff's lot, as we understand, was occupied by the cut complained of leading to the southerly opening of the tunnel.

So far as damage to plaintiff's land is concerned, the change of grade of the tunnel is not material. It is only as the right to lower the floor of the tunnel affects the jurisdiction of the city to proceed in the matter that it becomes significant. The complaint also alleges the adoption of an ordinance on the 25th of March, 1913, establishing the grade to which the contractor later lowered the floor of the tunnel, and also sets out such ordinance as Exhibit C of the complaint.

Nothing appears in the complaint attacking the regularity or validity of the proceeding for the adoption of these ordinances.

[2] The objection that there was no authority under the Street Improvement Act of 1913 to establish a grade for a tunnel to be used as a public thoroughfare is not pressed in respondent's brief. In any event, we think the act sufficiently authorizes tunnel work. Section 1, in authorizing streets to be improved to established grades, includes as part of the authorized work the construction of "culverts," "bridges," and "tunnels." The construction of a bridge over a chasm, or the boring of a tunnel through an obstructing hillside, would be integral parts of the actual highway improvement, and not a mere accessory structure. *Bailey v. Hermosa Beach*, 192 Pac. 712. In the case of *Thompson v. Hance*, 174 Cal. 572, 163 Pac. 1021, which held that tunnel construction was not authorized under the Vrooman Act as amended in 1911, the court was considering a statute which only mentioned tunnels as obviously intended for drainage purposes in connection with the street, the reference being to tunnels, sewers, ditches, * * * conduits, and channels for sanitary and drainage purposes."

[3] Plaintiff further attacks the jurisdiction for this procedure on the ground that the resolution of intention did not designate the grade upon which the work on the tunnel was to be done. The act of 1913 provides that before ordering any street work under

such act the legislative body of the city "shall pass an ordinance or resolution declaring its intention to do so, * * * designating the proposed grade." It may be questioned if the requirement to designate "the proposed grade" applies where the grade is already established, but rather refers to proceedings where an establishment or change of grade is contemplated concurrently with the physical improvement of the street. The Hammond Act of 1909, upon which we have seen the present act is based, and which only dealt with street improvements where the grades were already established, did not direct any reference to the grade in the resolution of intention. In other words, in this proceeding there was no "proposed grade," the grade having previously been established. This resolution does, however, provide that the work shall be constructed as shown on various plans and specifications referred to for more particular description, and on file in the city engineer's office.

It is not alleged in the complaint, does not affirmatively appear from the resolution itself, and is not found by the court, that all the data required to be shown was not contained in the plans and specifications referred to. If this reference makes the specifications a part of the resolution of intention, we cannot infer that all the information required was not contained in such specifications.

In *Chase v. Trout*, 146 Cal. 350, 368, 80 Pac. 81, Mr. Justice Shaw writing the opinion, it is held that a reference to plans and specifications on file will serve to make sufficient the description of the work in a resolution of this character where by the terms of the description in the resolution itself it would be void, and that it is not required that such plans and specifications should be published as part of the resolution.

In the case before us counsel for plaintiff recite in their notice of motion for judgment in plaintiff's favor on the findings that it appears upon the face of the ordinance that "the grading and improvement of said streets and highways or thoroughfares was ordered to conform to the official grade thus theretofore established."

Another and more serious objection to the validity of these proceedings under the Street Improvement Act of 1913 is the alleged failure of the city clerk to make an affidavit before the work was ordered that he had mailed postal cards to the property owners within the assessment district containing the notice required by the statute of the proposed improvement. Section 3 of the act requires that the city clerk shall, immediately upon the passage of the resolution of intention, mail to each of such property owners a postal card giving notice of the passage of the resolution of intention, "the name of street to be improved, and between what streets located." It is then further provided as follows:

"The city clerk shall immediately upon the completion of the mailing of said cards file in the office of the superintendent of streets an affidavit setting forth the time and manner of his compliance with this requirement; provided, that the failure of the city clerk to address said cards or any of them to the true owners of said property, or to mail said cards, or the failure of the property owners to receive the same, shall in no wise affect the validity of the proceedings or prevent the legislative body from acquiring jurisdiction to order the work; provided, however, that the legislative body shall not pass any ordinance or resolution ordering the work until such affidavit is made and filed as herein prescribed."

[4] The making and filing of this affidavit is mandatory and jurisdictional as affecting the power of the city council to pass an ordinance ordering the performance of the work. The reservation made in the proviso, that failure in fact in properly addressing or mailing or delivering said cards shall in no wise affect the validity of the proceedings, is clearly intended to avoid the uncertainty and complication that would inevitably arise if the proceeding could be attacked for failure to reach any one or several of the interested property owners with such cards by making the affidavit conclusive evidence of the facts alleged; but the negative provision contained, that such failure in the actual making and delivery would not invalidate the proceedings, or destroy jurisdiction, coupled with the final proviso, that the legislative body "shall not pass any ordinance or resolution ordering the work until such affidavit is made and filed as herein prescribed" emphasizes the intention of the Legislature to make such affidavit a condition of jurisdiction to take further action.

[5, 6] There was an affidavit made and filed in this instance. The vital question is, Did it meet the substantial requirements of the statute? Obviously, an affidavit by the clerk that he had mailed notice of intention to pave the Appian way would not suffice in this case. In order to conform to the requirement of the statute the affidavit must show that the notice mailed was in compliance with the requirements of the law. When this is done the affidavit becomes conclusive evidence that such notice was properly directed, mailed, and delivered, but the notice itself must, of course, conform to the statute.

[7] The notice which the clerk did make affidavit that he had mailed was as follows:

"Los Angeles, Cal., Oct. 22, 1913.

"You are hereby notified that on the 9th day of October, 1913, the legislative body of the city of Los Angeles, California, by virtue of the street improvement act of 1913, passed an ordinance (resolution) of intention numbered 28,413 (new series) for the improvement of Broadway tunnel. Protests will be heard on the 19th day of November, 1913, at the hour of 9 o'clock a. m. in the council chamber of said city.

"Your property is in the district to be assessed for this improvement.

"Chas. L. Wilde, City Clerk."

Three distinct improvements were included in the resolution of intention—Broadway tunnel between Temple street and Sunset boulevard, California street between North Broadway and Hill street, North Broadway between Temple street and California street. In the notice certified to by the affidavit the only reference to the location of the work proposed is in the words, "for the improvement of Broadway tunnel." Is this the notice called for by the statute and required to be certified to in the affidavit?

The change in the streets for which plaintiff claimed damages was not in the Broadway tunnel, but on North Broadway and California street. He may have been indifferent to improvements to be made in the tunnel and willing to bear his portion of the assessment therefor without further investigation. The law required specific notice of the work proposed on these other streets. There was nothing in the notice certified to that can be said to have put a property owner on inquiry as to the inclusion of any other work than the improvement of the tunnel, and there was nothing on the face of the notice to suggest that the proposed improvement would extend to property in the other localities. If there had been it might well be said that the property owner was put on inquiry, and should have gone to the records for particulars.

That it was not the legislative purpose to make reference to the resolution of intention help out the notice in question is indicated by the provision of section 44 of the act that in "all resolutions, notices, orders and determinations subsequent to the 'notice of street work' a description of the work by reference to the ordinance or resolution of intention shall be sufficient." This notice was not subsequent, but prior to, or at least concurrent with, the notice of street work.

The decision of the Court of Appeal, *Beale v. City of Santa Barbara*, 32 Cal. App. 235, 243, 162 Pac. 657, cited by counsel for appellant, does not apply here, for the reason that such affidavit of mailing postal notices there involved was not made a condition precedent to ordering the work, under the Vrooman Act as then in force, which was under consideration in that case. Neither is there room for application of the rule referred to in *Bailey v. Hermosa Beach*, 192 Pac. 712, that jurisdiction does not depend upon record evidence or affidavit of notice, but upon the fact of notice. In this case the statute makes the affidavit of mailing the exclusive and conclusive proof of the fact of notice, and there is no allegation or offer of other proof that the law was complied with. In fact, the affidavit itself contains the proof

that the notice mailed was not the notice required by the statute.

[8] We see no escape from the conclusion that in this absence of a substantial compliance with the law relating to the mailing of such notice there was a failure of jurisdiction to order the street improvements from which plaintiff's claim for damages arose. It follows that plaintiff was not estopped by such attempted proceedings from pursuing his relief in this action.

In view of the conclusion thus reached upon the merits of this proceeding, it is perhaps unnecessary to pass upon plaintiff's objection that the appeal was not properly taken.

We have not heretofore referred to the fact that judgment in this action was originally for the defendant, and that such judgment was vacated and a judgment on the findings entered for plaintiff, in pursuance of a motion under section 663 of the Code of Civil Procedure. The appeal is from this final judgment, and it is the contention of plaintiff that it should have been from the order directing the new judgment. Without discussing the merits of the question thus raised, it is sufficient for the purposes of this decision that a motion to dismiss this appeal on the grounds stated was heretofore presented to this court and denied. The circumstances attending the rendition of the new judgment, however, become material in the consideration of the appeal taken by plaintiff.

[9] The prayer of the third amended complaint was that plaintiff recover judgment for \$5,000 damages, with interest thereon from the 1st day of September, 1915. In granting the motion vacating the first judgment for defendant and directing judgment for the plaintiff, the order of the court recites as follows:

"The plaintiff's motion to set aside and vacate the judgment (based upon findings of fact made by the court) heretofore rendered against him and entered on the 24th day of December, 1919, and to enter upon said findings a judgment in the plaintiff's favor in accordance with the prayer of his third amended complaint, filed here on the 24th of November, 1919, came on regularly to be heard on the 20th day of January, 1920, the parties appearing by their respective counsel, whereupon, after argument heard from both sides, the court being duly advised, grants said motion and orders that judgment be entered accordingly."

The judgment thereafter made and entered, after reciting the foregoing order, decrees as follows:

"Wherefore, it is now ordered, adjudged and decreed that the conclusions of law heretofore announced be amended and corrected by striking out said conclusions as the same now appear in the findings of fact and conclusions of law and substituting in lieu thereof the following: As conclusions of law from these facts the court

decides that the plaintiff is entitled to judgment according to the prayer of his third amended complaint. And it is further ordered, adjudged, and decreed that the judgment heretofore entered herein on the 24th day of December, 1919, be and the same is hereby set aside and vacated, and that the plaintiff do have and recover from the defendant the sum of \$5,000, together with his costs."

Thereafter, on the 9th day of April, 1920, judgment was entered for the plaintiff for \$5,000 damages, but without interest. Plaintiff at the time objected to the entry of a judgment without interest as not being in accord with the order of the court directing such judgment, but the court overruled the objection and caused the judgment to be entered without interest, to which ruling plaintiff excepted.

No question is raised by the defendant as to the regularity of the proceedings on the motion under section 663, Code of Civil Procedure. The new judgment is therefore to be considered precisely as though it were founded on original findings of fact and conclusions of law. Plaintiff's rights in the premises are to be measured by the findings of fact rather than the conclusions of law, and if the facts do not entitle him to interest he is not prejudiced by the judgment.

[10] The trial court, under section 663, Code of Civil Procedure, still had jurisdiction to further amend its conclusions of law if they did not conform to the findings of fact. This, perhaps, would have been the consistent course, but if under the findings of fact plaintiff is not entitled to recover interest he would not be entitled to relief on this appeal. An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right. *Spencer v. Duncan*, 107 Cal. 423, 40 Pac. 549; *Helm v. Duncan*, 3 Cal. 454; *Bleven v. Freer*, 10 Cal. 172.

[11, 12] As has already been shown by the record, this judgment was for damages arising from the unlawful changing of the street grade in front of plaintiff's premises by the city of Los Angeles. The claim sued on was unliquidated, and could not draw interest before judgment even as against an individual defendant. *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

[13] As against the state or a municipality thereof, interest cannot be recovered except under special statutory authorization. *Engelbretson v. City of San Diego*, 197 Pac. 651; *Savings Society v. San Francisco*, 131 Cal. 356, 363, 63 Pac. 665.

The appeal by plaintiff is therefore also without merit.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LEENON, J.; LAWLOR, J.; SHURTLEFF, J.

187 Cal. 232

RABE v. LLOYD et al. (L. A. 7069.)

(Supreme Court of California. Oct. 20, 1921.)

Appeal and error — 422—Failure of notice of appeal to specify court to which taken held not ground for dismissal.

Under Code Civ. Proc. § 941b, relating to appeals by alternative method, and requiring the notice to state to which court the party appeals, failure of such notice to specify the court in an appeal, where the Supreme Court was the only court to which such appeal would lie, was not ground for reversal, especially in view of Const. art. 6, § 4, forbidding appeal to be dismissed when not taken to the proper court, but to be transferred.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by J. W. Rabe against Mae Lloyd and others. From a judgment for defendants, plaintiff appeals. On motion to dismiss appeal. Denied.

Morganstern & Smith, of San Diego, for appellant.

Sherman Lacey, of San Diego, for respondents.

PER CURIAM. Motion to dismiss appeal; the ground of motion being that the notice of appeal is fatally defective, in that it does not state to what court the appeal is taken. The notice is most specific in all other respects, describing with the utmost particularity the judgment from which the appeal was attempted to be taken.

Under the provisions of our Constitution the only court to which the appeal in this case would lie is this court. Section 941b, Code of Civil Procedure, relative to appeals taken by the alternative method, provides that the notice of appeal shall state, among other things, that the party does hereby appeal "to the Supreme or District Court of Appeal, as the case may be," from the judgment or order, identifying the thing appealed from with reasonable certainty. Technical compliance with the provisions of this section would include a statement of the court to which the appeal is taken; but we are of opinion that failure in this regard should not be held to invalidate the notice of appeal. As we have noted, any appeal in this case could properly be taken only to this court. In every case there is only one court to which an appeal may properly be taken, this court or one of the three District Courts of Appeal, the respective appellate jurisdiction of the Supreme Court and District Courts of Appeal being specified in the Constitution. It is further expressly provided in the Constitution (section 4, art. 6) that—

"No appeal taken to the Supreme Court or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto."

In view of the fact that the only court in which an appeal in any case can be heard is determined by constitutional provision, and in view of the further constitutional provision which we have just quoted, we are of the opinion that this notice which does state an appeal from a judgment described with absolute certainty should be held sufficient to sustain the appeal.

The motion to dismiss the appeal is denied.

ANGELLOTTI, C. J., and WILBUR, SLOANE, LAWLOR, LENNON, and SHURTLEFF, JJ., concur.

187 Cal. 270

STARR v. LOS ANGELES RY. CORPORATION. (L. A. 6177.)

(Supreme Court of California. Oct. 19, 1921.)

1. Pleading $\hookrightarrow$ 127(1)—Specific denial of allegation of negligence in starting car held not to admit negligence in general operation.

Where a complaint specifically counts on the negligent starting of a street car after stopping it, an answer, specifically denying this allegation, does not admit negligence in the general operation of the car.

2. Pleading $\hookrightarrow$ 93(1)—On denial of negligence other count, alleging contributory negligence, does not admit negligence.

Where the first count of answer denied negligence and the second count alleged contributory negligence, failure to deny negligence in that count, since defendant had a right to make inconsistent defenses, was not an admission of negligence.

3. Trial $\hookrightarrow$ 191(9)—Instruction, assuming that street car conductor had duty to be in a certain place, held erroneous.

In action for injuring plaintiff by giving the car a sudden jerk or lurch and throwing plaintiff off, an instruction that, if the conductor of a pay-as-you-enter car knew that plaintiff was about to alight, and that the alighting place was dangerous, and, because the car was traveling at a fast rate of speed, would necessarily give a lurch upon reaching a certain place, and the conductor was not in his place, he was negligent, was erroneous in assuming that a conductor under such circumstances had a duty to be at a certain place in the car, and in view of the fact that the conductor's position was not the proximate cause of the injury.

4. Trial $\hookrightarrow$ 296(3)—Instruction, omitting to charge that defendant's negligence must be the proximate cause of injury, cannot be cured by other instructions on proximate cause.

In action for injuries caused by negligence of a street railway, an instruction for plaintiff, omitting the questions of proximate cause and contributory negligence, is not cured by instructions asked by defendant, and containing these questions.

5. Trial $\hookrightarrow$ 253(7) — An instruction directing verdict for plaintiff if certain facts are found must embrace all things necessary to show liability.

Where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all things necessary to show the liability.

6. Trial $\hookrightarrow$ 251(8), 253(9)—An instruction on negligence, referring to three rates of speed, held erroneous as ignoring contributory negligence and authorizing recovery for negligence not pleaded.

In an action for negligently causing a jerk or lurch, throwing plaintiff from a car and causing injuries, an instruction that defendant may be justified under certain circumstances in running its cars at a very fast or the fastest rate of speed, while under other circumstances to run its cars at a high rate of speed might be negligence is erroneous, as allowing a verdict for plaintiff if the rate might be negligent, in failing to mention the question of contributory negligence, and in permitting the verdict for injuries on account of a high rate of speed when plaintiff relied on a negligent jerk or lurch.

7. Appeal and error $\hookrightarrow$ 1064(1)—Trial $\hookrightarrow$ 243—Where instructions are flatly contradictory, they are erroneous and prejudicial.

Instructions are to be construed together, but where they are flatly contradictory, as where the jury is instructed upon a specific state of facts to bring in a verdict for plaintiff or defendant, and is elsewhere instructed in general terms not to do so, the instructions are erroneous and prejudicial.

8. Carriers $\hookrightarrow$ 347(3)—Evidence of previous conduct and habit of conductor in sitting down and talking to passengers held incompetent.

In action for injuries because of causing a jerk or lurch throwing plaintiff from a street car, evidence as to the previous conduct and habit of the conductor in sitting down and talking to passengers was incompetent.

9. Witnesses $\hookrightarrow$ 77—On cross-examination of a 10 year old boy, a question as to conflict with his written statement should have been permitted.

On cross-examination of a boy 10 years old, a question as to conflict between his oral testimony and a prior written statement should have been permitted, since his answer would aid the jury in weighing and considering his degree of intelligence.

In Bank.

Appeal from Superior Court, Los Angeles County; Howard A. Peairs, Judge.

Action by Laura Starr against the Los Angeles Railway Corporation. From judgment for plaintiff, defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

Ernest E. Rogers, of Los Angeles, for respondent.

WILBUR, J. The plaintiff recovered judgment for personal injuries received by her by reason of being thrown from a car of the defendant railway company while she was a passenger thereon. The complaint alleges that the car was so negligently operated that it started with a sudden jerk while the plaintiff was standing on the platform of the car, thereby throwing her with great force and violence to the pavement. The defendant denied this act of negligence and by way of affirmative and separate defense alleged that the plaintiff contributed to her own injuries by negligently attempting to alight from the car while it was still in motion. It appeared from the evidence that the car was operated westerly on West First street in Los Angeles and was descending a steep hill from Figueroa to Fremont street about 9 p. m., November 17, 1917. The hill ends at the easterly line of Fremont street. The intersection of First and Fremont streets is level; and in order to stop on the level it is customary to cross Fremont street before stopping. The plaintiff knew of this custom. The evidence as to where the plaintiff struck the pavement on leaving the car varied from 15 to 75 feet east of the east line of Fremont street. Thus, according to the witnesses which place the point of accident nearest to the usual stopping place of the car, it was the entire width of Fremont street, plus 15 feet from the point where the rear end of the car usually stopped.

The plaintiff testified that after the conductor gave the signal to stop the car he took a seat in the rear of the car with a lady passenger; that plaintiff walked to the rear platform of the car, and stood there, holding an upright stanchion with one hand and the handhold of the rear seat with the other. While so standing on the rear platform the car came to a stop; that she did not attempt to alight, but that the car suddenly started forward with a jerk that threw her from the platform; that she alighted on the stone pavement on her head, and was rendered unconscious. Jefferson Owens, a boy of 10 years, was watching the car from the window of his residence, opposite the scene of the accident. He saw the plaintiff fall from the car, and noticed at the time that the conductor was seated at the time, talking to a lady passenger; that the car was slowing down on the hill from 20 miles per hour to 10; that at 10 miles the car either suddenly accelerated, or decreased its speed 2 miles per hour (he testified both ways) with a jerk that

threw plaintiff from the platform to the pavement. The conductor was in France with the A. E. F. and his testimony could not be secured. The only other witness who saw the accident testified that the plaintiff walked down the steps from the rear platform, and either stepped off the car backwards or fell off from the lower step while the car was still in motion; that there was no jerk or lurch or unusual motion of the car. Ten witnesses called by the defendant testified that there was no jerk or lurch of the car, and that the car did not stop before reaching its usual stopping place.

[1, 2] Before passing to a consideration of the main points of the case, one or two preliminary matters may be briefly disposed of. The respondent claims that the plaintiff alleges negligence and carelessness in the operation of the car, and that the answer by failure to deny this allegation, admitted the same. The plaintiff is in error in that regard. As already stated, the complaint specifically counts on the negligent starting of the car, after stopping, and this allegation is specifically denied. The respondent also claims that by reason of the fact that the defendant raised the issue of contributory negligence, its own negligence was thereby admitted. In the first count of the answer, negligence was specifically denied. The second count alleges the contributory negligence of the plaintiff and by failure to deny its own negligence in that count, thereby, for the purpose of that count, admitted negligence. The defendant had a right to make inconsistent defenses and did so.

The evidence in the case was conflicting, and would have justified the jury in the conclusion that the car never stopped until it had passed beyond the point where the plaintiff was thrown to the pavement; that the car stopped at the point where plaintiff was thrown to the pavement, and suddenly started with a jerk, thereby causing her fall; that the plaintiff heedlessly attempted to alight while the car was moving with considerable speed and fell, either because she heedlessly walked off the car backward, or fell off while attempting to alight, or was thrown off by a sudden jerk or lurch of the car while she was on its steps, attempting to alight, or while standing on the platform, either holding on with both hands, as she testified, or while standing without holding on; that at the time of the accident the conductor was forward in the car; or that at the time of the injury he was seated, engaged in conversation with a lady passenger.

[3] The car was a "pay-as-you-enter" car and the usual station of the conductor in such a car is at the rear entrance, where passengers enter the car and from which some of them make their exit, others going to the forward exit. In this state of the evidence the court gave the following instruction:

"You are further instructed that if you find from the facts in this case that the conductor was not attending to his duties, in this, that he had knowledge that this plaintiff was about to alight, and that said place was a dangerous place, in this, that the car was traveling at a fast rate of speed, and would necessarily give a lurch or jerk upon reaching Fremont street, then and in this case I charge you that the acts of the conductor, consisting in his failure to be at his post, constitutes negligence on the part of this defendant, and in that case, if you so find, you are instructed to bring in a verdict for this plaintiff."

Appellant contends that this instruction should not have been given, for the reason that there is no issue in the case as to negligence arising from the position of the conductor; that it instructs the jury upon a question of fact; and that it is prejudicially erroneous because it fails to take into account the alleged contributory negligence of the plaintiff and also the fact that the negligence of the conductor, if any, must be the proximate cause of the injury in order to justify recovery based upon such negligence. Each of the points is well taken. The instruction advances the proposition that—

If the conductor knew that the plaintiff was about to alight, and that the alighting place was dangerous because the car was traveling at a fast rate of speed and would necessarily give a lurch upon reaching Fremont street, and was not in his place, "then and in this case I charge you that the acts of the conductor * * * constitutes negligence, * * * and in that case, if you so find, you are instructed to bring in a verdict for this plaintiff."

The instruction thus assumes as a matter of law that it is the duty of the conductor under such circumstances to be at a certain place at the rear end of the car. This is purely a question of fact. The place of duty of the conductor depended upon the terms of his employment, while the duty of the defendant to the plaintiff arose out of the relationship of passenger and carrier. The law fixes no particular place for the performance of the duties of the employees of the carrier, it merely fixes the obligation of the carrier to the passenger. A conductor has various duties to perform. *Cary v. L. A. Ry. Co.*, 157 Cal. 599, 604, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329.

It is argued that in the "pay-as-you-enter" car it is the duty of the conductor to be at the rear end of the car and that decisions recognizing the fact that the conductor might be called to other parts of the car, such as *Cary v. L. A. Ry. Co.*, *supra*, are not applicable for that reason. This contention merely emphasizes the vice of the instruction, for it concedes that, in the old-fashioned car, where the conductor went about the car collecting fares, his position might be at any point in the car where his duties called him, but that in the "pay-as-you-enter" car, he

must remain upon the rear platform, and from this it is apparent that the place of duty of a conductor varies with different circumstances; in other words, it is a question of fact and not of law. The instruction is also erroneous because it entirely overlooks the principle that the negligence must be a proximate cause of the injury in order to justify recovery. This is manifest from the fact that the lurch or jerk referred to in the instruction is the necessary lurch or jerk of the car upon reaching Fremont street. According to some of the witnesses, in this case the plaintiff was thrown to the ground 75 feet before reaching Fremont street, and thus the fact that the conductor had reason to anticipate such a jerk at Fremont, if it be a fact, would have nothing whatever to do with the injuries to the plaintiff, if she in fact was thrown from the car before the point indicated was reached, for, in that view of the case, the jerk or lurch that caused the accident was not the one the conductor had reason to anticipate, and hence his conduct could not be the proximate cause of the accident. If we accept the testimony of the plaintiff herself, the instruction has no application to the facts, for the instruction is predicated upon a sudden jerk necessarily resulting from the descent of the hill at a fast speed, while her evidence involves a jerk upon starting from a standstill. If we accept the testimony of her only other witness to the accident, the boy of 10 years, the instruction has no applicability, because the jerk was caused by the increase or decrease of the speed at 10 miles per hour, which the jury could have hardly considered "fast" as the car had been running 20 miles per hour, according to this witness. If we accept the testimony of the defendant's sole witness to the accident, there was no jerk or lurch of the car, and the plaintiff was on the lower step. On any of these theories as to the injury to the plaintiff, we fail to see how it could be said that the position of the conductor was a proximate cause of the injury. According to the plaintiff and her witness, the proximate cause of her fall was a sudden and unexpected jerk of the car, with which the position of the conductor had nothing whatever to do, and the instruction introduced an entirely false quantity. We are not considering, let it be observed, what the duty of the conductor or of the defendant was with relation to a usual and expected lurch or jerk of the car; we are merely illustrating the fact that his position could not be the proximate cause of the injury. If there was negligence in failing to warn the plaintiff of such a usual and anticipated shock as described in the instruction, it was not alleged, or counted upon by plaintiff, and such contention is wholly at variance with her complaint and testimony. The proximate cause of the injury would be the shock or jar in any such an event, and not the position of the conductor. The instruction then

is faulty, not only because it permitted the jury to find a verdict upon conduct of the conductor which could not be a proximate cause of the injury, but also because it in effect required them to find a verdict for the plaintiff if she was injured by a jerk or lurch of the car, necessarily incident to its operation over the intersection of First street at fast speed, and if the conductor was not in his place.

[4] The respondent justifies the giving of the instruction for the reason that, while such negligence is not specifically alleged, it is claimed that the complaint alleges negligence in general terms, and that evidence was given as to the whereabouts of the conductor. The complaint, as already stated, counts upon the negligence of the company in suddenly starting the car with a jerk while the plaintiff was alighting. There is no general allegation of negligence, and evidence of the whereabouts of the conductor was introduced by the plaintiff over the defendant's objections. However that may be, the instruction was so erroneous and prejudicial that it should not have been given in any event. Respondent's contention that this instruction was cured because of other instructions on the subject of proximate cause and contributory negligence cannot be maintained. The jury were elsewhere instructed, at defendant's request, that unless the plaintiff proved the negligence of the railroad company, and that such negligence proximately contributed to the injuries sustained, there could be no recovery; that the defendant was not responsible for the negligence of its employees unless it contributed directly or proximately to the injuries of the plaintiff; that, if the plaintiff voluntarily undertook to step from the car while it was in motion and before it reached its usual stopping place, and fell as a direct and proximate result of so attempting to leave the car, plaintiff could not recover.

[5] The difficulty is that when the court specifically instructed the jury that in a certain state of facts they must bring in a verdict for the plaintiff, the jury has the right to assume that the court in that instance is determining as a matter of law that such negligence was the proximate cause of the injury, and that there was no contributory negligence. Furthermore, as already pointed out, the position of the conductor was not in any possible view of facts a proximate cause of plaintiff's injuries. The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to a verdict. *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184, 118 Pac. 700, citing *Killelea v. Cal., etc., Co.*, 140 Cal. 602, 74 Pac. 157.

[6] Appellant assigns as error the giving of instruction No. 4, as follows:

"The court instructs the jury that the defendant Los Angeles Railway Corporation may be justified under certain circumstances in running its cars at a very fast, or the fastest rate of speed, while under other circumstances to run its cars at a high rate of speed might be negligence. If you find in this case that the defendant company operated its car at such a rate of speed while approaching West First and Fremont streets, and that said speed contributed to or was the proximate cause of this accident, then I charge you that your verdict in this case shall be for the plaintiff."

The instruction is ambiguous because it does not appear therefrom what rate of speed was considered by the court in the last sentence of the instruction. The jury were told in the first sentence of the instruction that the defendant might be justified in running its cars at a very fast or the fastest rate of speed and under other circumstances that a high rate of speed might be negligent. Three rates of speed are dealt with in this sentence, "very fast," the "fastest rate," and a "high" rate. The first two might be justified and the last negligent. The instruction is plainly susceptible of the construction that if the defendant's car was approaching Fremont street at justifiable rate of speed, and that such speed contributed to or was the proximate cause of the accident, the verdict should be for the plaintiff, which would be clearly erroneous. Assuming, however, that the speed referred to in the last sentence is the high rate of speed which "might be negligence," the concluding clause of the sentence should be interpreted as follows:

"If you find in this case that the defendant company operated its car at such a rate of speed (as might be negligent) while approaching West First street and Fremont street, and said speed contributed to or was the proximate cause of the accident, then I charge you that your verdict in this case shall be for the plaintiff."

This instruction is still erroneous for several reasons. In the first place, it allows the jury to bring in a verdict for the plaintiff if the rate of speed "might be negligent." In order that the plaintiff should recover because of the speed alone, it is essential that the speed should have been negligent under the circumstances. Furthermore, the complaint does not count upon a high and excessive rate of speed as a basis of recovery. On the contrary, it counts on the shock due to a sudden starting of the car. A more serious objection to the instruction, if possible, is the fact that the jury were instructed that if the speed contributed to or was the proximate cause of the accident, their verdict should be for the plaintiff. The court may have intended to have used the words "contributed to" and "proximately caused" as synonymous. But, as pointed out by the appel-

lant, a certain amount of lurching and jerking of a car may be attendant upon the speed at which it is usually operated, and such lurching and jerking is to be anticipated by the passenger. Under this instruction, the defendant would be liable even though the lurching and jerking of the car was usual upon the customary motion of the car. The instruction also ignores the question of contributory negligence by the plaintiff justifying a verdict if defendant's conduct contributed to the accident. The jury is specifically instructed that if the high rate of speed of the defendant might have been negligence and contributed to her injuries she was entitled to a verdict. The instruction was erroneous.

[7] It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached.

Because of the foregoing erroneous instructions, it will be necessary to reverse the case, and in view of a new trial it is proper to pass upon some of the other questions presented by the record.

The appellant complains of the refusal to give certain instructions offered on its behalf, one to the effect that if the conductor was seated in the rear open section of the car it was not negligence on his part and could not be made a basis of a verdict against the defendant. Another, that if the conductor was not in his usual position, but was seated and talking to a lady, it could not be considered as negligence, and could not be considered except in determining how the accident occurred. In view of the discussion of the subject herein, it is sufficient to say that the refusal of these instructions emphasizes the error in instruction No. 3.

Instruction C, asked by the defendant, was a correct exposition of the doctrine of proximate cause as applied to the seating of the conductor and the accident; it also pointed out that the plaintiff must be free from contributory negligence in order to recover. Respondent points out no error in this instruction and we observe none. It is, however,

unnecessary to say more than that this refusal emphasizes the error in giving instruction No. 3, in which these two elements of proximate cause and contributory negligence are omitted. The court did not specifically point out the necessary connection between the misconduct of the conductor and the accident, when requested to do so by the defendant, and it is not likely that the jury would have been more able or willing to do so, under a very general direction as to the necessary causal connection between the accident and the conduct of the conductor.

[8] Evidence as to the previous conduct and habit of the conductor as to sitting down and talking to passengers was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his habit was not competent (*Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 732, 733, 164 Pac. 398; *Steinberger v. Cal. Elec., etc., Co.*, 176 Cal. 386, 168 Pac. 570) to establish the condition at the time of the accident. We need not here consider the effect of the exception to this general rule considered in *Wallis v. S. P. R. R. Co.*, 195 Pac. 408, where circumstantial evidence only is relied upon, and there are no eyewitnesses.

[9] On cross-examination, the boy, Jefferson Owens, having testified on direct examination that the conductor was seated talking with a woman passenger at the time of the accident, was asked concerning his statement in writing theretofore made to the defendant's representative. The question and answer in the statement are as follows:

"Where was the conductor at the time of the accident? Answer: When the lady fell he ran to the door."

After his attention was called thereto, he was asked:

"Why didn't you say there that you saw him sitting talking to her?"

The objection offered and sustained was as follows:

"That is objected to as asking this witness, a youth of tender years, for a conclusion that a grown person could not make."

Cross-examination as to conflicting statements is one of the most important rights of the adverse party. If it was true that the boy could not explain or understand the question, he should have been permitted to say so in response to the question, and thus the jury could weigh and consider his degree of intelligence.

Judgment reversed.

We concur: SHURTLEFF, J.; LENNON, J.; SLOANE, J.

54 Cal. App. 191

CAPUTO v. FUSCO. (Civ. 3883.)

(District Court of Appeal, First District, Division 1. California. Sept. 10, 1921.)

1. Husband and wife ⇨270(7)—Presumption that note to wife was separate property rebutted by allegation that it was community property.

From the pleaded fact in complaint, in action by husband on note, that the note was executed to the wife of plaintiff, merely a disputable presumption arose that it was her separate property, and a further allegation that it was in fact community property rebutted the presumption and rendered the complaint immune from attack on the general ground of want of facts to state a cause of action.

2. Husband and wife ⇨270(1)—Wife not proper party plaintiff in action to recover community property.

Wife was not proper party plaintiff in an action on a note executed to her in return for money loaned from community property, and action was properly brought by husband alone.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Giovanni Caputo against F. S. Fusco. Judgment for plaintiff, and defendant appeals. Affirmed.

Carl A. Day, and Devoto, Richardson & Devoto, all of San Francisco, for appellant. Hoefler, Cook & Snyder, and William E. Billings, all of San Francisco, for respondent.

WASTE, P. J. The plaintiff in his own name brought an ordinary action to recover upon a promissory note made, executed, and delivered to his wife, Elisa Caputo, by the defendant, in the sum of \$1,500. It was alleged that the money so loaned to the defendant was the community property of the plaintiff and his said wife, and that the promissory note and the money due thereon was community property. Defendant filed no demurrer to the complaint. He interposed only a general denial by way of answer, and made no further appearance. Judgment was accordingly entered in favor of the plaintiff as prayed for.

[1, 2] Defendant now appeals to this court, and seeks a reversal of the judgment on the sole ground that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff, for the reason that the money having been loaned by Elisa Caputo, and the promissory note being an instrument in writing, the presumption of law is that the money is her separate property. From the pleaded fact, however, that the note was executed to the wife of plaintiff, merely a disputable presumption arose that it was her separate property. *Estate of Young*, 123 Cal. 337, 346, 55 Pac. 1011; *Volquards v.*

Myers, 23 Cal. App. 500, 504, 138 Pac. 963. The further allegation that it was in fact community property rebutted the presumption, and rendered the complaint immune from attack on the general ground of want of facts to state a cause of action. *Elisa Caputo*, the wife, was not a proper party plaintiff in the action to recover the community property. *Spreckels v. Spreckels*, 116 Cal. 339, 349, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *In re Burdick*, 112 Cal. 387, 393, 44 Pac. 734.

The appeal appears to have been taken for the purpose of vexation and delay. The judgment is affirmed, and it is ordered that plaintiff recover of the defendant, as part of the costs of appeal, the sum of \$100.

We concur: **KERRIGAN, J.; RICHARDS, J.**

54 Cal. App. 207

SPINDLER v. WITTEMANN CO. (Civ. 3904.)

(District Court of Appeal, First District, Division 1, California. Sept. 13, 1921.)

Judgment ⇨256(6)—Findings held not to support judgment.

Where plaintiff claimed that commissions earned amounted to \$1,192.50, and that he agreed with defendant to reduction of \$365, leaving net balance of \$827.50, that defendant paid \$285 and that net balance unpaid was sum of \$540.42, findings of court that allegations of complaint "are true except that defendant paid to plaintiff on account of said commissions \$300 * * * \$350 * * * and \$150, * * * and not \$285, as stated in said complaint, and that there is due and owing plaintiff only the sum of \$392.40," would not support a judgment for the latter amount.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Charles Spindler against the Wittemann Company. Judgment for plaintiff, and defendant appeals. Reversed.

Willard P. Smith, of San Francisco, for appellant.

Charles L. Brown, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of \$392.40 as the balance due for services rendered by the plaintiff to the defendant in the matter of the sale of certain machinery. The appeal is upon the judgment roll alone, and the appellant's sole contention is that the findings do not justify the judgment for the sum declared therein to be the balance due, but only for a much smaller sum.

The plaintiff alleged in his complaint that he had performed certain specified services for the defendant, which had resulted in the sale of the machinery in question for the sum of \$7,950, upon which sale price the defendant had promised to pay plaintiff a commission of 15 per cent.; that the commission thus earned amounted to \$1,192.50; "that plaintiff agreed with the defendant to a deduction of \$365 from said commission, leaving the net balance thereon the sum of \$827.50; that the defendant has paid this plaintiff on account thereof the sum of \$285; and that the net balance of said commission unpaid and due and owing from the defendant to the plaintiff is the sum of \$540.42, together with interest at the rate of 7 per cent. per annum from December 1, 1918."

There is another cause of action stated in the second count of the complaint, with which we are not concerned upon this appeal, the judgment having been as to that account in the defendant's favor.

The answer of the defendant as to the first count of the complaint, while admitting the sale of the machinery by plaintiff for defendant, denied its promise to pay a commission of 15 per cent. upon the selling price of the machinery so sold or any greater commission than 10 per cent. thereon, all of which it alleges has been fully paid. It makes no reference in its answer to the plaintiff's averment of an agreed reduction in the amount of said commission.

Upon the trial of the cause the court made its findings as to the first count in the plaintiff's complaint as follows:

"That paragraphs I, II, III, and IV of the first cause of action set out in the second amended complaint are true except that defendant paid to plaintiff on account of said commissions \$300 on July 31, 1918, \$350 on December 16, 1918, and \$150 on December 28, 1918, and not \$285, as stated in said complaint herein, and that there is due and owing plaintiff only the sum of \$392.40, with interest thereon from December 1, 1918."

Judgment was accordingly rendered for the sum of \$392.40.

Upon this appeal the appellant contends that upon the face of the foregoing finding it appears that there could only be due to the plaintiff the sum of \$27.40. The respondent makes no satisfactory reply to this contention. The plaintiff having alleged an agreed reduction of \$365 from the amount of the gross commission which he claimed, and the answer by its silence having admitted this agreement, and the trial court having found that the plaintiff's allegation as to the gross amount of the commission due and as to the said agreed reduction thereof in said sum, leaving a balance of \$27.50 due thereon, was true; and having followed this find-

ing with the further finding of three specific payments made by the defendant to the plaintiff, to wit, \$300 on July 31, 1918, \$350 on December 16, 1918, and \$150 on December 28, 1918, said payments aggregating the sum of \$800.10, it follows inescapably that there could only have remained due to plaintiff the sum of \$27.40, instead of the sum of \$392.40, for which judgment was given.

It follows that the judgment must be reversed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 198

MALTER v. NATIONAL FIRE INS. CO.
OF HARTFORD et al. (Civ. 3954.)

(District Court of Appeal, First District, Division 2, California. Sept. 12, 1921.)

1. Insurance ☞665(3)—Evidence held to warrant finding of ownership of property under fire policy.

In an action on a fire policy, evidence held to warrant a finding that plaintiff was the sole and unconditional owner of the property specified in the policy.

2. Appeal and error ☞1057(2)—Exclusion of evidence held harmless, if error.

In an action on a fire policy, any error of the court in excluding statement made by plaintiff to assessor concerning ownership of property was not prejudicial, where the statement would not have contradicted in any way the testimony introduced, and plaintiff admitted making such statement.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by George H. Malter against the National Fire Insurance Company of Hartford and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Miller, Thornton, Miller & Watt and Miller, Thornton & Miller, all of San Francisco, for appellants.

Short, Lindsay & Woolley and F. W. Docker, all of Fresno (C. O. Hansen, of Fresno, of counsel), for respondent.

LANGDON, P. J. This action is to recover from each of the defendants \$2,000 on fire insurance policies issued and delivered by them, covering certain personal property and insuring plaintiff against loss by fire. The case was tried by the court, without a jury. Judgment was for the plaintiff against both defendants.

[1] The first ground for appeal urged by the appellants is the insufficiency of the evidence to justify the findings of the court. The finding which is particularly attacked is

the one wherein the court finds that the plaintiff was, at the time of the insurance and delivery of the policies, and at the time of the fire, the sole and unconditional owner of the property specified in the policies. The testimony of the plaintiff on this point amply supports the finding. There was also other testimony which would raise a presumption of ownership in the plaintiff. The only evidence tending to prove the contrary is the testimony of a deputy tax assessor who testified that the plaintiff had signed a tax return in 1917 in which the wines and brandies and wine-making apparatus covered by the insurance policies and also other property, real and personal, were listed in the names of Pacific Vineyard Company and Mabel P. Malter. Plaintiff admitted signing the tax statement, in which the property was so listed, and explained that his vineyard and wines and manufacturing apparatus had at one time been transferred to the Pacific Vineyard Company merely for convenience; that that he had always been the real owner; that the stock of that company was owned by him, and that he had always paid the taxes on the property, although for a time the record title had been in this company; that it was no longer in the company, and that he had neglected to have the name changed on the assessment list, which list was made out by the assessor from previous records. There was no other testimony tending to disprove plaintiff's ownership in the property. We are of the opinion that the court was clearly justified in finding for the plaintiff on this issue.

[2] The only other objection urged by appellants is that the court erred in excluding the statement made by the plaintiff to the assessor in 1917. Granted, for the purposes of this opinion, that the statement should have been admitted in evidence, nevertheless, its exclusion therefrom does not under the facts of this case, constitute prejudicial error. The record contains the testimony of the tax collector regarding this statement, and also the admissions of the plaintiff that he did make it and his explanation thereof, and these matters were before the trial judge in making his findings. An examination of the statement offered in evidence discloses that it covers certain wines and brandies, which were a part of the property covered by the policies, and also musical instruments, farming utensils, wagons and other vehicles, horses and cows, poultry, sewing machines, automobile and other items. The statement was headed "Pacific Vineyard Co. and Mabel P. Malter." At the bottom of the statement the plaintiff signed the following oath:

"I do swear that I am a resident of the county of Fresno, that the above list contains a full and correct statement of all property subject to taxation, which I, or any firm of which I am

a member, * * * owned, claimed, possessed or controlled," etc.

If the statement had been admitted in evidence, it would not have contradicted, in any way, the testimony of Mr. Malter already in the record regarding the assessment of the property. He stated that the vineyard and liquors had for a time been in the name of Pacific Vineyard Company and that he had neglected to have the assessment record changed, but that he had always paid the taxes on this property personally and had paid them for the year covered by this assessment list.

With the other property listed, which was not covered by the policies, we are not concerned, and it is immaterial whether this belonged to Mabel P. Malter or Pacific Vineyard Company or the plaintiff.

The admission in evidence of the assessment list signed by plaintiff would have added nothing to defendants' case; its execution and contents were admitted by the plaintiff and were testified to by the deputy tax collector and these matters were therefore before the court. It was not conclusive as to ownership, and plaintiff contradicted it and explained the reason for the mistake. Under the circumstances, its exclusion even though conceded to be erroneous, would not warrant a reversal of this judgment which is clearly a proper and just one upon the entire record before this court.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

54 Cal. App. 204

RIEDER v. HOGAN CO. et al. (Civ. No. 3120.)

(District Court of Appeal, Second District, Division 2, California. Sept. 12, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Principal and agent 23(5)—Evidence held to show an ostensible agency.

Evidence that S. had been authorized or permitted to deal with P., the agent of plaintiff, in matters of the same character, and the knowledge of P. that S. held an important position of trust with defendant, supports a finding that there was an ostensible agency, under Civ. Code, § 2300.

2. Appeal and error 931(1)—Findings presumed supported.

The Court of Appeals, in the absence of a showing, is bound to indulge that assumption which leads to a support of contested findings as to ostensible agency.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Lester Rieder against the Hogan Company and another. Judgment for plain-

tiff, and the defendant named appeals. Affirmed.

Flint & Mackay, of Los Angeles, for appellant.

Oliver O. Clark, Claud B. Andrews, and James Roche, all of Los Angeles, for respondent.

WORKS, J. This is an action for the recovery of the purchase price paid by plaintiff for five automobile lease or sales contracts. Plaintiff had judgment for the amount from defendant the Hogan Company, and that defendant appeals.

[1, 2] The contracts were purchased for respondent by the firm of Porter & Brown, who were his agents in the deal, the negotiations leading up to the sale having been conducted by Porter, a member of the firm. Porter made the purchase from defendant Sears. In fastening liability upon appellant the trial court found that Sears, in making the sale, acted as the ostensible agent of appellant. The result of the appeal depends on the question whether this finding is supported by the evidence, for appellant contends that it is not. At the time of the sale of the contracts Sears had been for some time the manager of an insurance department which was operated by appellant, and Porter knew that he was employed by appellant in that capacity. We must assume, from the very designation given to this position, that Sears occupied a somewhat important place with appellant, and Porter was justified in so regarding him. Laying aside, for the moment, the question of his authority to make sale of the five contracts, appellant held Sears out to the world as a person worthy of trust, for appellant itself had placed him and had retained him in a position of trust. That being so, no more than slight additional evidence would be necessary to justify Porter in assuming that Sears had authority to sell the contract. What additional evidence was there upon which Porter might have relied, as entitling him to assume that Sears had actual authority to sell? At the same time, what evidence is there to which we may look for a support for the finding that Sears was the ostensible agent of appellant in making the sale? Undoubtedly, evidence leading Porter justly to assume the existence in Sears of an actual authority will at the same time warrant our upholding the finding that he was clothed with an ostensible authority. Civ. Code, § 2300. Sears, after having testified concerning the sale of the five contracts to Porter, went on to say, "I had sold other contracts to Porter, acting as manager of the insurance department of the Hogan Company." This statement, especially when taken in connection with Porter's knowledge that Sears held an important posi-

tion of trust with appellant, appears to us to afford a sufficient support for the finding that there was an ostensible agency. It was evident to the trial court that appellant had authorized, or at least had permitted, Sears to deal with Porter in and about matters which were of the same character with the transaction out of which this litigation arose. Appellant asserts, however, that this evidence is not "binding" upon it for the reason that it "appears from the evidence, and the findings are to the effect, that Sears purchased and sold many contracts without the knowledge of appellant." This language is followed by no reference to any part of the evidence, but attention is directed to one of the findings. It is true that the trial court did find as stated, but it is also true that immediately preceding that finding it was found that Sears had been employed by appellant for about three years at the time of the sale of the five contracts, that during most of that time he had been the manager of appellant's insurance department, and that while acting in that capacity and with the knowledge of appellant he had bought and sold for appellant numerous automobile sales contracts. There is no means pointed out to us whereby we may ascertain whether the earlier deals between Sears and Porter were among those mentioned in the findings as having transpired without the knowledge of appellant, or whether they were among the number designated by the findings as having occurred with appellant's knowledge. We are bound, of course, in such a situation, to indulge the assumption which leads to a support of the contested finding as to ostensible agency; that is, that the earlier sales to Porter were among those declared by the trial court to have been made with the knowledge of appellant. Under these conditions it appears to us that the finding of ostensible agency is supported by the evidence. There are other portions of the evidence which lend additional support to the finding, but it is not necessary to refer to them.

Appellant contends that error was committed by the trial court in several instances in rulings upon objections to the admissibility of evidence. In view of the conclusion we have reached upon the question above discussed, we find it unnecessary to consider the points mentioned, as nearly all of them are connected with that question. If it be granted, which we do not decide, that appellant's claims as to the errors of law are well founded, it still appears to us that none of the alleged errors was prejudicial.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 275

DETELS et al. v. LAWRENCE et al. (Civ. 3956.)

(District Court of Appeal, First District, Division 2, California. Sept. 20, 1921.)

1. Appeal and error ⇨870(3)—Order transferring cause not reviewable on appeal from order dismissing.

An order transferring a cause from one superior court to another, being an appealable order under Code Civ. Proc. § 963, and no appeal being taken, the nature of the action and the propriety of its transfer are not subject to consideration on appeal from an order of the court to which it was transferred dismissing it for failure to pay transfer fees.

2. Venue ⇨80—Suit subject to dismissal for failure to pay transfer fees within one year.

Code Civ. Proc. § 581b, as to payment of transfer fees within one year after the transfer of a cause, is mandatory, and a suit is properly dismissed for such failure.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by John Detels and others against Mabel Lawrence and others. From an order dismissing the action, plaintiffs appeal. Affirmed.

L. O. Pistolesi, of San Francisco, for appellants.

S. Laz Lansburgh and S. Joseph Theisen, both of San Francisco, for respondents.

LANGDON, P. J. This is an appeal from an order of the superior court of Marin county dismissing the action on motion of defendants under the provisions of section 581b, Code of Civil Procedure.

[1, 2] The action was originally commenced in the city and county of San Francisco, from which county it was transferred to the court in Marin county. The transfer was made upon the motion of the defendants, based upon their residence in the county of Marin. Appellants admit that they did not pay the fees required by section 581b, Code of Civil Procedure, for more than one year after the transfer of the action. Their position upon appeal is that the order of the superior court of the city and county of San Francisco transferring said action was erroneous, for the reason that the action involves title to real property part of which is situated in the city and county of San Francisco. The complaint also prays for personal judgments against certain defendants, residents of Marin county. However, the nature of the action and the propriety of its transfer are not matters for our consideration upon this appeal. The order transferring the cause was an appealable order. Code Civ. Proc. § 963. No appeal was taken from this order, and the same has become final. The superior court of Marin county acted upon this final

determination, and properly dismissed the action under the provision of the Code section above referred to. The provisions of said section are mandatory. *Davis v. Superior Court (Sup.)* 195 Pac. 390.

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

54 Cal. App. 179

REED v. CORNELL et al. (Civ. 3803.)

(District Court of Appeal, First District, Division 1, California. Sept. 8, 1921. Hearing Denied by Supreme Court Nov. 7, 1921.)

1. Accord and satisfaction ⇨25(1)—Must be specially pleaded.

An agreement of accord and satisfaction must be specially pleaded.

2. Pleading ⇨409(4)—Plaintiff waived defendant's failure to plead accord and satisfaction by not objecting to evidence of settlement.

Where plaintiff, in an action to recover possession of a piano, payment for which had not been made as required by defendant's contract with plaintiff's assignor, interposed no objection to, and made no motion to strike out, testimony as to a settlement with such assignor at less than the agreed price, he waived defendant's failure to specially plead an accord and satisfaction.

3. Trial ⇨404(5)—Where court found defendant not indebted for article sold to her, plaintiff could not recover possession, whether full contract price paid or less amount accepted in payment of balance.

In an action to recover possession of a piano, payment for which had not been made as required by defendant's contract with plaintiff's assignor, where the trial court found substantially in the language of the pleadings, which alleged defendant's indebtedness and title to and ownership of the instrument in plaintiff, that nothing was due and unpaid from defendant, and that title was in her, it was immaterial whether defendant paid in full according to the terms of the contract or settled with plaintiff's assignor for a less amount, plaintiff's right of recovery depending on the existence of an indebtedness.

4. Appeal and error ⇨1012(1)—Weakness of evidence for consideration of trial court.

Alleged weakness and lack of convincing force of evidence is primarily for the consideration of the trial court.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by W. W. Reed against Ada A. Cornell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Werner Olschewski and Frederick Olschewski, both of San Francisco, for appellant.

Marcus L. Samuels, of San Francisco, for respondents.

WASTE, P. J. The plaintiff, as assignee, brought this action to recover the possession of a certain piano. He alleged that the defendant had entered into an agreement with the Heine Piano Company, plaintiff's assignor, for the purchase of the instrument; that payment had not been made as required by the contract; that by reason of the violation of the terms of the agreement, plaintiff was entitled to a return of the piano. The defendant denied any indebtedness, and alleged that the piano had been fully paid for, and asserted title in herself. Judgment was entered for the defendant, from which the plaintiff has appealed.

The contract for the sale of the piano provided for an initial payment of \$40 upon the signing of the agreement, and monthly payments of \$10 each, until the whole amount of \$458, the purchase price, together with interest, had been paid. According to the plaintiff's theory the defendant was in arrears \$147.63, plus some additional interest, at the time of the trial. The defendant testified that she made payments on the contract until the sum of \$185 had been paid. Becoming tired of making installment payments, she asked to be allowed to settle the contract in full. Her proposition was accepted, and she paid the sum of \$200 in cash, and received a receipt for full payment of the contract. This receipt she subsequently lost when moving from one house to another. The account books of the Heine Piano Company showed the payments testified to by the defendant, and what purported to be a subsequent additional payment of \$50, made in the form of a Liberty Bond. This item was repudiated by the defendant as not having been made.

[1, 2] Appellant's major contention relates to the proof adduced in support of the defendant's case. He first contends that the evidence does not prove payment in full of the contract, but an accord and satisfaction, which, not having been specially pleaded, could not operate as a defense to the action.

The well-settled rules of pleading in this state require an agreement of accord and satisfaction to be specially pleaded, before it can be availed of as a defense, but the appellant is not in position to urge the point for the first time in this court on appeal from the judgment. The record discloses

that he interposed no objection to the evidence introduced on the part of the defendant as to the real nature of the settlement with the Heine Piano Company, and made no motion to strike out the testimony when apprised of its purport and effect. So far, therefore, as relates to the introduction of the testimony, the appellant must be held to have waived any advantage he might have gained if the timely objection had been made.

[3] The appellant raises the same objection in another way. He attacks the findings as not being supported by the evidence, his point being that only an accord and satisfaction was proved, and not that the piano was "fully paid for," as found by the trial court. Thus stated, the contention is correct, but the court found other facts. The appellant based his right to recover the piano upon an alleged indebtedness of the defendant, and title to, and ownership of the instrument in himself, all of which was denied by the defendant. The trial court found substantially in the language of the pleadings, as the ultimate facts, that nothing was due and unpaid from the defendant, and that title to the piano was in her. These facts were amply sufficient to warrant its conclusion that the defendant was the lawful owner and holder of the piano, and entitled to its possession. Whether the defendant paid in full for the piano according to the terms of the contract, or settled with the Heine Piano Company for a less amount than it would have been entitled to under that agreement, and received a receipt and discharge in full, does not matter. The ultimate fact was the indebtedness, if any, due from the defendant to the plaintiff upon the existence of which depended the right of the plaintiff to recover. This was determined and found not to exist, upon the evidence submitted to the court. *Jacobs v. Ludemann*, 137 Cal. 176, 182, 69 Pac. 965; *Tower v. Wilson*, 188 Pac. 87. The appellant was content to submit the matter upon evidence received without any objection on his part, and under the circumstances we must hold that the findings properly concluded the whole controversy.

[4] Appellant urges upon our attention the alleged weakness and lack of convincing force of the evidence for the defendant, but that was a matter primarily for the consideration of the trial court. We find no abuse of its power in that regard.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(54 Cal. App. 201)

PEOPLE v. VITRO. (Cr. 558.)

(District Court of Appeal, Third District, California. Sept. 12, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Seduction ☞45—Evidence held to show previous chaste character.

In a prosecution for seduction under promise of marriage of an unmarried female of previous chaste character, held that there was evidence tending to show previous chaste character.

2. Seduction ☞40—Evidence of subsequent acts admissible.

In a prosecution for seduction under promise of marriage of an unmarried female of previous chaste character, court properly permitted the prosecution to prove that defendant indulged in frequent acts of sexual intercourse with the prosecutrix after the commission of the act charged, and that she gave birth to a child.

3. Seduction ☞50(4)—Court did not err in modifying requested instruction.

In a prosecution for seduction under promise of marriage of an unmarried female of previous chaste character, where defendant requested the court to instruct that: "Illicit intercourse, permitted by a woman as a mere barter and trade for a promise of marriage, is not seduction. There must be the exercise of certain influence on her affections by reason of the promise. If, in order to obtain an agreement from the defendant, the prosecuting witness permitted him to have sexual intercourse with her, then there is no seduction, and the defendant should be acquitted"—court did not err in modifying the instruction by striking out the last sentence, which stated no rule of law not contained in the part given.

4. Criminal law ☞1160—Denial of new trial for newly discovered evidence contradicted by affidavit conclusive.

In a prosecution for seduction, where only evidence as to previous chastity was testimony of prosecutrix, and on motion for new trial defendant produced affidavit of third person that he had intercourse with prosecutrix prior to time of act charged, and affidavit of prosecutrix was introduced in denial, it was for the trial court to determine whether prosecutrix or the third person told the truth, and its determination, denying new trial, is conclusive on appeal.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Antone Vitro was convicted of seduction under promise of marriage, and appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from a judgment of conviction of the crime of seduction, under promise of marriage, of an unmarried female of previous chaste charac-

ter, and from the order denying his motion for a new trial.

[1] It is claimed that the evidence does not show that the prosecutrix was of previous chaste character. The prosecutrix gave her testimony through an interpreter and counsel, and the interpreter at times fell into the bad practice of putting questions and answers in the third person. The prosecutrix testified, "I had sexual intercourse with the defendant," stating the time and place, and that it was her first act of sexual intercourse with him. Thereafter the following testimony was given by her:

"Q. Why did she permit the defendant to have sexual intercourse with her during January, 1919?

"Mr. Maddux: '18.

"Q. 1918. A. Promised to marry her.

"Q. Had you ever had intercourse with any other person before that time? A. No, sir."

It is logically argued that the word "intercourse" does not necessarily mean "sexual intercourse," but, following as it does immediately after the use of the term "sexual intercourse" in the preceding question, there can be no doubt that the witness understood that "sexual intercourse" was meant.

[2] The court permitted the prosecution to prove, over the objection of the defendant, that he indulged in frequent acts of sexual intercourse with the prosecutrix after the commission of the act charged and up to February, 1920, and that she gave birth to a child October 8, 1920. It has so often been held that such evidence is admissible in the trial of a defendant on a charge of illicit sexual intercourse that citation of authorities would be superfluous.

[3] The defendant requested the court to give the following instruction:

"Illicit intercourse, permitted by a woman as a mere barter and trade for a promise of marriage, is not seduction. There must be the exercise of certain influence on her affections by reason of the promise. (If in order to obtain an agreement from the defendant, the prosecuting witness permitted him to have sexual intercourse with her, then there is no seduction, and the defendant should be acquitted.)"

The court modified the proposed instruction by striking out the part inclosed in parentheses, and gave it as so modified. The part stricken out states no rule of law not contained in the part given, and hence the modification was not error.

[4] On his motion for a new trial the defendant produced the affidavit of one Emanuel Teixeira to the effect that the affiant had sexual intercourse with the prosecuting witness in September, 1917, a few months prior to the time of the act charged by the information. In opposition to the motion the affidavit of the prosecutrix was introduced in which she denied that she ever had

sexual intercourse with Teixeira. The affidavits of defendant and his attorneys were introduced, stating that they had made diligent effort to obtain the facts in connection with the case, and that neither of them had learned of the facts stated in the affidavit of Teixeira until after the trial. The only evidence admitted at the trial on the issue of the previous chaste character of the prosecuting witness was her own testimony that she had never had intercourse with any other person prior to the act charged. It is thus apparent that the testimony of Teixeira, if worthy of belief, would be of vital importance in a retrial of the case.

But "a motion for a new trial upon the ground of newly discovered evidence has always been regarded by the courts with a great deal of suspicion and disfavor." *People v. Freeman*, 92 Cal. 366, 28 Pac. 264.

"The question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court." *People v. Oxnam*, 170 Cal. 215, 149 Pac. 167.

"It is well settled in this and many other states that not only may the facts of diligence and materiality be inquired into, but the truth of the evidence itself, or the truth of the facts as alleged, as well as the weight thereof and the credibility of the witnesses, may be contested by counter affidavits." *Haynes' New Trial and Appeal* (Rev. Ed.) p. 442.

"Upon the ground of newly discovered evidence it is sufficient to say that the affidavits offered in support thereof were fully contradicted by counter affidavits on the part of the prosecution, and for that reason the court below exercised a proper discretion in refusing to grant the motion." *People v. Fice*, 97 Cal. 460, 32 Pac. 532, *People v. Sing Yow*, 145 Cal. 6, 78 Pac. 235.

In the case of *People v. Byrne*, 160 Cal. 225, 116 Pac. 525, the court said:

"While a mere reading of the record in this case necessarily leaves one in grave doubt on the question of the defendant's guilt, there is certainly enough in the evidence to sustain the conclusion of the jury and trial judge who saw and heard the various witnesses, and who were in a much better position to determine the truth than a court that does not possess such an advantage. An apparently very strong showing was made for a new trial on the ground of newly discovered evidence, but in the light of the well-settled rules applicable in the consideration of appeals from orders of trial courts denying such motions, we do not see how it can properly be held that the trial court abused its discretion in denying the motion."

It was for the trial court to determine whether the prosecutrix or Teixeira told the truth relative to the facts stated in the latter's affidavit, and under the foregoing authorities that determination is conclusive on appeal.

The judgment and order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.

54 Cal. App. 236

SMITH et al. v. BACH et al. (Civ. 3645.)

(District Court of Appeal, Second District, Division 1, California, Sept. 14, 1921.)

1. Appeal and error $\S$ 673(3)—In view of record judgment held not shown to be res judicata.

It cannot be held on appeal that action of court in sustaining a demurrer to plaintiffs' second amended complaint in a former action was an adjudication of subject of litigation and a bar, where neither the second amended complaint in the former action nor the demurrer thereto is set forth in the record.

2. Money received $\S$ 14—Defendants held not jointly liable.

Where liability of defendants was not founded on contract upon which they were jointly liable, but upon an implied obligation of each for money had and received without consideration, one of the defendants was not liable for money received by the other.

3. Contracts $\S$ 139—Illegality of contract held not to prevent recovery of money paid by one not in pari delicto.

Where contract, pursuant to which money was paid by plaintiffs, was for the purchase of lots referred to as delineated upon an unrecorded map, and hence null and void, as declared by St. 1907, p. 290, plaintiffs are not estopped from maintaining an action for money had and received to recover the sum so paid by reason of their having had knowledge that the map was unrecorded; plaintiffs being comparatively innocent, and not in pari delicto.

4. Vendor and purchaser $\S$ 334(1)—Money paid on void contract recovered.

Where money was paid for lots referred to as delineated upon an unrecorded map, and the contract was null and void as declared by St. 1907, p. 290, no obligation was imposed upon defendants to convey the lots to plaintiffs, and hence money paid thereon was paid without consideration, and could be recovered as for money had and received.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara L. Smith and others against George J. Bach and John Borgh. From judgment in favor of Bach but against Borgh, the latter appeals. Affirmed.

Clifford C. Pease, of San Diego, for appellant.

F. G. Blood and Sweet, Stearns & Forward, all of San Diego, for respondents.

SHAW, J. Action in assumpsit. Upon a trial of the case first had, a nonsuit was

granted, followed by judgment against plaintiffs, which on appeal therefrom was reversed, to which decision (reported in [Sup.] 191 Pac. 14), we refer for a full statement of the facts upon which the action is founded.

Upon a retrial, judgment was rendered in favor of defendant Bach and for plaintiffs against Borgh, but for a less sum than the amount claimed by plaintiffs. Thereupon plaintiffs, insisting they were entitled to judgment against both defendants for the full sum of their claims, appealed. This judgment was affirmed. See 199 Pac. 1106.

[1] Borgh has likewise appealed from the judgment so rendered against him. Based upon the record presented, there is no merit in his contention that, by reason of the action of the court in sustaining a demurrer to plaintiffs' second amended complaint in a former action, an adjudication of the subject of litigation was had which constituted a bar to the bringing of a new suit to recover the amount claimed. Neither the second amended complaint in the former action nor the demurrer thereto is set forth in the record, without which we cannot say the subject of the litigation in the former action is the same as in this, nor that the complaints are identical. No attack is made upon the sufficiency of the complaint in the present action. Moreover, assuming the action of the court had and taken in the former suit to have been free from error, it may have been based upon defects in the complaint not affecting the merits; hence such ruling could not bar a new suit founded upon a complaint the sufficiency of which is conceded.

[2] As held in plaintiffs' appeal (reported in 199 Pac. 1106), the liability of defendants was not founded on contract upon which they were jointly liable, but upon an implied obligation of each for money had and received without consideration. Hence, in the absence of a joint liability, Bach was not liable for the money received by Borgh.

[3] The contract pursuant to which the money was paid by plaintiffs was for the purchase of certain lots referred to as delineated upon an unrecorded map, and hence, as declared by statute (see Stats. 1907, p. 290), it was null and void. Nevertheless, appellant insists that, as plaintiffs must be deemed to have had knowledge that the map was unrecorded prior to making the payments, they are estopped from maintaining an action to recover the sum so paid. In other words, appellant's claim is that parties by their acts may destroy and render nugatory the plain language of this prohibitory provision. The contention is wholly without merit. As said by the Supreme Court in discussing the question on the former appeal by plaintiffs (Smith v. Bach [Sup.] 191 Pac. 14):

"Where money has been paid in consideration of an executory contract which is illegal, the

party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money."

And in answer to appellant's claim that, conceding his violation of the statute (which act is declared a misdemeanor and punishable by fine and imprisonment), plaintiffs are in *pari delicto*, and hence should not assert claim to the money so paid, the court said:

"In such a case it is the duty of the court in furtherance of justice to aid one not in *pari delicto*, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require."

What is said in the decisions on the former appeals herein cited is determinative of other points made by appellant.

[4] Since the contract was null and void, it imposed no obligation upon defendants to convey the lots of land to plaintiffs; hence the money paid thereon was without consideration, and their right to recover from each of the defendants the amount paid by him, except as barred by the statute of limitations, would seem clear.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 239

CALEXICO LUMBER CO. v. EMERSON et al. (Civ. 3391.)

(District Court of Appeal, Second District, Division 2, California. Sept. 14, 1921.)

1. Pleading ⚡93(1)—Inconsistent defenses may be pleaded.

Inconsistent defenses may be pleaded by a defendant, and he may plead as many defenses as he may have, under Code Civ. Proc. § 441, and affirmative matter pleaded in one defense in an answer does not operate as a waiver of a denial contained in another defense.

2. Trover and conversion ⚡40(4)—Evidence of conversion insufficient.

In an action for conversion of laths, evidence held insufficient to support a finding of conversion.

3. Appeal and error ⚡938(4)—Exceptions, bill of ⚡12—Bill of exceptions need not contain all evidence, and it will be presumed that it contains enough.

Bill of exceptions need not purport to contain all the evidence bearing on the point involved, moving party being required only to set forth so much of the evidence as may be necessary to explain the points specified, and, when settled, it will be presumed that it contains all the evidence given in the cause which was necessary to be stated.

4. Appeal and error 762—Matter raised first in closing brief not considered.

A question ordinarily will not be considered by a court of review if it is presented for the first time in a closing brief.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Calexico Lumber Company against Springer Emerson and another. Judgment for plaintiff, and defendants appeal. Reversed.

H. E. Gleason, of El Centro, for appellants.

Ault & Anderson, of Calexico, for respondent.

WORKS, J. This is an action of conversion. The plaintiff had judgment, and the defendants appeal.

The first point made by appellants is that the evidence is insufficient to support the court's finding of conversion. The property involved in the action consisted of 556 bundles of laths, and the parties had already had a contest over the same property in an action of replevin. In that action, which, for convenience, will be referred to henceforth as the replevin action, the defendants in this action, appellants also, were plaintiffs, and vice versa. The replevin action resulted peculiarly, in this, that the judgment was that the plaintiffs take nothing, but it did not require a delivery of the laths to the defendant, assuming for the present that at the commencement of the action the plaintiffs took possession of them from the defendant, as, of course, they had the right to do in an action of replevin.

[1] In the present cause the appellants allege in their answer that in the replevin action they, as plaintiffs therein, took the laths into their possession under the appropriate provisions of the Code of Civil Procedure. Respondent points to this allegation as one of the steps leading to the finding of conversion, insisting that it is an admission against the interest of appellants. Appellants, in turn, contend that the allegation cannot be so considered. The answer is composed of two separate defenses, the first one, in which the allegation in question is contained, being that respondent is estopped to maintain the present action for the reason that the question of the possession of the laths was litigated, or could have been litigated, in the replevin action. The second defense consists of specific denials of various averments of the complaint. Appellants' contention that the allegation of the taking of the laths in the replevin action, pleaded in the first defense of the answer in this action, cannot be considered as an admission, is based upon the fact that in the

second defense of the answer they specifically deny the taking. The denial is, in terms, that—

They, "or either of them, wrongfully or otherwise, took, carried away, converted, and disposed of to their own use, or the use of either of them, or took, carried away, converted, or disposed of to their own use, or the use of either of them, said bundles of laths, or any part thereof."

Appellants say in their brief:

"If respondent relied upon proving a conversion by showing that the appellants took the lath in the former action, * * * it was just as incumbent upon respondent to prove the taking in that action as if the answer contained only the defense consisting of denials, and the affirmative defense was omitted therefrom."

They then cite *Billings v. Drew*, 52 Cal. 565, and *Light v. Stevens*, 8 Cal. App. 74, 103 Pac. 361, to the effect that affirmative matter pleaded in one defense in an answer does not operate as a waiver of a denial contained in another defense. This rule is based upon the principle that inconsistent defenses may be pleaded by a defendant, or, to use the language of some of the cases and of the Code (Code Civ. Proc. § 441), a defendant may plead as many defenses as he may have. In addition to the cases cited by appellant, we refer to *Miller v. Chandler*, 59 Cal. 540; *Dillon v. Center*, 68 Cal. 561, 10 Pac. 176; *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 206, 35 Pac. 643; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Butler v. Delafield*, 1 Cal. App. 367, 82 Pac. 260.

These additional authorities are mentioned for the reason that the decisions in this state were not formerly in harmony on the question. In *Bell v. Brown*, 22 Cal. 671, there is a dictum at variance with the principle of the cases just cited, and the language of that case, at least, was applied in *Hayes v. Silver Creek, etc., Co.*, 136 Cal. 238, 68 Pac. 704. Although the dictum in *Bell v. Brown* is apparently in accord with the rule in many of the other states (note to *Seattle National Bank v. Jones*, 48 L. R. A. 177, 188, and note to *Susznik v. Alger Logging Co.*, Ann. Cas. 1917C, 704, 712, 713), the language of that case, in so far as it may conflict with the views we express in this opinion, has been directly repudiated by *McDonald v. Southern Cal. Ry. Co.*, supra, and *Banta v. Siller*, supra, and that language is inconsistent, as well, with the cases cited by counsel and with the additional cases cited by us above. *Hayes v. Silver Creek, etc., Co.*, seems to present an instance of inconsistent allegation and denial within the confines of a single defense. There are many cases in this state contain-

ing expressions at variance with the dictum in *Bell v. Brown*, but in which the allegations and denials under consideration appear not to have been of the directly contradictory character which evidenced those advanced in that dictum. Those other cases apparently present allegations and denials inconsistent by implication of law rather than inconsistent in fact; the latter having been the nature of those discussed in *Bell v. Brown*. In order that the profession may have the history of this interesting question collated in one place, we present a list of the cases referred to: *Willson v. Cleaveland*, 30 Cal. 192; *Siter v. Jewett*, 33 Cal. 92; *Nudd v. Thompson*, 34 Cal. 39; *Buhne v. Corbett*, 43 Cal. 264; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753; *Eaton v. Metz*, 5 Cal. Unrep. 59, 4 Pac. 947; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Snipsic Co. v. Smith*, 7 Cal. App. 150, 93 Pac. 1035; *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622; *Tustin Packing Co. v. Pac. Coast F. A. Co.*, 21 Cal. App. 274, 131 Pac. 338; *Cass v. Rochester*, 174 Cal. 358, 163 Pac. 212; *Clovis Fruit Co. v. California Wine Ass'n*, 40 Cal. App. 623, 181 Pac. 229; *Globe Grain & M. Co. v. Drenth*, 41 Cal. App. 604, 183 Pac. 285; *Newark Trust Co. v. Kriebel*, 193 Pac. 962.

It is undoubtedly the settled law in this state that the allegation of a fact in one defense of an answer will not operate to the disadvantage of the party making it, when the allegation is invoked against him on the trial, in the same action, of an issue presented by a denial in a separate defense of the existence of the same fact. Therefore, the affirmative allegation in question here cannot be considered as an admission against the interest of appellants, nor as a support to the finding of conversion.

[2] Respondent sees in the testimony of its president a basis for the finding of conversion. The witness said, on direct examination, that the laths "were delivered to the representative of Mr. Emerson on the order of the sheriff." This statement was but a conclusion, and a motion was immediately made to strike it out on that ground, but the court made no ruling upon the question. If we leave this state of the record out of consideration, however, and ascribe any weight whatever to the statement, an inspection of the remainder of the direct examination and of the cross and redirect examinations demonstrates that it was without foundation. On direct examination the witness testified that the laths were "hauled away and used in the construction of the Emerson building." If we indulge the wholly gratuitous assumption that this building was the property of appellants, we are met by the statement of the witness on cross-examination that he knew only that

the person who took the laths away left in the direction of the Emerson building. On that examination he also said that he did not know of his own knowledge that the material was used in the construction of the building; that, so far as he knew, it might have gone into that building and it might not; and that the laths were taken away by a son of appellant Springer Emerson and of the deceased Mary A. Emerson, but that he, the witness, did not know whether or not the son was a deputy or employee of the sheriff, or whether or not he was an agent or representative of his parents. The cross-examination and redirect examination of the witness show that he had no knowledge upon the question whether the taking of the laths had any connection with the replevin action. We are satisfied that the record shows no support for the finding of conversion.

[3] Respondent contends that the bill of exceptions contained in the record cannot be considered because it does not purport to contain all the evidence bearing upon the point made by appellant, and cites *Moore v. Tice*, 22 Cal. 513. The opinion in that case does contain language indicating that a statement of the case or bill of exceptions must show affirmatively that it contains all the evidence touching questions presented on appeal. It was said, however, in *Abbey Homestead Ass'n v. Willard*, 48 Cal. 614:

"The moving party is required to set forth so much of the evidence (and no more) as may be necessary to explain the points specified in his statement or bill of exceptions; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause, which was necessary to be stated, in order to explain the points specified; and that it would not have presented a different case in respect to the specified points, had it contained, also, the omitted evidence. It is desirable that counsel shall consider this point as settled."

This rule has since been followed in many decisions, several of which are noted in *Polkinghorn v. Riverside P. C. Co.*, 24 Cal. App. 615, 142 Pac. 140.

[4] Relying on the rule that a demand for the return of converted property is necessary where the conversion results after possession has been rightfully acquired, appellants insist for the first time in their reply brief that a reversal of the judgment must result for the reason that there was no such demand in this action. We have not considered this point. A question ordinarily will not be considered by a court of review if it be presented for the first time in a closing brief. *Glasspoole v. Pac. Lumber Co.*, 22 Cal. App. 338, 134 Pac. 349; *Camp v. Boyd*, 41 Cal. App. 83, 182 Pac. 60.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 283

COOKE v. NEWMARK GRAIN CO.
(Civ. 3535.)(District Court of Appeal, Second District,
Division 1. California. Sept. 21,
1921.)**1. Frauds, statute of § 116(3, 4)—Action on contract of agents for purchase of barley not to be sustained without evidence of written authority.**

Where a contract for the purchase of barley by defendant's agents involved more than \$5,000, action thereon could not be sustained where there was no evidence that the agents signing the contract were authorized in writing as required by Civ. Code, § 2309, to make the contract, which, being for the sale of personal property for \$200 or more, required a written memorandum under sections 1624 and 1739; no part of the purchase price being paid nor any of the barley accepted.

2. Frauds, statute of § 116(10)—Oral ratification of contract of agent whose authority is required to be in writing held insufficient.

Oral instructions to the buyer's agent for the purchase of barley held insufficient as a ratification of the sales contract signed by the agent, since, under Civ. Code, § 2310, the ratification of the agent's act can only be made in the manner that would have been necessary to confer original authority for the act ratified; section 2309 providing that authority to enter into a contract required to be in writing can only be given by an instrument in writing.

3. Principal and agent § 137(1)—Buyer of barley held not estopped to deny authority of agent signing contract.

In an action by the seller for breach of a contract to purchase barley, that defendant accepted and paid for other shipments from others purchased by the same agents held not to estop him to deny that the agents signing plaintiff's contract were duly authorized to do so; plaintiff having no knowledge of such other transactions at the time of his sale.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by C. E. Cooke against the Newmark Grain Company. Judgment for plaintiff, and defendant appeals. Reversed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

E. R. Simon, of El Centro, for respondent.

CONREY, P. J. In this action the plaintiff has recovered a judgment in damages for the breach of an alleged contract for the purchase of a quantity of barley. The defendant appeals from the judgment.

The defendant is sued as an undisclosed principal in relation to a contract whereby the alleged agents in their own name made a written agreement to buy the barley. Appellant contends that the evidence is insufficient to sustain the finding that the contract was

made by the defendant in this, that the evidence is insufficient to prove that the alleged agents were authorized to make the contract as agents for or on behalf of the defendant. An agreement for the sale of personal property for a price of \$200 or more is invalid unless the agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged or his agent, unless the buyer accepts or receives part of such goods and chattels or pays at the time some part of the purchase money. Civ. Code. §§ 1624, 1739.

"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Civ. Code § 2309.

[1] The contract sued on in this case involved a consideration of more than \$5,000. The defendant has not accepted or received any of the property alleged to have been sold to him, nor was any part of the purchase price paid. There is no evidence of any written authority given to the alleged agents to make the contract in question. We may assume, without so deciding, that the evidence would be sufficient to sustain the finding if an oral authorization of the agency were legally sufficient for the purpose, although it may be noted that the fact of such oral authorization is warmly disputed by the defendant, which wholly disclaims that it authorized the contract in any manner whatever.

[2] On behalf of respondent it is suggested that the defendant ratified the agency authorization by giving shipping instructions, through an agent named Wolz, for the plaintiff's grain. We have been unable to discover in the record any evidence of such instructions given by Mr. Wolz, other than a telephone message to which Hayward testified, or any evidence that Wolz had authority to give such instructions on behalf of the defendant. The ratification of the agent's act can be made only in the manner that would have been necessary to confer an original authority for the act ratified. Civ. Code, § 2310.

[3] Respondent further suggests that the defendant is estopped to deny that Hayward, Rath & Marshall, who signed the contract with plaintiff, were its duly authorized agents. This claim of estoppel is based upon the fact that the defendant accepted and paid for two other shipments of barley purchased by Hayward, Rath & Marshall at about the same time. It is argued that these three independent purchases from separate and independent sellers were all made under one authorization, and that the defendant cannot be permitted to accept the benefits from such agency authorization in two

instances and reject the third. Whatever might be said in favor of this contention if this were an action between the agents and their alleged principal, it can have no application for the purpose of raising an estoppel in favor of respondent. It does not appear that at the time when he sold his barley respondent had any information whatever concerning said other transactions, or relied upon them as constituting any matter of inducement to him in making the sale. As to those other transactions, the plaintiff is a third person who knew nothing of the conduct of the defendant and placed no reliance thereon.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

54 Cal. App. 186

In re BEFFA'S ESTATE.

DOTTA v. ROCCHI.

(Civ. 2324.)

(District Court of Appeal, Third District, California. Sept. 9, 1921.)

1. Wills ⚡69—"Will" is disposition of property to take effect at testator's death.

A "will" is a disposition of property to take effect at testator's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Will.]

2. Wills ⚡87—Court in determining nature of instrument will give effect to testator's intention.

In determining whether an instrument was intended to be testamentary, its language will be construed in the light of the surrounding circumstances, and, if such intention appears, the court will give effect thereto if it can be done consistently with the language, regardless of the particular form of the instrument; the true test being, not testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only on his death and passing no present interest.

3. Assignments ⚡31—"Assignment" defined.

An "assignment" is a transfer or setting over of property or some right or interest therein from one person to another, and includes transfers of all kinds of property, but is ordinarily limited to transfers of choses in action and to rights in or connected with property, as distinguished from the particular item of property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment.]

4. Wills ⚡88(1)—Whether instrument as signing and transferring decedent's property was deed or will determined from surrounding circumstances, maker's intention not being conclusively shown by language.

Whether an instrument assigning and transferring all of deceased's property is a

deed or will must be determined in the light of the circumstances under which it was made, the words "assign" and "transfer," while sufficient to convey property by deed or will, not being the usual operative words of either, so that the language does not show conclusively whether deceased intended the instrument as a will or as a conveyance of a present interest.

5. Wills ⚡88(4)—Undelivered instrument placed by maker where beneficiary would find it after his death held will.

Where a decedent, who committed suicide, executed an instrument disposing of his property, after having determined to take his life, and did not deliver it, but placed it where it would come into the beneficiary's possession after his death, the inference was justified that he intended it as a will rather than a deed; he being presumed to have known the law that without delivery the instrument would be ineffective as a deed, but effective as a will.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Application by Teodora Rocchi for the probate of the will of Candido Beffa, deceased.

From a judgment for proponent, Pacifica Dotta, contestant appeals. Affirmed.

J. H. Daly, of Long Beach, and Snyder & Snyder, of San Andreas, for appellant.

Virgil M. Airola, of San Andreas, for respondent.

FINCH, P. J. This appeal is from a judgment and order admitting the instrument hereinafter set out to probate as the last will of Candido Beffa, deceased.

The appellant is a sister of the deceased and his sole heir at law. Her home is in the state of Missouri and she had not seen her brother for many years prior to his death, though they kept up a correspondence and he occasionally sent her money. The deceased was a native of Switzerland. He came to this country in 1899, at the age of 17 years, and thereafter made his home with his aunt, Mrs. Teodora Rocchi, and her husband until the latter's death; they residing on a farm in Calaveras county. Upon the death of Mr. Rocchi, Beffa and his aunt took up their residence in San Andreas where, in the language of the trial judge, "they practically lived in the relationship of mother and son" until the death of Beffa; she being the housekeeper and he being employed by others for a time and later engaging in business for himself in partnership with one Louis Queirola. Queirola, shortly before Beffa's death, decided to withdraw from the partnership business, and it seems to have been agreed that an effort would be made to sell the same. During the forenoon of April 11, 1920, the partners went over their business affairs with the purpose of ascertaining the extent of their assets and liabilities and were to meet again in the aft-

ernoon for the same purpose. Beffa failed to appear in the afternoon and his body was found the next day in the basement of a neighbor's barn. A coroner's jury found that his death was due to a gunshot wound self-inflicted, he having shot himself some time during the afternoon of the 11th.

After his death the instrument admitted to probate as his will was found in the partnership safe, in a sealed envelope, together with other papers belonging to Mrs. Rocchi. The instrument was pinned to the deed of trust referred to therein, and on the face of the envelope was written: "Papers belong to Mrs. Teodora Rocchi." Mrs. Rocchi had no knowledge of the existence of the instrument prior to Beffa's death. It is wholly in the handwriting of the deceased and reads as follows:

"April 10th, 1920.

"I Candido Beffa I sign and trasfer all my right and title of thi Deed of trust to Mrs. Teodora Rocchi is part payment of twenty years House keaping for me I also sign to her my house here in San Andrea my automobile a lot at leas Palmas and all wat will be realize of my share in the stock here in the store.

"Candido Beffa."

[1, 2] Appellant contends that the instrument is not testamentary in character. A will is a disposition of property to take effect at the death of the testator.

"It is well settled in this country and in England: First, that in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of these circumstances. Second, that if it shall appear under all the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument; and in such cases the particular form of the instrument is immaterial." *Clarke v. Ransom*, 50 Cal. 600.

"A will may be informally drawn, and may consist of one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death, and parol evidence as to the attending circumstances is admissible." *Mitchell v. Donohue*, 100 Cal. 207, 34 Pac. 615, 38 Am. St. Rep. 279.

"It is undoubtedly the general rule enunciated by the leading case of *Habergham v. Vincent*, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest." *Nichols v. Emery*, 109 Cal. 329, 41 Pac. 1091, 50 Am. St. Rep. 43.

[3, 4] It is apparent, of course, that by "sign and trasfer" the deceased meant "assign and transfer." They are the words usually employed to convey a present interest in

property of the character of the deed of trust to which they are applied in the instrument. The instrument further provides, however:

"I also sign to her by house here in San Andrea my automobile a lot at leas Palmas."

The word "assign" is not the usual operative word to effect a conveyance of property of the character enumerated.

"The words 'transfer and assign' are not the usual operative words of a conveyance of real estate." *Sanders v. Ransom*, 37 Fla. 457, 20 South. 530.

"An assignment in law is a transfer or setting over of property, or some right or interest therein, from one person to another. * * * The word is sufficiently comprehensive to include transfers of all kinds of property, but ordinarily it is limited in its application to the transfers of those things which are commonly designated choses in action, and to rights in or connected with property as distinguished from the particular item of property itself." 2 R. C. L. 593.

"In its original and technical sense it is held to refer to a transfer of an interest in land only. It is most frequently used, however, to describe the transfer of nonnegotiable choses in action." 5 C. J. 836.

"The term 'assignment' refers to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession. The assignment of such property is considered in law as an authorization to the assignee to reduce it to his possession." *Cross v. Sacramento Savings Bank*, 66 Cal. 466, 6 Pac. 96.

The deceased had not attended the schools of this country, and the instrument in question shows that he was not familiar with the use of the English language. It is evident that he did not use words in their strict technical sense. While the words "assign" and "transfer" are sufficient to convey property by deed or by will, they are not the usual operative words of either. The language of the instrument in question does not show conclusively whether the deceased intended it as a will or as a conveyance of a present interest and resort must be had to the circumstances under which it was made.

[5] It conclusively appears from the face of the instrument that the deceased intended that the property described therein should go to Mrs. Rocchi. He is presumed to have known the law. *Estate of Young*, 123 Cal. 344, 55 Pac. 1011. He is presumed to have known that without delivery the instrument would be ineffective as a deed but effective as a will. The court was justified in believing that the instrument was executed by the deceased after he had determined to take his own life. Under such circumstances, the fact that the instrument was not delivered but was placed where it would most certainly come into Mrs. Rocchi's possession after his death justifies the inference that the deceased in-

tended it as a will rather than a deed. "The nondelivery of a writing is a circumstance favoring it as a will." *Nichols v. Chandler*, 55 Ga. 369. The case of *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400, is similar to the instant case. The will there under consideration was as follows:

"High James Rogers do give to John Jackson, Sr., my property known as 'Pen argyl Hotel' and the land adjoining in Pen argyl, in Northampton county, P. A.

"James Rogers."

The deceased shot himself in his room and, immediately after his death the instrument was found on a trunk in the same room, inclosed in an unsealed envelope indorsed "John Jackson." The court said:

"It is manifest * * * that at the moment of the death of James Rogers the paper was in his possession, and that fact alone conclusively disproves the theory that he intended it to take effect in his lifetime. He had never delivered it. * * * The paper was exposed conspicuously, lying on top of the trunk, where it could readily be seen. * * * These circumstances are only consistent with the theory that, so far as the intention of the deceased was concerned, it was his purpose that the gift of the property should become effective after his death. In truth the undisputed facts entirely exclude any other inference. * * * It is impossible to conceive of a stronger or more convincing act of testamentary purpose and intent. There is of necessity no room for any other inference."

See, also, *Kisecker's Estate*, 190 Pa. 476, 42 Atl. 886.

The judgment and order appealed from are affirmed.

We concur BURNETT, J.; HART, J.

54 Cal. App. 169

KELLER et al. v. CITY OF OAKLAND et al.
(Civ. 3952.)

(District Court of Appeal, First District, Division 2, California. Sept. 7, 1921.)

1. Municipal corporations ⚡658—Public streets belong to the people of the state.

The public streets of a municipality belong to the people of the state.

2. Municipal corporations ⚡657(1, 5)—Legislature may delegate to municipality authority to close streets.

The Legislature has power to vacate public streets, and could delegate that power to the municipality by Act March 6, 1889 (St. 1889, p. 70), but its exercise by the municipality is dependent upon the will and subject to the control of the Legislature, and where the mode is prescribed it must be followed, and failure to acquire jurisdiction in prescribed manner cannot be cured by consent of abutting property owners.

3. Municipal corporations ⚡657(3)—Erection of bulkhead in a street from curb to curb for parking purposes not an abandonment of street.

Where plaintiffs claim property in a street from property line to property line, and a bulkhead is erected by the municipality in the street from curb to curb, and the action sought to be taken by the municipality showed the relinquishment of a portion of the street was not permanent, but revocable at will by the city, such act by the municipality was not an abandonment of its street.

4. Municipal corporations ⚡657(3)—Easement in street not extinguished by disuser in less period than provided by Code.

Under Civ. Code, § 811, subd. 4, relating to the extinguishment of servitudes by disuse for five years, the right to use a street was not lost to a municipality by an ordinance of June, 1917, under which a bulkhead was erected from curb to curb, and action commenced to quiet title for abandonment July 14, 1920, is untimely.

5. Easements ⚡29—Revocation of license to another to use easement revives right.

Where the owner of an easement licenses another to do an act which affects the enjoyment of the easement, when the license is revoked, the right to the easement revives.

6. Municipal corporations ⚡657(3)—Ordinance held not to effect abandonment by city of a street.

Oakland city ordinance June 6, 1917, giving property owners a parking license in the street, revocable at will by the city, and the erection in the street of a bulkhead from curb to curb, not being permanent, is not such abandonment of the street that an action would lie by plaintiffs claiming the street on account of abandonment of the city's easement.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action to quiet title by Mary E. Keller, individually and as administratrix of Estate of Patrick J. Keller, deceased, and others against the City of Oakland and others. Demurrer to complaint sustained, and plaintiffs appeal. Affirmed.

Ostrander & Carey, of Oakland, for appellants.

H. L. Hagan, T. J. Ledwich, and Earl Warren, all of Oakland, for respondent City of Oakland.

F. L. Arbogast, of Oakland, for other respondents.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against them, after the demurrers of the defendants to the complaint had been sustained. Plaintiffs declined to amend, and judgment was entered against them. The complaint alleges that the plaintiffs "are the owners-in fee of all that certain piece or parcel of land situate in the said city of Oakland, county of Alameda,

state of California, lying between the northwestern curb line of that certain public street in said city known as 'Fairmount avenue' and the southeastern line of that certain public street in said city known as 'Piedmont avenue', and between the northeastern and southwestern property lines of what is now known as 'Rio Vista avenue.' " Plaintiffs claim title as the heirs at law of Patrick J. Keller, deceased, and it is alleged that—

"At the time of the death of said Patrick J. Keller, the said piece or parcel of land was subject to an easement over the same as a public street of the city of Oakland."

It is further alleged that on the 6th day of June, 1917, the city council passed and adopted an ordinance of said city numbered 1202 (N. S.) which ordinance is set out in hæc verba in the complaint. It is entitled "An Ordinance setting apart a portion of Rio Vista Avenue for Parking Purposes. * * *" Section 1 of this ordinance provides:

"The portion of Rio Vista avenue lying between the present northeastern and southwestern curb lines thereof and extending from the northwestern curb line of Fairmount avenue to a line distant 695 feet southeasterly from the southeastern line of Piedmont avenue, is hereby set apart for parking purposes, and the abutting property owners, at their own expense, are hereby permitted to plant and maintain said parking portion, subject to the condition that said permit is revocable at the pleasure of this council."

It is further alleged that—

"Pursuant to said petition and ordinance, the said city of Oakland did cause a bulkhead composed of concrete to be constructed from curb to curb upon said Rio Vista avenue."

It is to be observed that the ordinance and the bulkhead have reference only to the property from curb to curb, and plaintiffs are claiming the area of the street from property line to property line. It is not alleged that the plaintiffs are the owners of any property abutting on Rio Vista avenue.

Respondents contend, in support of the orders sustaining the demurrers, that the Legislature has prescribed a certain definite procedure for the closing of a city street, and that a street can be closed and abandoned in no other way, and that the allegations of the complaint indicate that that procedure has not been followed in the present case. The power to close up, in whole or in part, any street, etc., is given to the city council of any municipality by an act approved March 6, 1889 (Stats. 1889, p. 70). Appellant contends that the jurisdictional provisions of that act apply only to cases where assessments are required for improvements, etc. No such distinction is made in the act, but, on the contrary, section 6 thereof provides that after the city council has acquired jurisdiction in the manner provided for by the act, "the city council shall order said work to be

done, and unless the proposed work is for closing up and it appears that no assessment is necessary shall appoint three commissioners," etc. It appears, therefore, that a distinction between cases where assessments are necessary and those where assessments are not necessary is first made at a point in the procedure when the city council has acquired jurisdiction by the passage of a resolution of intention, the posting of such notice in the manner prescribed, the publication thereof, and such other matters as are prescribed by said act.

[1, 2] It appears therefore that the street could not be closed by the procedure alleged in the complaint. It is settled that the public streets of a municipality belong to the people of the state. *Ex parte Daniels*, 192 Pac. 442. The Legislature has power to vacate a street in a city and may delegate that power to the municipal authorities of a city, but its exercise by the municipal authorities is dependent upon the will and subject to the control of the Legislature. *Polack v. S. F. Orphan Asylum*, 48 Cal. 490; *McNeil v. City of South Pasadena*, 166 Cal. 153, 135 Pac. 32, 48 L. R. A. (N. S.) 138. The rule is general that where power is delegated to municipal bodies, and the mode for the exercise of that power is prescribed, the mode must be followed. As has been repeatedly held, the mode in such cases constitutes the measure of the power. *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *McQuillin on Municipal Corporations*, vol. 3, § 1412. It is true the plaintiffs alleged that the abandonment and closing of said portion of said Rio Vista avenue was with the consent and approval of, and without objection by, the owners of the property abutting thereon. But failure of the city council to acquire jurisdiction in the manner prescribed by the statute cannot be cured by the consent of the abutting property owners. *Dehail v. Morford*, 95 Cal. 457, 460, 30 Pac. 593.

[3] Appellants argue that if the proceedings alleged in the complaint are insufficient to constitute an abandonment of the street, nevertheless, the erection of a concrete bulkhead from curb to curb of Rio Vista avenue, as alleged in the complaint, is a physical closing of the street, and amounts to an actual abandonment by the city. In the first place, it is apparent that only a part of the street claimed by plaintiffs is closed by this bulkhead, for it is alleged that it extends from curb to curb while the plaintiffs are claiming the land from property line to property line. Furthermore, it is apparent from the action sought to be taken by the city council as evidenced by the ordinance set out in the complaint that the relinquishment of a portion of this street was not a permanent relinquishment, but was made upon the condition that it was to be revocable at will by the city,

[4] Reliance is placed upon the provisions of section 811, Civil Code. Subdivision 4 thereof would be inapplicable, in any event, because the ordinance is alleged to have been passed in June, 1917, and the bulkhead to have been erected in pursuance thereof. The action was commenced January 14, 1920, less than three years later. Under subdivision 4 of section 811 an easement acquired by enjoyment may be extinguished by disuser for a period of five years. *Garbarino v. Noce*, 181 Cal. 125, 130, 183 Pac. 532, 6 A. L. R. 1433. The only other portion of section 811 which could have any possible application is subdivision 3 thereof, providing for the extinguishment of an easement by the performance of acts by the owner of the servitude, or with his assent, which are incompatible with its nature or exercise. It is said in the case of *Lux v. Haggin*, 69 Cal. 255, 292, 4 Pac. 919, 10 Pac. 674, that this is a recognition and statutory declaration of the well-settled rule that if the owner of a dominant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished.

[5, 6] When the owner of an easement licenses another to do an act which affects the enjoyment of the easement, when the license is revoked, the right to the easement revives with full vigor. *Washburn on Easements and Servitudes* (4th Ed.) p. 726. In the present case it is clear that the ordinance pleaded merely gives to the abutting property owners a license to park the street with the express warning to them that the same is revocable at will. The bulkhead was erected in connection with the license granted, and may be removed whenever the license granted to the abutting owners is revoked.

Upon the face of the complaint, then, it appears that the erection of the bulkhead was not a permanent matter. Furthermore, even the temporary relinquishment of the enjoyment of the easement, in favor of the licensee, was not coextensive with the easement, for it appears that a substantial portion of the street which was occupied by the sidewalks is yet open to traffic by the public.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

54 Cal. App. 244

BELIEU v. POWER, Sheriff, et al. (Civ. 2320.)

(District Court of Appeal, Third District, California. Sept. 14, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Homestead §88—Equitable interest of vendee under contract sufficient upon which to file declaration of homestead.

Vendee, having an equitable title under a contract to purchase property, has a sufficient

interest to entitle him to file a declaration of homestead.

2. Judgment §780(3)—Lien does not attach to equitable interest of vendee under contract.

A judgment lien does not attach to the equitable interest in real property acquired by a vendee under an ordinary contract to purchase the property, the vendee having paid a portion of the purchase price and entered into possession under Code Civ. Proc. § 671.

3. Judgment §752—Lien matter of statutory regulation.

A judgment lien is wholly a matter of statutory regulation.

4. Judgment §780(3)—Lien held not to attach to land.

Where a judgment was obtained and defendant subsequently acquired equitable interest in real property under a contract to purchase the property, and thereafter, before receiving a deed of conveyance, filed a declaration of homestead, the lien of the judgment never attached, and the land could not be sold under execution after the deed of conveyance was received, under Code Civ. Proc. §§ 542, 638.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by W. T. Belieu against Newt Power, as Sheriff, and another. Judgment for plaintiff, and defendants appeal. Affirmed. George R. Freeman, of Willows, for appellants.

W. T. Belieu, of Willows, for respondent.

PREWETT, Presiding Justice pro tem. This appeal involves the single question whether a judgment lien attaches to the equitable interest in real property acquired by a vendee under an ordinary contract to purchase the property—the vendee having paid a portion of the purchase price and entered into possession. A statement in chronological order of the facts upon which the controversy depends will aid in its solution. They are:

(a) On March 29, 1916, a money judgment was regularly docketed against the property of the respondent, Belieu.

(b) On December 21, 1918, the respondent entered into a contract with the owner to purchase the real property in question. He at once entered into possession and paid one-half the agreed purchase price.

(c) On April 2, 1919, the respondent filed a declaration of homestead in all respects sufficient in form to effect a valid dedication of the premises as a homestead.

(d) On May 15, 1919, the respondent paid the remaining one-half of the purchase price and received a deed of conveyance in satisfaction of the terms of his contract of purchase.

(e) On October 4, 1919, the appellants caused a writ of execution to be levied up-

on the property thus dedicated as a homestead and were about to expose it for sale when this action was commenced to restrain them from so doing. The levy was made under the claim that the property became and remained subject to the lien of the judgment of March 29, 1916.

[1] Upon this state of facts, the trial court enjoined the sheriff from proceeding further with the sale, and held, in effect, that although the equitable estate acquired by the respondent coupled with his possession was sufficient to entitle him to dedicate the property as a homestead, it was insufficient to render the property subject to the lien of a judgment. The conclusion of the trial court that such equitable estate was sufficient to sustain the claim of homestead is not open to question. *Bell v. Wilson*, 172 Cal. 123, 155 Pac. 625, and numerous authorities there cited. The same cases sustain the contention of the respondent that every addition to his title feeds the homestead right. These cases render this contention so clear that an extended examination of the point would be superfluous.

[2-4] The judgment was docketed before, and the homestead declaration was filed after the date of the contract of purchase. It becomes necessary, therefore, to inquire whether the inchoate right acquired by the respondent under his contract of purchase constituted such ownership of real property as rendered it subject to the lien of the judgment. It is clear and is perhaps conceded that property must be "owned" by the judgment debtor before any lien can attach. It is not, by any means, every interest in property to which the lien of a judgment will attach, nor will it, in fact, attach to every species of property. The lien is not even a uniform consequence of the fact that a contract lien upon the property may be protected by the recording laws, as in the case of various classes of personal property; nor that the property may be taken under execution issued upon the judgment, as is seen in the case of personal property of every class. The whole matter is statutory. If it were purely a question of logic, it might be inquired why, if the lien of a chattel mortgage is, under certain conditions, protected by the recording laws the lien of a judgment against the same classes of property should not, in like manner, be protected. Or, if certain inchoate interests in real property may be seized on execution, why they should not be subject to a judgment lien. But a judgment lien is wholly a matter of statutory regulation. In *Boggs v. Dunn*, 160 Cal. 283, 116 Pac. 743, Angellotti, afterwards Chief Justice, speaking for the court, says: "The lien of a judgment is purely the creature of the statute, no such lien having existed at common law," and in support of the text cites other California cases.

An examination of the authorities discloses a vast difference in the classes of property and interests therein that will support judgment liens, homesteads, and levies under execution. Section 671 of the Code of Civil Procedure provides that a docketed judgment becomes a lien upon "all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire." Property interests of any and every kind, whether real or personal, and every interest therein are subject to seizure under attachment or levy on execution, unless exempt from execution. Sections 542 and 688, Code Civ. Proc. While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment—real property owned by the debtor at the time of docketing and real property that he may afterwards acquire. While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien. That a mere equitable interest in real property acquired under a contract of purchase and sale is not such ownership as is contemplated by section 671 was clearly decided in the early history of the state. The case of *People ex rel. v. Irwin*, 14 Cal. 428, was a case identical in all essential respects with the one involved in this appeal. An attempt was made to assert a judgment lien against the interest of a vendee under a contract substantially similar to the one now before the court. The court, in that case, says:

"It is undoubtedly true that the statutory lien of a judgment upon the real estate of the judgment debtor, can attach only upon property in which such debtor has a vested legal interest."

The *Irwin Case* has been cited a number of times in later decisions, and, if sound, conclusively disposes of the present appeal adversely to the contentions of appellants.

In *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315, the court cited the *Irwin Case* with approval and made quotations therefrom. *Zenda Mining Co. v. Tiffin*, 11 Cal. App. 62, 104 Pac. 10, refers to the *Irwin Case* with approval.

"We have already noted that a docketed judgment cannot 'become a lien' on after acquired property of the judgment debtor until the property is actually acquired by him." *Hertweck v. Fearon*, 180 Cal. 71, 179 Pac. 190.

"The judgment only becomes a lien upon the real property [owned by] the judgment debtor * * * at the time of the docketing of the judgment, or afterward and before expiration of lien acquired." *Wolfe v. Langford*, 14 Cal. App. 359, 112 Pac. 203.

In *Summerville v. Stockton Co.*, 142 Cal. 529, 76 Pac. 243, it is held that an estate

for years is not such an interest in real property as is subject to a judgment lien. The importance of this authority is appreciated when it is recalled that an estate for years is an interest in real property and is subject to execution.

In Nebraska it is provided by statute that "the lands and tenements of the judgment debtor within the county where the judgment is entered shall be bound for the satisfaction thereof." This is substantially our own statute on the subject. The courts of that state have repeatedly held that a judgment is not a lien upon mere equitable interests in real estate. *Flint v. Shaloupka*, 72 Neb. 34, 99 N. W. 825, 117 Am. St. Rep. 771; *Nessler v. Neher*, 18 Neb. 649, 26 N. W. 471; *Woolworth v. Parker*, 57 Neb. 417, 77 N. W. 1090.

The state of Oregon provides by statute that "all property, including franchises or rights or interests therein," etc., shall be liable to execution. The court in construing this statute in *Pogue v. Simon*, 47 Or. 6, 81 Pac. 566, 114 Am. St. Rep. 903, 8 Ann. Cas. 474, holds that a judgment is not a lien upon mere equitable interests in real property in that state, and cites a number of cases in support of its conclusions. The court, in discussing the characteristics of an equitable title, says:

"An equitable title is a right or interest in land, which, not having the properties of a legal estate, but merely a right of which courts of equity will take notice, requires the aid of such court to make it available."

In *Bourn v. Robinson*, 49 Tex. Civ. App. 157, 107 S. W. 874, a Texas case, the court says:

"The term 'real estate' within the statute [making all the real estate of the judgment debtor subject to the lien of a judgment] means a freehold, which is either an estate for life or in fee simple, and not a mere chattel interest in land, nor a simple contract right to perform conditions."

The text-writers sustain the same doctrine. In *Pomeroy's Equity* (4th Ed.) § 367, we read:

"What is the effect at law of a contract whereby the owner agrees to sell and convey a designated tract of land, but which is not a true conveyance operating as a present transfer of the legal estate and the legal seisin? It is wholly, in every particular, executory and produces no effect upon the respective estates and titles of the parties and creates no interest in nor lien or charge upon the land itself. * * * On the other hand the vendee acquires no interest nor property right whatever; he can maintain no proprietary nor possessory action for its recovery; his right is a mere thing in action to recover compensation in damages for a breach from the vendor, and his duty is a debt—an obligation to pay a stipulated price; on his death, both his right and his duty pass to his

personal representatives and not to his heirs. In short, the vendee obtains at law no real property nor interest in real property. The relation between the two contracting parties is wholly personal. No change is made until, by the execution and delivery of the deed, the estate in the land passes to the vendee. * * *

It is quite true that that learned author in section 105 of the same work says:

"The vendee is looked upon and treated as the owner of the land and an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years," etc.

He announces a similar doctrine in other parts of his work; but in enunciating these principles, he is dealing with the rights of a vendee in courts of equity. It is an established doctrine of equity, disputed by no one, that a court will, for the purpose of administering equitable relief, treat the purchaser under a valid contract of purchase, as the legal owner of the property, but this is far from saying that he is vested with a legal title such as would be recognized at law.

None of the California cases cited by appellants are in point. They rely with much confidence upon the case of *Fish v. Fowle*, 58 Cal. 373. But that case deals only with the estates or interests in real property that are subject to levy on execution, and we have already noted that the statutes relating to the two matters are quite unlike. Real property "or any interest therein" may be seized on execution, while only real property owned by the judgment debtor at the time is subject to a judgment lien. No more does the case of *Leese v. Clark*, 20 Cal. 387, aid the appellants. In that case the court was construing the rights of citizens under the provisions of the Treaty of Guadalupe Hidalgo, which stipulated that the property of the inhabitants of the newly acquired territory should be protected. In this connection, the court held that the word "property" as applied to lands embraces all titles, legal or equitable, perfect or imperfect. While the case is authority in the connection in which it arose, it is not applicable to the case in hand. The case of *Martinovich v. Mariscano*, 137 Cal. 354, 70 Pac. 459, has no application to equitable estates. In that case the court held that the title which descends to a widow in probate proceedings constitutes ownership in her within the meaning of section 671, supra. No question as to inchoate or equitable titles arose in that case, and none was decided.

The citations from other jurisdictions to which appellants direct our attention are, for the most part, singularly inapt. We find no case among them that sustains their position. The few which, at first glance, might seem to help them, are found on ex-

amination to be cases where statutory provisions impose a judgment lien upon equitable interests. In Ohio, for instance, the courts held, since the amendment to section 11,655 of their General Code, that the interest of the vendee under a contract to purchase land is bound by the lien of a judgment; but they have placed their conclusions squarely upon the amendment to said action. *First National Bank v. Logue*, 89 Ohio St. 288, 106 N. E. 21, L. R. A. 1915B, 340. Prior to the amendment, it had often been held that no such lien existed.

In the state of Georgia, it is held that such lien exists, but in that state it is expressly provided by statute that the judgment "shall bind all the property of the defendant." *Stewart v. Berry*, 84 Ga. 177, 10 S. E. 601. A similar statute prevails in Iowa; hence the citations from that state are not in point.

Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463, is cited by appellants, but it is held in that case that the words "real property" are qualified by the statute which provides that the lien shall cover "all rights thereto and interests therein."

We find no authority inconsistent with the conclusions of our Supreme Court in *People ex rel. v. Irwin*, supra. That case seems never to have been overruled or doubted, and it must be accepted as a correct exposition of the law upon the subject.

It may be added that we discover no anomaly in the rule which requires different measures of title to support levies on execution, the liens of judgments and homestead dedications. If such anomaly should be found, it may be answered that the Legislature has seen fit so to provide.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(54 Cal. App. 232)

YOUNG v. COLYEAR et al. (Civ. 3512.)

(District Court of Appeal, Second District, Division 1, California. Sept. 14, 1921. Rehearing Denied Oct. 8, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Interpleader § 12—Warehouseman barred by conduct from right to exercise interpleader.

Warehouseman employed by codefendants to store goods of which they claimed to be owners, who at their request sent his employes to plaintiff's residence, where they under codefendants' instructions, removed property in a manner little short of larceny, although innocent of any unlawful intent, was an active participant in the wrongful act, which act would bar him from asserting the right to exercise an

interpleader, which is a proceeding of equitable nature.

2. Interpleader § 10—Defendant held to have assumed position inconsistent with that of disinterested stakeholder.

Where warehouseman, at codefendants' request, sent employes to plaintiff's residence, where they took property of the plaintiff in a manner little short of larceny under codefendants' instruction, and, on plaintiff's entering claim therefor, told her she must sue in replevin, and when she brought action in claim and delivery, he joined with the codefendants in denying plaintiff's title and claim to possession of the property, and contested her right thereto, and in a cross-complaint asserted claims arising from his contractual relation with his codefendants consisting of a lien for cartage, storage, and attorney's fees, he cannot contend that his cross-complaint constituted a proceeding in interpleader, under Code Civ. Proc. § 386, but must be deemed a complaint in intervention, under section 387, and he cannot complain of a judgment against him for costs.

3. Warehousemen § 30—No lien on property of third person.

While a warehouseman, as provided by section 27 (St. 1909, p. 437), may by virtue of his lien retain possession of goods deposited by the owner or by one in the lawful possession thereof until the charges for which the lien exists are paid, such right does not apply to property of which the depositor has neither title nor right of possession, and who has obtained the same from a third person with the warehouseman's knowledge in a manner little short of larceny.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Marie J. Young against Curtis C. Colyear, doing business in the name of Colyear's Van & Storage Company, and others. From an adverse judgment, the named defendant appeals. Affirmed.

J. A. Adair, of Los Angeles (Henry E. Carter and W. S. Baird, both of Los Angeles, of counsel), for appellant.

Winslow P. Hyatt and Henry O. Wackerbarth, both of Los Angeles, for respondent.

SHAW, J. Action in claim and delivery for the recovery of certain household goods and furnishings. Judgment went against all of the defendants, from which defendant Colyear alone appeals.

It appears that defendant Colyear was a warehouseman, who as such was employed by his codefendants to store certain household goods and furnishings of which they claimed to be the owners. Acting at their request, he, on October 25, 1919, sent his employes with a truck to plaintiff's residence during her absence therefrom, at which time they, under instructions from defendants

they, under instructions from defendants Young and Appell, who had gained access to the house by unlawfully entering the same through a window and then opening a door, took the goods and chattels from plaintiff's dwelling to Colyear's warehouse, where they were, without the issuance of a receipt therefor, deposited in the name of Young and Appell. Immediately upon learning of the removal of the goods, and on the same day that they were taken, plaintiff went to Colyear and demanded a return thereof, and, in consideration of his delivering the goods, offered to give him an indemnifying bond. He refused to surrender the goods, stating that she would have to bring an action in replevin to obtain them. Thereupon, and after notice in writing served upon him that the property had been "burglariously taken from her residence," she instituted this action, wherein Young and Appell are made codefendants with Colyear. After Young and Appell had answered, denying all the material allegations of the complaint, defendant Colyear filed an answer likewise denying that plaintiff was entitled to possession of the property, and with it a cross-complaint wherein he alleged that both plaintiff and his codefendants claimed the property, upon which as warehouseman he asserted a lien for cartage, storage, and attorney's fees of \$250 incurred in the action, offering to surrender the property to such person as the court might designate, subject to the payment to him of said alleged lien, and asked that his codefendants and plaintiff be required to interplead as to their respective rights in the property so alleged to be subordinate to his claims.

The court, upon ample, though conflicting, evidence, found that plaintiff was the owner and entitled to immediate possession of the larger part of the property, the value of which was fixed at \$370, for which, with costs, judgment was given to plaintiff, and from which Colyear has appealed.

[1] The taking of plaintiff's property from her residence was little short of larceny thereof, and while Colyear, under the circumstances, should be deemed innocent of any unlawful intent, nevertheless he was, with notice of plaintiff's claim at the time of the taking, given by his agents and employees, an active participant in the wrongful act, which fact alone, since the proceeding of interpleader is of an equitable nature, should bar him from asserting a right to the exercise thereof. *First National Bank v. Bininger*, 26 N. J. Eq. 345; *North Pac. Lumber Co. v. Lang*, 28 Or. 246, 42 Pac. 799, 52 Am. St. Rep. 780;

[2, 3] However this may be, we are clearly of the opinion that the cross-complaint filed with the answer, and not before, as provided by the statute, and without application for defendant Colyear's discharge as

a party and in the absence of a tender, free from his asserted claims arising from the contractual relation with his codefendants, cannot be construed as a proceeding in interpleader under section 386, Code of Civil Procedure, but must be deemed a complaint in intervention (section 387, Code Civ. Proc.), wherein it appears that upon the institution of the action, instead of disclaiming any interest by lien or otherwise in the property and delivering the same subject to the order of the court, and, before answer filed, asking, upon affidavit as provided by said section 386, to be discharged as defendant, he joined with his codefendants in denying plaintiff's title and claim to possession of the property or any part thereof, and at the trial contested her right thereto, and now on appeal strenuously attacks the findings made adversely to his codefendants, Young and Appell, upon the ground that the evidence is insufficient to support the same. Such a position is wholly inconsistent with that of a disinterested stakeholder, which he claims to be. As cross-complainant in the action, his position, as appears from his pleading and arguments made, is that of a party litigant, wherein he not only resists the claims of the plaintiff but asserts the right to affirmative relief against her, the sole basis for which is his wrongful act. His claim of lien, in so far as valid, must be measured by the contract with his codefendants, against whom he had judgment. Having refused, upon plaintiff's tender of an indemnifying bond, to surrender the property upon demand therefor, and joined with his codefendants in an effort to sustain their right to possession thereof, upon the success of which his right depended, he is in no position to complain because of the fact that the court, in awarding possession of the property to plaintiff, adjudged that she recover from him and his codefendants her costs laid out and expended in pursuit of her property. While a warehouseman, as provided by section 27 of the act (St. 1909, p. 437) may, by virtue of his lien, retain possession of goods deposited by the owner, or by one in the lawful possession thereof, until the charges for which the lien exists are paid, such right does not apply to property of which, as in the instant case, the depositor has neither title nor right of possession. As against the true owner, the keeper of a garage could have no lien for storage upon an automobile left with him by one who had stolen it.

The appeal is not only without merit, but, in view of appellant's active participation in the unlawful entry and taking of the property from plaintiff's house, it would be impossible to conceive of a principle so unjust as to entitle him to a lien thereon for the costs and attorney's fees incurred by him in resisting her lawful claim to the possession of the property, particularly so when she of-

ferred to give him a bond indemnifying him against any loss from so doing.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 217

BUTLER v. SCHOLEFIELD, Supervisor in and for Sacramento County.
(Civ. 2362.)

(District Court of Appeal, Third District, California. Sept. 14, 1921.)

1. Counties 67 — Supervisor prejudiced against employee may sit in judgment and hear charges.

Strictly speaking, board of supervisors of county, when engaged in the prosecution or investigation of charges of misfeasance, nonfeasance, malfeasance, or other dereliction of duty of an employee or officer appointed by such board, exercises functions which are merely administrative, and a member thereof who has filed the charges for removal of the employee may sit in judgment on the latter.

2. Counties 67—Board of supervisors sole tribunal for trying charges against county engineer.

It is clear from St. 1919, p. 1290, authorizing the appointment of county engineer by the boards of supervisors of counties, that the Legislature intended, in a case where the engineer appointed is charged with dereliction of his duties as such, to constitute the board of supervisors itself the sole tribunal by which such charge or charges should be heard and determined, though they cannot arbitrarily discharge him, and it is not necessary to resort to Pen. Code, § 758, or section 772.

3. Counties 67—Municipal corporations 159(4)—Tribunals for trying officers or employee not subject to rules appertaining to judicial tribunals.

Trials of charges against an officer or employee of a municipality or county are not controlled by or subject to the rules that appertain to judicial tribunals, where the Legislature has expressly given the governing body of the municipality or the county the exclusive cognizance or jurisdiction of such trials.

4. Judges 49(1)—Not disqualified for bias in absence of statute.

In the absence of statute, judges of courts would not be disqualified from trying cases in which they have some bias or feeling for or against one of the litigants, except any pecuniary interest they might have in the litigation.

Original application by Drury Butler for writ of prohibition prayed to be directed to John S. Scholefield, as Supervisor in and for the County of Sacramento, to prevent him from sitting as a member of the Board of Supervisors. Writ denied.

Butler & Van Dyke, of Sacramento, for petitioner.

Hugh B. Bradford and White, Miller, Needham & Harber, all of Sacramento, for respondent.

HART, J. This is an original application for a writ of prohibition. The petitioner is, and was for some time prior to the institution before the board of supervisors of said county of Sacramento of a proceeding looking to his discharge therefrom, county engineer of said county, having been duly appointed by said board of supervisors to perform and discharge the duties of said position. St. 1919, p. 1290. The respondent, as the title of this proceeding indicates, is, and has been for several years, a duly elected and qualified member of said board of supervisors and regularly acting as such member.

On the 31st day of May, 1921, there were filed before and with said board written charges against the petitioner, accusing him of having committed, in his official capacity of county engineer of said county, "numerous offenses of misfeasance and malfeasance in office, of inefficiency, neglect of duty, and misconduct in his said office."

It is alleged in the petition:

"That said respondent, John S. Scholefield, has heretofore expressed his desire and intention to secure the removal of this petitioner as such county engineer, and that, in furtherance of his said desire and intention, said charges and specifications were formulated and prepared at the instigation of respondent, John S. Scholefield, and at his special instance and request and by his, said John S. Scholefield's procurement, and were signed by Ford P. Gage and Maurice Leavitt, who allege themselves to be residents, electors, and taxpayers of Sacramento county."

It is further alleged in the petition:

"That respondent, John S. Scholefield, as supervisor of Sacramento county, threatens and intends, and, unless prohibited by the order of this court, will proceed, to sit in judgment upon said charges, and will proceed to vote upon their truth or falsity, and will proceed to vote upon the removal or retention of said Drury Butler, petitioner herein, as such county engineer, and petitioner avers that John S. Scholefield has prejudged the said case and is solicitous for petitioner's removal, and intends and will, unless prohibited, without cause or any reason, except his dislike for and prejudice against this petitioner, proceed to vote to sustain the said charges against this petitioner, and will vote to remove this petitioner from office, and that such vote of said Scholefield may decide the judgment of the said board."

The petition declares:

"That none of the charges and specifications set forth in said Exhibit A (the written charges filed before said board, and made a part of the petition here) are true, and this petitioner

has a good and sufficient defense to each and every charge therein contained."

It is further made to appear by the petition that on June 14, 1921, the petitioner filed a petition in the superior court in and for the county of Sacramento for a writ of prohibition to restrain said Scholefield, respondent here, from sitting as a member of said board of supervisors in the proceeding before said board involving an investigation and trial of the charges preferred against the petitioner, as set forth in Exhibit A attached to and made a part of the petition here; that a demurrer was interposed to the petition so filed in said superior court upon the ground that said petition did not state facts sufficient to entitle the petitioner to the relief therein and thereby prayed for; and that said demurrer was sustained by said court, and the writ denied. It is alleged that the remedy by appeal from the judgment of the superior court is inadequate, since an appeal therefrom cannot be perfected and the same prosecuted to a finality so as to render it effectual; the time for the hearing of the said charges by said board having been fixed for Monday, July 11, 1921, at 10 o'clock a. m.

Upon the filing of the petition in this court an order to show cause and an order temporarily restraining the respondent from sitting with said board on the trial of the charges against petitioner were issued. Upon the return day respondent appeared by counsel and filed a demurrer to the petition on the general ground and on the further ground that—

"It appears on the face of the petition of plaintiff and petitioner herein that a final judgment has been entered in the same matter by the superior court of the * * * county of Sacramento."

Thus two questions are here presented for decision: (1) Whether the writ herein applied for will lie where the precise question at issue has already been determined against petitioner at nisi prius and an appeal from the judgment of the trial court therein is available to the petitioner. (2) Whether, in any event, the respondent, as a member of the board of supervisors, may be restrained by the writ herein prayed for from sitting in the trial by said board of said charges on the ground that he is, as the petition alleges, biased and prejudiced against the petitioner, and therefore disqualified from sitting in the investigation of the charges because of having been personally active in instituting or causing to be instituted the proceeding for the removal of the petitioner from the position of county engineer.

At the hearing of this proceeding it was stated by counsel for the petitioner that an appeal had been taken from the judgment of the superior court in this matter, but it is claimed by counsel for petitioner that, even if

the facts as stated in the petition are not such as to justify the issuance of the peremptory writ for the purpose of prohibiting the respondent from sitting at all in the investigation of the charges, it is nevertheless still the duty of this court in this proceeding, upon the facts as disclosed by the petition, to order a provisional writ to issue as ancillary to his remedy by appeal, or, in other words, for the purpose of preventing the board from proceeding with the trial of the charges pending the determination of petitioner's appeal, and thus preserving the efficacy thereof or the judgment on appeal in case it be favorable to him; it being manifest that the denial in toto of the application for the writ will mean that the trial of the charges may proceed, with respondent as one of the triers, before the appeal is determined.

As forecast above, the appeal from the judgment of the superior court of Sacramento county in this matter involves and is limited to precisely the same jurisdictional question that is involved in this proceeding. In other words, the petition here discloses that the petition filed in the superior court was for a writ of prohibition to restrain the respondent, as a member of the board of supervisors, from participating in the trial of the charges preferred before said board against the petitioner, and that the same broad question presented therein is submitted here, to wit, whether the respondent is, by reason of the facts set forth in said petition, disqualified as a member of the board of supervisors from acting as such member in the investigation of the charges filed against the petitioner. This being the question of overruling importance submitted both by the appeal and in this proceeding, and inasmuch as we have been persuaded to the conclusion that the respondent is not disqualified from acting in his official capacity in the hearing of the charges against petitioner, there can be no impropriety in passing upon and determining said question in this proceeding. The conclusion thus announced upon the principal question propounded here will obviously render it unnecessary to notice or consider here in the question of the propriety, under the circumstances of the case as revealed by the petition, of the remedy herein petitioned for. We will therefore now proceed with an exposition of the reasons supporting the conclusion at which we have arrived upon the jurisdictional question submitted herein.

The argument advanced in support of the position of petitioner is that the board of supervisors, when engaged in the prosecution of an investigation of charges of misfeasance, nonfeasance, malfeasance, or other dereliction of duty by an employee or officer of the county appointed by such board, exercises functions which are judicial in their nature, and therefore to permit respondent, upon the showing made by the petition that he is personally interested in and likewise

solicitous for the removal of the petitioner from the position of county engineer, to sit in judgment upon the latter in the matter of the charges pending before the board of supervisors against the petitioner, would be to impinge upon the just principle that no one should be a judge in his own case; that, at all events, the petition, the allegations of which are admitted to be true by the demurrer interposed thereto, clearly discloses that respondent is biased and prejudiced against the petitioner, or at the least has been personally so active in the preferment and thus far the prosecution of the charges against the petitioner as to raise the implication of his bias and prejudice against the petitioner; that therefore he could not try the charges fairly and impartially, and for this reason he is legally disqualified from participating in the investigation of said charges. The proposition last stated, it will be noted, involves an insistence upon the rigor with which the rules as to the disqualification of judges and juries in the trial of cases in the courts are applied.

[1, 2] While it cannot be doubted that in investigations such as the one concerned herein the board of supervisors in a sense exercise judicial functions, still we are of the opinion, considering the relation, officially, of such board to the county, or its general purpose and scope as a part of the governmental machinery of the county, that, strictly speaking, such investigations are merely administrative, and we are therefore firmly of the conviction that the respondent here is not disqualified for either of the reasons suggested by counsel for the petitioner. Moreover, it is clear from the statute authorizing the appointment of county engineers by the boards of supervisors that the Legislature intended, in a case where the engineer appointed is charged with dereliction of his duties as such, to constitute the board of supervisors itself the sole tribunal by which such charge or charges should be heard and determined.

The statute giving the board of supervisors authority to appoint a county engineer in any of the counties of the state was passed by the Legislature of 1919 (Stats. 1919, p. 1290, *supra*), and the first section thereof reads as follows:

"The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent. of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer who has had within five years last past, not less than one year's actual experience in practical road building as county engineer, who shall be deemed an employee and not a county officer. The county engineer shall, under the general direction and supervision of the board of supervisors and except as otherwise provided in this act, have

complete direction and control over all of the construction, improvement, maintenance and repair of county roads, highways and bridges."

The second section reads in part as follows:

"The county engineer shall hold his employment for the term of four years from the date of his appointment; provided, that he may be removed at any time by the board of supervisors for inefficiency, neglect of duty, malfeasance, or misconduct in office, or other good cause shown, upon written charges to be filed with and heard by the board of supervisors and sustained by a three-fifths vote of said board after a hearing as herein provided. Said board is hereby vested with the power to administer oaths, compel the attendance of witnesses and the production of books, papers and testimony."

From the above provisions of the statute these propositions irresistibly follow: (1) That it was the legislative intent that the county engineer appointed by the board of supervisors should be possessed of the skill as an engineer necessary to enable him to cope with the requirements of modern road construction, and that he should, as such engineer, be entirely under the control and subject to the orders of the board; (2) that the Legislature intended to and did constitute the board of supervisors the exclusive tribunal by which any charges which might be preferred against the engineer should be heard and determined. The latter proposition follows from express language contained in the statute, while the former is deducible from the provision that the engineer so appointed "shall be deemed to be an employee and not a county officer," although it may be here parenthetically added that whether he is an employee only or a county officer is not material or important to the decision herein; the reference to said provision being made here only for the purpose of disclosing that it was the intent of the Legislature that the board of supervisors should be empowered to discharge the engineer, not arbitrarily, of course, but when, for any reason, his services as such proved unsatisfactory, much upon the same principle that a private employer may discharge an employee for inefficiency or deficiency in the qualifications required of his employment.

If, then, we were required to hold with petitioner that, where a member of the board of supervisors has himself filed charges against the engineer or has been personally instrumental in procuring such charges to be filed by some other person, such supervisor would be incompetent to sit with the board in the investigation of the charges so preferred, upon the principle that no one is to be permitted to "act as a judge in his own case," it would be necessary to hold that the provision of the statute constituting the board of supervisors the tribunal by which such charges are to be tried and determined is unconstitutional, since, by reason of the

provision that the engineer can be removed only upon a three-fifths vote of the board, the statute clearly contemplates that upon such charges he is entitled to the judgment of the whole membership of the board, and obviously, if one or two or any number of the members were incompetent, for the reasons suggested, to serve, the tribunal trying him would not be the tribunal as constituted by the Legislature. But, as above declared, we are of the opinion that the power vested in the board by the statute to investigate charges preferred against the engineer and to remove him from the position if the charges be by evidence sustained is perfectly valid and in no manner infringes the constitutional rights of the engineer. Indeed, it is clear that the Legislature, *ex industria*, constituted the board of supervisors the exclusive tribunal for the trial of charges of inefficiency or malfeasance or nonfeasance against the engineer, for the reason that, when appointed, he holds the position under the direct authority of said board, which is responsible to the public for the manner in which he discharges his duties as such engineer. The board is charged with the duty of seeing that he performs his official duties according to the requirements of the county, and may or may not accept as satisfactory such work as he may perform in his official capacity. We know of no other legal way than that as outlined or contemplated by the statute authorizing the appointment of a county engineer in which the supervisors may exercise the complete control over that officer or employee, whichever he may be, which the statute has undoubtedly vested in them. It is argued, however, that resort may be had either to section 758 or section 772 of the Penal Code in the case of charges preferred against the engineer, but we think that a comparison of those sections with the statute authorizing the appointment of an engineer will make it entirely clear that, if the procedure for the removal of the engineer was limited to that prescribed in either of the Code sections named, there still might be a just ground for the removal of said employee and at the same time no legal way by which such removal could be effected. Section 758 of the Penal Code provides:

"An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed."

The provisions following said section provide for the subsequent proceedings to be taken, including the trial by jury and judgment of removal in case of his conviction. Section 772 provides for the removal of any officer within the jurisdiction of the superior court who has been found guilty of charging and collecting illegal fees for services ren-

dered or to be rendered in his office or who has refused or neglected to perform the official duties pertaining to his office. Section 2 of the statute in question, it will be observed, provides that the engineer may be removed at any time by the board of supervisors for inefficiency, neglect of duty, malfeasance, or misconduct in office, or other good cause shown. It will thus be noted that, while some of the grounds upon which the engineer might be removed under the statute of 1919 are in effect the same as some of the grounds prescribed in the two sections of the Penal Code for the removal of public officers, yet it sets forth one cause for his removal which is not embraced within the provisions of the said sections of the Code, *viz.* inefficiency. It is hence to be seen that, if the right vested in the board to try and determine charges against the engineer and to remove him from his employment, if the charges be proved, is to be denied upon the ground that it involves a trespass upon the fundamental rights of that employee, then, obviously, if he were inefficient or incompetent as an engineer and no other ground for his removal could be sustained, there would be no power which could remove him until the expiration of his term of employment as such engineer, which, under the statute, is for four years from the date of his employment. And this very ground of distinction between the statute and the Code sections referred to clearly gives added support to the proposition heretofore stated, to wit, that it was the legislative intent to make the board of supervisors the sole and exclusive tribunal for the hearing and determination of any charges which might be preferred against the engineer.

[3] Nor are trials of charges against an officer or employee of a municipality or county controlled by or subject to the rules that appertain to judicial tribunals, where the Legislature has expressly given the governing body of the municipality or the county the exclusive cognizance or jurisdiction of such trials, and the law creating such body the exclusive tribunal by which such trials should be had makes no provision for disqualifying a member from acting upon the ground that he is biased or prejudiced against the officer or employee on trial. Of course, such an investigation, as has been before stated, is in a sense of a judicial nature, and the members of the board acting as the tribunal for the trial of the charges should not permit their bias or prejudice, if any they have, to influence them against the accused official. It is, of course, their duty to determine the question of the guilt or innocence of the accused officer or employee exclusively upon the evidence presented before them, and not to allow their minds to be influenced in the slightest degree by any personal feeling that they or any of them might have

against the officer or employee on trial before them; yet, while this is all true, it is also true, as before declared, that if any one of them happens to possess a feeling of prejudice against the accused or has acted in the preliminaries of the matter in such manner as to justify the implication that he may be biased or prejudiced against him in the trial, public policy, as it is established by the law creating the board the tribunal in such case, does not permit the member or members having such bias or prejudice to be precluded from participating in the trial upon that ground.

These propositions are sustained by the greater weight of authority, as, indeed, is the conclusion at which we have arrived upon the proposition first above considered—that is, that a member of the board who has himself filed charges or is personally interested in their filing would be acting as a judge in his own case should he be permitted to sit in the trial of the charges. In 2 McQuillin on Municipal Corporations, § 565, it is said:

“Some authorities hold that a council or other municipal board in proceedings for removal acts judicially, and therefore those boards whose members prefer the charges are disqualified from sitting as members of the council or board on hearing them, since they cannot act both as accusers and judges. But the contrary view is usually taken. Thus, in a proceeding to remove, members of the council are not disqualified because of the fact that they were members of a committee to investigate and afterwards preferred charges; the fact that they may have formed an opinion concerning the accused was regarded as immaterial. * * * On the trial of the mayor, the fact that one of the councilmen will act as mayor in event of removal, and the further fact that another councilman signed the charges, does not prevent either from sitting as councilmen at the trial. The formalities of a criminal court need not be observed.”

In *People ex rel. Burby v. Common Council of City of Auburn et al.*, 85 Hun, 601, 33 N. Y. Supp. 165, the relator, as city attorney of the city of Auburn, stipulated with counsel for the defendant in a case against the city for damages that he would abide the decision of the Supreme Court on appeal and not take the case to the Court of Appeals in the event the decision in the former court was against the city. The matter of making this stipulation was investigated by two members of the city council, and upon that investigation said members preferred charges against the city attorney of inefficiency in the management of the case referred to, and on investigation of the charges by the city council the relator was found guilty by a majority vote and removed from office. He thereupon applied for a writ of certiorari to the Supreme Court for the purpose of securing judgment nullifying the action of the city council removing him from office and assailed the jurisdiction of that body upon the ground,

among others, that the two councilmen who preferred the charges against him had taken part in the proceedings for his removal and had voted to sustain the charges. The same argument was made upon the hearing before the Supreme Court as is made here against the legal competency of the respondent to sit with the board of supervisors in the investigation of the charges preferred against the petitioner here. The court in that case said, *inter alia*:

“The common council is created, by statute, the only tribunal that can take proceedings against the relator for the matter alleged against him. It is therefore absolutely necessary that this body take this action, or it cannot be taken at all. Consequently the duty that devolved upon each member of the common council to take part in the proceeding was absolute, notwithstanding he may have formed such an opinion or taken such action in the premises as would disqualify him if he were a judge or juror in an action at law. In *re Ryers*, 72 N. Y. 1, 11–13, the county judge of Richmond county had made an order appointing commissioners in a proceeding to drain lands under a statute, and lands in which the judge was interested; he being the only authority, under the statute, that could appoint such commissioners. The point was made that the judge was disqualified from making the appointment, on account of being an interested party; and the Court of Appeals, after citing many authorities, reaches the conclusion ‘that it must be the law, from these cases, that where the judicial power has been confided to one judge, and if he should fail to act there would be no means of proceeding in the matter, though interested, he may take such cognizance of the case as is absolutely necessary, so far that the party shall not be without remedy.’ This we understand to be confined to cases where the judicial officer has not such an interest in the cause or matter that the result must necessarily affect his personal or pecuniary interest; or where his interest is minute, and he has so exclusive a jurisdiction, by Constitution or statute, that his refusal to act in the cause or matter will prevent any proceeding in it, then he may act, so far as that there may not be a failure of remedy. This is the rule as to judicial officers. The rule would be more liberal still in this case. The common council, in this proceeding, were, strictly speaking, not a court, nor were its members judges. The proceeding was not a common-law trial, with the incidents and common-law rights pertaining to a trial; nor, strictly speaking, was it a trial before a court. It was an investigation required by the statute to furnish information to the common council, upon which it could act. *People v. Board of Police Com’rs*, 93 N. Y. 102, 103; *Id.*, 98 N. Y. 334, 335; *People v. Doolittle*, 44 Hun, 293. These members of the common council had no pecuniary interest in the result of the proceeding, and were not in any sense parties to it, further than to discharge the duties imposed upon them by law. We must hold that the common council had jurisdiction, and that the authority conferred upon it by the statute in relation to the subject-matter has been pursued in the mode required by law in order to authorize them to make the determination.”

In *State ex rel. Starkweather v. Common Council of the City of Superior*, 90 Wis. 612, 619, 64 N. W. 304-306, a proceeding before the city council involving an investigation by said body of charges of official misconduct against the mayor was reviewed, and in said case the argument was made that the power conferred upon the city council to investigate charges against the mayor and remove that official from his office in case the charges were sustained was unconstitutional, because it was a grant of judicial power that could not be conferred upon any body of men save courts and justices of the peace. It was further claimed that the "court" so constituted was unconstitutional because at least two of the aldermen or councilmen were interested in the result, they having preferred the charges before the common council against the mayor. To these contentions the Supreme Court of Wisconsin replied:

"There are certainly some decisions lending color to the view that the amotion of an officer of a corporation is purely an exercise of judicial power. *Dullam v. Willson*, 53 Mich. 392; *Tompert v. Lithgow*, 1 Bush, 176. The better authority, however, is clearly to the effect that the power to remove officers for cause, though to be exercised in a judicial manner, is administrative, not judicial. It is a part of the power of the corporation which is very useful, in fact almost necessary, for the efficient performance of the corporate duties. * * * The common council, not being a court, but merely an administrative body, is not subject to all the rules governing courts in the transaction of business; and thus it undoubtedly is the law that the fact that one of the aldermen will discharge the duties of mayor in case of the removal of the mayor, and that another of the aldermen signed the charges upon which the mayor was tried, does not bar these aldermen from sitting. The Legislature has power to designate the officers who shall possess and exercise the power of removal, and it has designated in this case the common council. It created the office, and it may provide for the removal of the officer; and it may undoubtedly provide for such removal by a body, one of whom will be called to exercise the duties of mayor in case of his removal. Nor is there any affidavit of prejudice provided for by the statute. Passion and prejudice frequently play an important part in such proceedings as those before us, but in the absence of constitutional or legislative restrictions they do not disqualify the members of the removing board from acting. 'Ita lex scripta est.' *Andrews v. King*, 77 Me. 224."

The doctrine of the above authorities is expressly approved by our own Supreme Court in *Federal Construction Co. v. Curd*, 179 Cal. 479, 177 Pac. 473, Id., 179 Cal. 494, 177 Pac. 469, 2 A. L. R. 1202, in which the subject is elaborately considered, and the reasoning thereon squarely in line with that of the cases and the authorities above cited. See, also, *Grosjean v. Board of Education*, 40 Cal. App. 434, 441, 181 Pac. 113; *Riggins*

v. Richards et al., 97 Tex. 229, 237, 77 S. W. 946; *Barrett v. Board of Comm'rs*, 85 N. J. Law, 134, 88 Atl. 856, 857; *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842, 849; *Tibbs v. City of Atlanta*, 125 Ga. 18, 53 S. E. 811, 812; *People ex rel. Jones v. Sherman et al.*, 66 App. Div. 231, 72 N. Y. Supp. 718, 720; *State ex rel. Heimburger v. Wells*, 210 Mo. 601, 109 S. W. 758, 761-762; *State ex rel. Murphy v. Burney*, 269 Mo. 602, 191 S. W. 981, 982, et seq.

All the foregoing cases declare that the power to remove an officer of a municipal corporation for cause is administrative, not judicial, and may be vested in such a body as the common council, and that the power of removal is not subject to all the rules governing courts in the transaction of business.

The case of *Stockwell v. Township Board*, etc., 22 Mich. 341, cited by petitioner, is one of the very few cases which hold adversely to the principles established by the cases above named. But we are not impressed with the reasoning by which the conclusion in that case was reached, and, as before declared, think the sounder reason is at the bottom of the cases cited by the respondent, above referred to.

[4] It may be added to what has already been said that even the judges of our courts would not be disqualified from trying cases in which they had some bias or feeling for or against one of the litigants, except for any pecuniary interest they might have in the litigation, were it not for the statutory provisions disqualifying them under certain circumstances and conditions.

We may also add that neither in the present case nor indeed in any case where the sole power of the trial of an officer upon charges which, if proven true, would result in his removal from office, is vested in the governing body of a city or county, is it to be assumed that any member of said body who is big enough, broad enough, intelligent enough, and honest enough to be elevated to so important a local public office would not be able in the trial of the officer to cast entirely aside any personal bias or prejudice he might have against such officer and so try him and determine the question of his guilt or innocence of the charges preferred wholly upon the competent evidence adduced before him. Indeed, we doubt not that the respondent in this case, even if it be true that he has entertained such a feeling of prejudice against the petitioner as appears to be shown by the petition, will try the petitioner upon the charges pending against the latter in the same fair and impartial manner as he himself would desire, and, indeed, be entitled to be tried were he placed in petitioner's position.

However, for the reasons herein stated, the demurrer to the petition herein is sustained,

and the application for a writ of prohibition, either peremptory or as auxiliary to petitioner's appeal, is denied.

We concur: FINCH, P. J.; BURNETT, J.

54 Cal. App. 266

BRIGDEN et al. v. DODGE et al. (Civ. 3622.)

(District Court of Appeal, Second District, Division 1, California. Sept. 19, 1921. Hearing Denied by Supreme Court Nov. 17, 1921.)

1. Levees and flood control ⇨25—Assessment of cost of improvements in protection district without appointment of commissioners void.

Acts of board of supervisors of county in letting contracts for work in a protection district before commissioners had been appointed, as provided in St. 1895, p. 247, as amended by St. 1911, p. 446, were irregular, and assessments levied to pay the cost of the work were void.

2. Levees and flood control ⇨5—Protection districts possess no separate entity from county.

A protection district, created under St. 1895, p. 247, as amended by St. 1911, p. 446, relating to improvement of channels of innavigable streams and water courses, is in no wise a public corporation, and possesses no separate entity from the county itself, the scope of the statute being to authorize the creation of an assessment district to the end that the property in the district may be required to pay the cost of the work in proportion to the benefits received.

3. Levees and flood control ⇨26—County liable for assessments illegally collected in protection district.

If assessments have been illegally collected in a protection district created under St. 1895, p. 247, as amended by St. 1911, p. 446, then the county wherein such district is located is responsible, and must respond to a claim for reimbursement.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Petition by T. Dwight Brigden and others for a writ of mandamus against Jonathan S. Dodge and others, Supervisors of Los Angeles County, and others. From an adverse judgment granting the writ, defendants appeal. Affirmed.

A. J. Hill, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles, for appellants.

Hartley Shaw and T. C. Gould, both of Los Angeles, for respondents.

JAMES, J. Plaintiffs, having recovered a judgment against the county of Los Angeles for a sum of money, brought this proceeding in the superior court to compel the supervisors of said county and the other dis-

bursing officers named to audit, allow, and pay the amount of said judgment from the general fund of the county. Mandate was decreed agreeable to the prayer of the complaint, and the defendants have appealed. The judgment roll alone constitutes the record on appeal.

[1-3] In 1912 the board of supervisors of Los Angeles county, acting under authority of an act to provide for the improvement of channels of innavigable streams and water courses, as the same was approved in 1895 (St. 1895, p. 247) and amended in 1911 (Stats. 1911, p. 446), adopted a resolution by which a district was described under the name of Fair Oaks Protection District, and proceed further to have surveys made and to provide for the doing of certain work and the assessment of the cost thereof against the property within said district. However, the board of supervisors did not proceed regularly with its action, but let contracts for work before commissioners had been appointed. Such procedure was not in accordance with the requirements of the act referred to. The case thus made was the same as that considered in Pasadena Park Improvement Co. et al. v. Leland, 175 Cal. 511, 166 Pac. 341. There it was held that the acts of the board of supervisors in ordering the doing of protection work and in levying assessments to pay the cost thereof were void. Plaintiffs having paid assessments levied against their property, located within the said Fair Oaks Protection District, brought an action to recover back the money, and obtained a judgment against the county, which judgment was general in its form without limiting or restricting terms as to the fund from which it was to be paid. Being a general judgment against the county, its payment would ordinarily be made from the county's common or general fund. In due course the plaintiffs presented their demand to the board of supervisors in their effort to collect upon the judgment, and the board allowed the demand, but ordered that it should be paid from the Fair Oaks Protection District improvement fund. At the time the demand of plaintiffs was so allowed no money was shown upon the books of the auditor and treasurer to the credit of the fund named, and no money was thereafter credited to that fund. As it appeared that there was ample money in the general fund of the county, plaintiffs insisted that their demand should be paid, and petitioned the superior court for the writ of mandate, which was, after final hearing, allowed to them. The position of appellants is that the Fair Oaks Protection District constituted an organization apart from the county of Los Angeles and one possessing individual and separate responsibilities, and their counsel say that, if the funds of that district were depleted,

plaintiffs could not obtain satisfaction of their demand from any other source. This conclusion would be right if the premise were correctly chosen. The situation bears no analogy to that of a school district, which is referred to in some of the decisions cited, for it has been directly held that a school district is in itself a public corporation possessing powers of a quasi municipal character. *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Kennedy v. Miller*, 97 Cal. 432, 32 Pac. 558. In *Pasadena Park Improvement Co. v. Leland*, supra, our Supreme Court determined that a protection district, such as that attempted to be organized by the board of supervisors, is in no wise a public corporation, and that it possesses no separate entity from the county itself, but that its scope is to authorize the creation of an assessment district to the end that the property in the district may be required to pay the cost of the work in proportion to the benefits received, and the court there says:

"In all essentials is the power conferred by the act like that conferred upon city councils and boards of trustees to create assessment districts for the improvement of streets," etc.

The act provides that the district shall be governed and controlled by the board of supervisors, and that the board, in employing the power of eminent domain, shall act in the name of the county. While it is provided that the supervisors in the formation of the district shall proceed upon receiving a petition of landowners, that is a means only for calling into use the power of the county as vested in its legislative and administrative board, and for the particular purposes provided in the act. It is true that a special fund is created into which moneys collected to defray the cost of the improvement work are to be segregated and kept; nevertheless the county is in effect the contracting agency and the collecting power. If the assessments have been illegally collected, as was determined in the cases of these plaintiffs, then the county is responsible, and must respond to a claim for reimbursement. Our Supreme Court has said, as we have noted, that a protection district of the kind referred to is similar to an assessment district described within a municipality under street improvement proceedings. In a case of the latter it has been held that the city itself owes the obligation to pay back to the property owner the amount of an assessment illegally levied and collected. *Spencer v. City of Los Angeles*, 180 Cal. 103, 179 Pac. 163. Our conclusion is that the plaintiffs are entitled to the writ which the judgment of the superior court awarded to them.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

54 Cal. App. 795

SCOVILLE v. DODGE et al. (Civ. 3623.)

(District Court of Appeal, Second District, Division 1, California. Sept. 19, 1921. Hearing Denied by Supreme Court Nov. 17, 1921.)

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Petition by C. B. Scoville for a writ of mandate against Jonathan S. Dodge and others, Supervisors of Los Angeles County, and others. Judgment granting the writ, and defendants appeal. Affirmed.

A. J. Hill, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellants.

Hartley Shaw and T. C. Gould, both of Los Angeles, for respondent.

PER CURIAM. The facts in this case are in all essentials parallel to those shown by the record in *Brigden et al. v. Dodge et al.* (No. 3622), 201 Pac. 631, in which decision was this day filed. Pursuant to stipulation, both cases were submitted on the same briefs.

For the same reasons as those stated in the opinion filed in *Brigden et al. v. Dodge et al.* the judgment herein is affirmed.

PER CURIAM. The petitioner has filed an application for a writ of certiorari to review the action of the defendant Engram as city clerk of the city of Redding in determining that a certain petition filed in the office of said clerk for the recall of certain of the city trustees of said city is sufficient to authorize a recall election, as provided in section 1 of the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns. Stats. Ex. Sess. 1911, p. 128.

We are satisfied that the action required of the clerk by that act is not judicial in character, and that, consequently, certiorari will not lie to review his decision. The act provides that, after the recall petition has been filed in his office "within ten days from the date of filing such petition, the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of said examination." It is this action which is claimed to be judicial and to be, therefore, subject to review. We think all that is required of the clerk to accomplish this duty is to use his eyesight and capacity for counting to determine whether the names on the petition which also appear on the record of registration constitute enough persons to authorize the recall under the statute; that is, whether or not they number 25 per cent. of the entire vote cast in such city at the last preceding regular municipal election at which the officers to be recalled were voted for. The record of registration will be sufficient for his information upon the question whether or not the persons signing the petition are qualified voters. The law does not require him to go outside for information, but he must determine "from the records of registration" whether or not the fact exists. Such an examination involves merely ministerial acts and is in no sense judicial.

If it should happen that names were forged to the petition in sufficient number to reduce the lawful signatures to the petition below the statutory requirement, persons legally interested perhaps might have a remedy, the nature and character of which we need not here decide. It is enough for the disposition of this application to say that the action of the clerk is not judicial, and hence certiorari is not the proper remedy.

The petitioner relies upon *Baines v. Zemansky*, 176 Cal. 376, 168 Pac. 565, and *Fickert v. Zemansky*, 176 Cal. 443, 168 Pac. 891. These cases hold that the action of the registrar of election of the city of San Francisco in determining whether or not a recall petition is sufficient under the provisions of the charter of that city is judicial in character. That conclusion was, however, based entirely on the elaborate provisions of the

186 Cal. 659

WRIGHT v. ENGRAM et al. (S. F. 9952.)

(Supreme Court of California. Aug. 19, 1921.)

Certiorari  **24—Does not lie to review decision of city clerk as to signing of recall petition by sufficient qualified voters, his action not being judicial.**

Under St. Ex. Sess. 1911, p. 128, § 1, providing that after a recall petition has been filed in the office of a city clerk he shall examine and "from the records of registration" ascertain whether the petition is signed by the requisite number of qualified voters, his action is not judicial, but merely clerical, so that certiorari will not lie to review his decision.

In Bank.

Original application by James D. Wright against Leslie Engram and others for certiorari. Application denied.

Carr & Kennedy and Chenoweth & Leining-er, all of Redding, for petitioner.

city charter, which are wholly different from the above-quoted provisions of the recall act applying generally to the cities within the state. The charter provided for an investigation which involved notice to the voters to come forward and prove their eligibility to sign the petition, and involved the decision of various other facts which were appropriate for judicial proceedings and which were not ministerial or clerical in their character. It was held that under the provisions of the Constitution relating to the powers of the city of San Francisco it was competent for that city to commit the determination of judicial questions, such as were or might be involved in a recall proceeding, to an officer specially authorized for that purpose, and that such exclusive jurisdiction was not subject to review in the superior courts on certiorari, nor even by way of injunction. This was put upon the ground that the matter was political, and that all officers elected were presumed to take their office subject to the conditions imposed by the charter and the provisions thereof for their recall. The cases above mentioned can have no application to the question here presented for consideration. Our complicated system of city government, which gives each city above a certain size power to adopt a charter for its own government, and our numerous statutes relating to and providing for the recall of elective officers, tend to create great confusion on the subject, and, when a decision of a court is resorted to for information, close attention must be paid to the particular city and the particular law on which the decision is predicated; otherwise the legal profession is likely to be misled in regard to the construction of the particular law in controversy.

The application for the writ is denied.

All concur, excepting ANGELLOTTI, C. J., absent.

54 Cal. App. 280

Ex parte BRUCE. (Cr. 812.)

(District Court of Appeal, Second District, Division 1, California. Sept. 21, 1921.)

1. Municipal corporations ⚡122(2)—Presumptions in favor of regularity of revenue ordinances.

Every reasonable presumption will be indulged in as to the regularity of a municipal ordinance imposing license taxes for revenue, and if its terms, in any condition of the subject dealt with, appear valid, it will be sustained.

2. Constitutional law ⚡230(3)—Licenses ⚡7(4)—Ordinance licensing auctioneers held not discriminatory.

A municipal ordinance requiring auctioneers to procure a license at \$50 per year for those

who sold real estate, live stock, or secondhand goods, and at \$10 per day for those who sold other property, or other property in connection with that mentioned, *held* not invalid as discriminatory, since a difference in the amount exacted may be justified, where it can be referred to the volume of business done.

Application by A. G. Bruce for a writ of habeas corpus, to be directed to the chief of police of the city of San Diego, to secure petitioner's release after conviction of conducting the business of an auctioneer without a license. Writ discharged, and petitioner remanded.

L. E. Dadmun, of San Diego, for petitioner.

C. G. Selleck, City Pros., of San Diego, for respondent.

JAMES, J. Petitioner was convicted in the police court in the city of San Diego of the offense of having conducted a business of an auctioneer without having first procured a license from said city entitling him so to do. He seeks to be discharged from custody of the chief of police on the ground that the ordinance, under the terms of which his conviction resulted, is unconstitutional and void. The particular contention made is that the ordinance in question, as its terms affect the business of auctioneering, is discriminatory. A copy of the ordinance is attached to the petition, and in section 29 thereof we find the following provisions:

"Class A. For every person who sells or offers for sale at public auction any real estate, live stock, or secondhand goods, wares, or merchandise, the sum of fifty dollars (\$50.00) per year.

"Class B. For every person who sells or offers for sale at public auction any other property than real estate, live stock, or secondhand goods, wares, or merchandise, or who sells or offers for sale at public auction any real estate, live stock, or secondhand goods, wares, or merchandise together with other property, the sum of ten dollars (\$10.00) per day."

The charge as made by the complaint filed against petitioner declared that he did willfully and unlawfully "sell and offer for sale at public auction new goods, wares, and merchandise, without having first secured a license." From the whole text of the ordinance in question it appears that its provisions were designed to be in part regulatory and in part for purposes of revenue. If that portion of it having to do with this petitioner's case could be said to be of a purely regulatory nature, and hence to be justified under the police power, there would be little room for any contention to be made against its validity.

"The police power, the power to make laws to secure the comfort, convenience, peace, and health of the community, is an extensive one and in its exercise a very wide discretion as to what is needful or proper for the purpose is

necessarily committed to the legislative body in which the power to make such laws is vested.' Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. * * * The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the Legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation." County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909.

[1] And the purposes of a taxing ordinance may be of a mixed nature and include both regulatory provisions and those designed to produce a revenue. San Francisco v. Ins. Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425. Conceding that an ordinance of the kind here presented, of mixed purpose and intent, is to be measured according to constitutional limitations affecting revenue measures, nevertheless every reasonable presumption will be indulged in as to its regularity, and if its terms, in any condition of the subject dealt with, appear valid, it will be sustained.

"A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution, or laws made in pursuance thereof. * * * The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade." Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

Under an ordinance imposing a license tax for revenue, an apparent discrimination may appear to be made between persons engaged in the same general business. The difference in the amount exacted is justified, where it can be referred to the volume of business done or profits realized. The bare terms of such an ordinance may not demonstrate that such a difference exists, but that is a matter which the legislative body of the municipality must be presumed to have considered and determined. In the case of the provisions of the ordinance before us, we are not required to say that it appears that persons such as would fall within "Class B" necessarily must transact a business greater in volume or profit than those included in "Class A." It seems altogether within reason that such may be the case; that being true, we must

here assume, in support of the ordinance, that such would be the condition of the business.

[2] In Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946, there was considered an ordinance of a city which required persons conducting a restaurant or boarding house to pay a license tax of \$3 per month where the meals were cooked and served by the proprietor or members of his family, and to pay \$8 per month in other cases. The ordinance was attacked as being discriminatory. It was sustained by the Supreme Court. In the light of that decision and the reasoning of it, we find no difficulty in concluding that the terms of the ordinance under which petitioner was prosecuted are valid.

The writ is discharged, and the petitioner remanded to the custody of the chief of police of the city of San Diego.

We concur: CONREY, P. J.; SHAW, J.

54 Cal. App. 260

TITLE GUARANTY & SURETY CO. v. DUARTE et al. (Civ. 2288.)

(District Court of Appeal, Third District, California. Sept. 19, 1921. Hearing Denied by Supreme Court Nov. 17, 1921.)

Subrogation — § 31(3)—**Surety on bond of sheriff paying judgment entitled to recover under bond indemnifying sheriff.**

Surety on the bond of a sheriff, which paid a judgment rendered against the sheriff and the surety jointly in favor of one whose property had been sold under attachment, was entitled to bring action and recover under a bond executed by the attaching creditor to indemnify the sheriff against loss by reason of the selling of the property under the writ, under Civ. Code, §§ 2777, 2848, 2849.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Title Guaranty & Surety Company against Joe Rose Duarte and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

F. W. Henderson and Terry W. Ward, both of Merced, for appellants.

Edward Bickmore, of Reno, Nev., for respondent.

HART, J. This is an action against the defendants, Vincent, as principal, and Joe Rose Duarte and Gonzales, as sureties, on a bond executed and given by said defendants as indemnity to the sheriff of Merced county on a sale of certain personal property seized by said officer under a writ of attachment.

The plaintiff, a corporation, is and was, at all the times mentioned in the complaint, en-

gaged in a general guaranty and surety business, and at all said times one S. C. Cornell was sheriff of said county of Merced; that the plaintiff was at all said times and down to the date of the death of said Cornell, on the 27th day of May, 1914, the surety on the official bond of said Cornell as sheriff of said county.

It appears that the writ of attachment referred to was issued out of a justice's court in said county, in an action wherein the defendant Vincent was plaintiff and one Frank Duarte defendant, and that on the 26th day of February, 1912, at Atwater, in said county, said Cornell acting in his official capacity of sheriff, levied upon and attached a certain carload of sweet potatoes as the property of said Frank Duarte, and noticed the sale thereof for the 28th day of February, 1912, at 2 o'clock p. m. It further appears that, prior to the sale, the ownership of the carload of potatoes so levied upon was claimed by a third party, and that, to protect himself as said sheriff, from any claim or claims of damages made by any third person claiming that said potatoes were not the property of said Frank Duarte at the time of the seizure thereof under said writ of attachment or thereafter, said Cornell, as sheriff, demanded of and received from said Fred Vincent, the attaching creditor, an indemnity bond whereby he (said sheriff) would be held free or immune from any liability for damages resulting to him in the event said potatoes at the time of said attachment and sale were not the property of said Frank Duarte, defendant in said justice's court action. The condition of said bond which, as stated, was executed by the defendants, Vincent, Joe Rose Duarte, and Gonzales, was in the sum of \$500, "to be paid to the said Sam Cornell, against any loss arising from the attachment of one carload of sweet potatoes, now supposed to be the property of Frank Duarte." It appears that the ownership of the potatoes in question at the time of their seizure and sale under the writ of attachment was claimed by a corporation designated and known as Brinkley-Douglas Fruit Company; that said corporation, after the sale of said potatoes by the sheriff, brought an action in the superior court of the county of Merced against the sheriff and the plaintiff in this action, the latter as surety on the official bond of said sheriff, claiming damages for the conversion and sale of said potatoes; that said S. C. Cornell died on the 27th day of May, 1914, and that on the 15th day of June, 1914, and in the superior court of Merced county, A. L. Silman was duly appointed administrator of the estate of said Cornell, deceased, and on the 17th day of June, 1914, duly qualified as such administrator and continuously after said last-named date until the 29th day of October, 1917, was the duly qualified and acting administrator of said estate; that on

the 15th day of May, 1915, said Silman, as such administrator, was duly substituted as a party defendant in said action instituted by said Brinkley-Douglas Fruit Company, as plaintiff, in the place and stead of S. C. Cornell, as sheriff of Merced county, and that on the 1st day of August, 1916, a joint and several judgment in the sum of \$472, with costs taxed in the sum of \$34.20, was duly rendered and entered against said A. L. Silman, as administrator, etc., and said Title Guaranty & Surety Company, as said surety on the official bond of said sheriff; that a motion for a new trial in said action was denied and thereafter said defendants appealed from said judgment and said order denying said motion for a new trial to the District Court of Appeal for the Third District and that said Court of Appeal affirmed the judgment and the order in said action; that the amount of said judgment with all costs of suit incurred during the trial of said action and the appeal thereafter and the interest thereon amounted to the total sum of \$625.30; and that the same was paid by the plaintiff in this action. The complaint alleges:

"That at all times after the execution of said instrument of indemnity, hereinbefore set forth, and up to the said death of said S. C. Cornell, he was the owner and holder of the same, and that at all times after said death, until the execution of the assignment of said instrument of indemnity hereinafter alleged and set forth, the said estate of said S. C. Cornell, and the heirs of the same, each represented by said A. L. Silman, as administrator of said estate, were the owners and holders of said instrument of indemnity and all rights secured thereunder; that on or about the 27th day of August, 1917, said A. L. Silman, acting as the administrator of said estate, and in consideration that the said plaintiff herein would duly pay and discharge said judgment so rendered against said plaintiff and said A. L. Silman, as administrator of said estate, did sell, assign, and set over unto the said plaintiff herein, all the right, title, and interest of the said estate of said S. C. Cornell, deceased, in and to said instrument of indemnity hereinbefore set forth; and said plaintiff herein did so pay and discharge said judgment and that said assignment to plaintiff was duly confirmed by this court in the matter of said estate of S. C. Cornell, deceased, on the 29th day of October, 1917, and that plaintiff, at all times since said assignment and confirmation has been, and now is, the legal owner and holder of said instrument of indemnity and all the right, title, and interest of said estate, and said heirs in and to said instrument of indemnity, and any and all rights accruing thereunder and any and all right of recovery thereon."

Upon findings substantially in accord with the averments of the second amended complaint, of which the above statement represents an epitomized résumé, the plaintiff was awarded judgment, from which the defend-

ants Joe Rose Duarte and J. J. Gonzales appeal, under the alternative method.

There was no oral evidence received at the trial, the evidential features of the record consisting wholly of certain facts stipulated by the parties and certain documents. The fact of the execution of the indemnity bond, the fact of the bringing of the action by the Brinkley-Douglas Fruit Company against plaintiff here and said Cornell, the fact of a judgment having been given in favor of said fruit company in said action against the plaintiff here and Silman, as administrator and substituted defendant, and the satisfaction of said judgment by the plaintiff here, were admitted at the trial. The documentary evidence, which was admitted over objection by appellants, consisted of the petition in the estate of said Cornell, deceased, for an order confirming the sale and transfer of said indemnity bond to plaintiff and the order confirming said sale and transfer.

The discussion in the briefs revolves around attacks upon the findings, upon the ground that there is no evidence in the record which supports them and the rulings allowing in evidence the documents above mentioned. It is first contended by appellants that there was no legal assignment of the indemnity bond to plaintiff because said bond was an asset of the estate of Cornell and had, previously to the purported assignment, been distributed to the heirs of the deceased, and for the further reason that there was some irregularity in the proceeding in which the order purporting to authorize the administrator of Cornell's estate to transfer said bond was made. It is, however, argued that, even assuming the transfer or assignment to have been valid, still the plaintiff in this case cannot claim any rights thereunder, inasmuch as the bond was given for the express purpose of indemnifying Cornell against loss by reason of selling the potatoes under the writ of attachment and so expressly provided, and, indeed, that the bond is even of no avail to the estate of Cornell, since to justify action by the administrator of said estate upon said bond it must have been made to appear that Cornell or his estate had suffered some loss by reason of the sale of the potatoes; but we regard all this discussion beside the legal propositions which are determinative of this appeal. The important or real questions in this case are whether the plaintiff, having paid the judgment awarded against it and Cornell in the action for damages against them for the seizure and sale of the potatoes, and the payment of said damages having been made for the benefit of the estate of said Cornell, is entitled to have recourse to the indemnity bond as in recoupment for the moneys so expended, and, if so, whether upon the payment of said damages it was subrogated to the rights of Cornell under said undertaking. It is clear that these proposi-

tions are answered by the Civil Code. Section 2777 of said Code provides:

"One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately to every person injured by such act."

The above section requires no construction. Its terms are plain and unambiguous and obviously applies to a case of this character. There can be no possible doubt that the plaintiff in this case was damaged by the act of the sheriff in seizing and selling the potatoes. See *Lewis v. Johns*, 34 Cal. 629, 635; *Stewart v. Wells*, 6 Barb. (N. Y.) 79, 81; *Freeman v. Adams*, 9 Johns. (N. Y.) 116. And that upon the payment of the damages there ipso facto accrued to plaintiff the right of subrogation to the rights of Cornell under the indemnity bond, is a proposition free from doubt. The rules pertaining to subrogation are succinctly stated in the Civil Code as follows:

"A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, * * * at the time of entering into the contract of suretyship, or acquired by him afterwards." Civ. Code, § 2849.

"A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal." Civ. Code, § 2848.

As is said by Mr. Justice Shaw in *Martin v. De Ornelas*, 139 Cal. 41, 49, 72 Pac. 440, 444, referring to the above Code sections:

"These sections are but a re-enactment of the well-settled rules of equity on the subject of subrogation or substitution. Story's Equity Jurisprudence, §§ 495-502; Brandt on Suretyship, § 260 et seq." "This right does not depend upon any contract, express or implied, but grows out of the relation of surety and creditor, and the principles of natural justice. Brandt on Suretyship, § 260; *Hidden v. Bishop*, 5 R. I. 29; *Mathews v. Aikin*, 1 N. Y. 595."

See, also, 37 Cyc. 406 and 391; *Bankers Loan, etc., Co. v. Hornish*, 94 Va. 608, 27 S. E. 459; *Berry v. Bullock*, 81 Miss. 463, 33 South. 410; *Boone Co. Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532; *Hawpe v. Baumgardner*, 103 Va. 91, 48 S. E. 554; *Coffee v. Tevis*, 17 Cal. 239.

It is true that as a general rule the surety only becomes subrogated to any rights of the judgment creditor, but this is not always so. As was said in *Townsend v. Cleveland, etc., Co.*, 18 Ind. App. 568, 47 N. E. 707, 709:

"More broadly, [subrogation] is the substitution of one person in the place of another, whether as a creditor, or the possessor of any other rightful claim."

See also *Leavitt v. Can. Pac. R. Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152; *Jack-*

son Co. v. Boylston Ins. Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728.

From the above authorities it is obvious that it was not necessary that the administrator of the estate of Cornell should have assigned the indemnity bond to plaintiff in order that the rights of Cornell thereunder should inure to the benefit of said plaintiff. It will also be observed that, in view of the above considerations, the rulings of the court admitting the documents above referred to in evidence and of which complaint is here made are not material to this decision. Nothing more can be added to what the Code sections above say upon the questions involved in this appeal.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

54 Cal. App. 269

In re WASSON.

WASSON v. WALDROP.

(Civ. 3940.)

(District Court of Appeal, First District, Division 1, California. Sept. 20, 1921.)

1. Adverse possession ⇨100(4)—Deed is color of title only to land actually described.

A deed is color of title only as to land actually described by it.

2. Adverse possession ⇨100(4)—Possession of land conveyed not constructive possession of land not included in deed.

Use and possession of land conveyed did not amount to constructive possession of a portion outside the boundaries in the deed consisting of part of a sand bar on the opposite side of the river forming the boundary line.

3. Adverse possession ⇨24—Clandestine acts held not to amount to continuous and uninterrupted possession.

Isolated acts of ownership, not exclusive and more clandestine than open and notorious, held not to amount to the continuous and uninterrupted possession which is necessary to constitute an adverse possession sufficient to bar the claim of one holding the record title.

4. Adverse possession ⇨95—Payment of taxes on very land in controversy must be proved.

Where payment of taxes is claimed as an element of adverse possession, claimant must prove payment of taxes on the very land in controversy, and it is not sufficient to show payment of taxes on a tract of land which he supposed contained the portion in dispute.

5. Trial ⇨139(1)—When directed verdict proper, stated.

A directed verdict is proper only when there is no substantial evidence tending to prove, in favor of the party upon whom the burden rests, all the controverted facts neces-

sary to establish his case; but whenever, upon the whole evidence, the court would be compelled to set aside a finding as unsupported by the evidence, it should direct a verdict.

6. Records ⇨9(3)—Purpose of application to register title is to settle title.

The general purpose of an application under the registration act, or Torrens Law, is to clear up and settle the title to land; it is a proceeding in the nature of an action to quiet title.

7. Records ⇨9(4)—Applicant for registration of title must prove possession title in fee claimed.

The applicant for initial registration of title, as a title in fee, must produce proof that he is possessed of such title, either by a chain of conveyances from the general governor or by title by adverse possession.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Application by Louis Logan Wasson for initial registration of title to land, to which Helen L. Waldrop objects. From a judgment denying the application as to part of the land applicant appeals. Affirmed.

A. W. Hollingsworth, of Healdsburg, Carl Barnard, of Santa Rosa, and Russell P. Tyler, of San Francisco, for appellant.

E. M. Norton, and Fred W. McConnell, both of Healdsburg, for respondent.

WASTE, P. J. This proceeding was instituted by the appellant Wasson as applicant under the provisions of the act for the certification of land titles (Stats. 1897, p. 138), commonly known as the Torrens Land Act, for initial registration of title to 78 acres of land situated in Sonoma county. He predicated his claim to the land upon the fact that he had been in actual, peaceful possession of the property, adversely to all other persons, for a period of more than five years next preceding the filing of his application, and during all of the time he had paid all taxes assessed against the property. The application for registration was opposed by the respondent, Helen L. Waldrop, denied that the applicant had been in adverse possession of 8.12 acres of the land described in the petition, lying westerly and southwesterly of the Russian river, and alleged that she was, and for more than 10 years prior to the filing of her answer had been, the owner in fee simple absolute of that portion of the property; and, further, that she had during all of that time been in actual, open, exclusive, notorious, continuous, and adverse possession of the land, and had paid all taxes levied or assessed against that particular parcel. When the evidence was in the court granted a motion, made by the objector, for an instructed verdict in accord with her contention. From the judgment entered thereon,

denying his claim to the 8.12 acres, the applicant has appealed, contending that there is ample testimony in the record to support a verdict, if one had been rendered in his favor, and that the trial court, therefore, erred in withdrawing the case from the jury, and instructing it to return a verdict for the objector.

The applicant claims to be the owner of, and entitled to registration of title to, 78 acres of land. In 1908 Levi Sutton and others deeded to him, in the same instrument, two parcels of land, aptly described by metes and bounds, lying east and northeast of the Russian river, and containing 47 acres, "and also all lands of the said parties of the first part, lying southwest of and adjoining the above-described premises, commonly called the gravel bar or waste land." Appellant went into possession of the property and has continuously lived on the place ever since. He seeks in this proceeding to have registration of title to the 47 acres conveyed to him by metes and bounds in the Sutton deed, and in addition asks for confirmation of ownership to 31 acres of gravel bar, 8.12 acres of which are cut off from the rest of the tract by the bed of the Russian river. This severed portion lies to the west and southwest of the stream and is contiguous to the lands of the respondent. The controversy here waged over this small tract.

The appellant takes the position that he has established title to the 8.12 acres of gravel bar west of the Russian river by adverse possession and payment of taxes for a period of five years. Such possession is of two kinds: First, where possession is taken by bow and spear without color of title; second, where possession is taken under a claim of title founded upon a written instrument. *Kimball v. Lohmas*, 31 Cal. 154, 159.

Appellant introduced in evidence a number of deeds carrying the chain of title backward from his immediate grantors to the year 1886, when B. M. Jones conveyed a tract of land containing 363 acres, more or less, to W. B. Reynolds. There is nothing in the record by which appellant can assert title to any land not embraced in the deed from Jones to Reynolds, yet the general description and the particular description by metes and bounds contained in that instrument fix the bed of the Russian river as the south and westerly boundary line of the property conveyed. One of the calls in the description runs "thence down Russian river near center." The land conveyed by the Jones deed is referred to as, and was a part of, the Alexander tract of the Sotoyome ranch. From various exhibits it is made to appear that the southerly and westerly boundary line of that tract is the Russian river. The 8.12 acres of land in controversy was never a part of the Alexander tract. The appellant sought to show that the Russian river is a changeable stream, and

that its bed has shifted within recent years to such an extent that it has severed the 8.12 acres of gravel bar from his larger portion. The proof was vague and unsatisfactory, and was apparently disregarded by the trial court as not worthy of consideration. At most, it only tended to prove that the bed of the stream occasionally changed from bank to bank.

[1, 2] In tracing the title from Jones through various transfers to appellant to that portion of the property conveyed to Reynolds by Jones, now owned by the appellant, we find that the bed of the Russian river constantly appears in the various descriptions in the deeds, wherever appropriate, as the west or westerly boundary line. One of the monuments frequently referred to is "an iron pin near the bed of the Russian river." Another is "a station in the bed of the Russian river." We can reach no other conclusion than that when the Suttons deeded to appellant "all lands of the parties of the first part lying southwest of and adjoining the above-described premises, commonly called the gravel bar or waste land," such general description was intended to, and did, carry only the portion of the gravel bar to which the grantors had title, the westerly boundary line of which was the Russian river. To hold otherwise would be to give effect to a deed conveying more property than the grantors owned. It is elementary law that a deed is color of title only as to land actually described by it. 2 C. J. 177, par. 339. That being so, the deed from Sutton to appellant is color of title only as to land lying east of the river. Having gone beyond the limits of the land described in his deed, and claiming to hold adversely, he can only claim possession by bow and spear, without color of title. Consequently appellant's use and possession of and residence on the land on the east side of the river, the only land conveyed by his deed, did not amount to constructive possession of that portion of the gravel bar on the other side of the stream, owned by the respondent. *Wheatley v. San Pedro, etc., R. R. Co.*, 169 Cal. 505, 516, 147 Pac. 135.

[3] The respondent, Mrs. Waldrop, satisfactorily proved good title in herself to a large tract of land on the west side of the Russian river, opposite the holdings of the appellant, and including the 8.12 acres of gravel bar in controversy. She was in actual possession of the property, had lived on a portion of it many years, and devoted the whole to the ordinary purposes for which it was adapted. Most of her land was fenced, but the part nearest the river, being gravel and sand and closely overgrown with willows, was of little use and was open. The respondent from time to time allowed parties to cut wood on this open land, and to cut the willow trees for props for supporting prune trees, and to take out sand and gravel. In other ways she exer-

cised the ordinary acts of dominion of an owner over the property. She testified that she knew nothing of the hostile claim of the appellant, and did not know that he had ever attempted to exercise any acts of possession over the gravel bar on her side of the river. In rebuttal the appellant produced witnesses who testified that under permission from him, they had gone on the land, cut wood and prune props, and removed gravel. He himself claimed to have once planted a crop on a portion of the gravel bar. But these acts were isolated, some of them occurring before the five-year period relied upon by appellant, and from their nature were more clandestine than open and notorious. They were not exclusive, and did not amount to the continuous and uninterrupted possession which is necessary to constitute an adverse possession sufficient to bar the claim of one holding the record title. *Unger v. Mooney*, 63 Cal. 586, 590, 49 Am. Rep. 100; *Thompson v. Pioche*, 44 Cal. 508, 517; *Mauldin v. Cox*, 67 Cal. 387, 392, 7 Pac. 804; *De Frieze v. Quint*, 94 Cal. 653, 663, 30 Pac. 1, 28 Am. St. Rep. 151.

[4] One of the requisites of title by adverse possession is the payment of all taxes for the statutory period. Appellant was assessed and paid taxes for the years 1914 to 1919, inclusive, upon 78 acres of land; but, as shown by the record, it was on land located on the easterly side of the Russian river. On the other hand, Mrs. Waldrop, the respondent, conclusively established the fact that she had been assessed and paid the taxes during that period on all the adjacent lands on the westerly side of the stream. Manifestly, appellant did not pay the taxes levied and assessed on the 8.12 acres of gravel bar involved in this controversy. One of the statutory requirements to the acquisition of a title by adverse possession was, therefore, not fulfilled. *Mann v. Mann*, 152 Cal. 23, 29, 91 Pac. 994. It was not sufficient for appellant to show that he had paid taxes on 31 acres of gravel bar land, supposing them to include the portion in dispute. He was bound to prove that he had actually paid the tax on the very property in controversy. *Reynolds v. Williard*, 80 Cal. 605, 608, 22 Pac. 262.

[5] A directed verdict is proper only when there is no substantial evidence tending to prove, in favor of the party upon whom the burden rests, all the controverted facts necessary to establish his case. But whenever, upon the whole evidence, the court would be compelled to set aside a finding of the jury as unsupported by the evidence, it should direct the verdict. It is not necessary that there should be an absence of conflict in the evidence, but to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. *Estate of Baldwin*, 162 Cal. 471, 473, 123 Pac. 267; *Los An-*

geles F. & M. Co. v. Thompson, 117 Cal. 594, 601, 49 Pac. 714.

[6, 7] The general purpose of an application under the registration act, or Torrens Law, is to clear up and settle the title to land. It is a proceeding in the nature of an action to quiet title. 3 *Tiffany on Real Property* (2d Ed.) § 581, p. 2275; *Peter v. City of Duluth*, 119 Minn. 96, 103, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. The applicant for initial registration of a title, as a title in fee, must produce proof that he is possessed of such title, either by the production of a regular chain of conveyance from the general government, or by proof of the creation of a title by adverse possession, and evidence establishing title good as against the world is essential to warrant a decree awarding such registration. *Glos v. Kingman*, 207 Ill. 26, 34, 69 N. E. 632; *Glos v. Holberg*, 220 Ill. 167, 170, 77 N. E. 80. The applicant was unable to make the required showing. His claim of ownership of the 8.12 acres of disputed gravel bar was not entitled to be registered. There was no dispute as to the remainder of the land. The action of the trial court in directing the verdict was proper, and the finding of the jury correctly disposes of the rights of the applicant and the objector in the land, title to which was sought to be registered.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 277

CONRAD v. FOERST. (Civ. 3930.)

(District Court of Appeal, First District, Division 1, California. Sept. 21, 1921. Hearing Denied by Supreme Court. Nov. 17, 1921.)

1. Contracts —296—Authorized or trivial alterations do not bar recovery.

The rule that one who has acted by virtue of a written contract has no right of recovery unless he can show that he has completed his contract, or that completion had been waived or excused, has no application, where the contract stipulates that the owner or architect may request alterations or deviations, and the deviations were either ordered or were trivial in character.

2. Contracts —302—Recovery by contractor not barred by trivial defects.

A contractor, who has substantially performed his contract to construct a building, will not be held to have forfeited his right of recovery by reason of trivial defects or imperfections in the work performed.

3. Appeal and error —842(1)—What constitutes trivial imperfections in work under contract, question of fact and not reviewable.

What constitutes "trivial imperfections," which will not bar recovery by a contractor

who has substantially performed his contract to construct a building, is a question of fact in each case, and the decision of the trial court upon proper evidence cannot be reviewed on appeal.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry Conrad against Wilhelm Foerst. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Castelhun, of San Francisco, for appellant.

Leon Samuels and Chas. J. McDonnell, both of San Francisco, for respondent.

KERRIGAN, J. Action to foreclose a mechanic's lien. Plaintiff contracted with defendant to furnish all the work on a two-story and basement frame building, with certain exceptions, for the sum of \$4,644, payable at specified times as the work progressed. Plaintiff entered upon the performance of the contract, and thereafter, so it is alleged, completed all the conditions on his part to be performed. Notice of completion of work was filed, and thereafter the architect delivered to plaintiff a certificate that the last payment mentioned in the contract was due. This payment amounted to the sum of \$1,164. Plaintiff also claimed the further sum of \$112, alleged to be the reasonable value of certain extra work ordered by defendant. The sum of \$600 was paid by defendant upon these claims, leaving a balance due thereon of \$676, for which sum plaintiff filed his claim of lien. The amount not being paid, this action was brought to recover the same.

Defendant, answering, alleged that plaintiff had not performed all the conditions of the contract, and charged that the building was not completed in a good and workmanlike manner as required by the contract, and, further, that the building was never completed. The answer specifies 24 particulars wherein it is alleged that the plaintiff failed to construct the building in accordance with the plans and specifications. Then follows a cross-complaint by which defendant seeks to recover from plaintiff an amount in excess of one-half of the entire cost of the building for alleged defects and delay in its construction.

[1-3] The trial court found that all the alleged objections and defects were of a trivial nature, and that the same could be readily remedied and repaired at a cost not exceeding \$30. After signing the findings and decision, however, the court ordered and the respondent stipulated that the judgment provided for by the findings should be reduced, and that

the sum of \$76 thereof should be remitted. Accordingly judgment was entered for the sum of \$600, from which judgment defendant appeals.

It is here contended that, as the plaintiff never completed his contract in strict compliance with the plans, drawings, and specifications, it is insisted that the law will not for this reason permit him to recover on the contract, for the reason that his pleadings do not recite that such changes were either waived or justified by defendant's conduct. We are cited to the case of *Herdal v. Sheehy*, 173 Cal. 163, 150 Pac. 422, as supporting this contention. It is true that it is there held that one who has acted by virtue of a written contract has no right of recovery unless he can show that he has completed his contract or that completion had been waived or excused. This principle, however, has no application to the instant case. One of the provisions of the contract stipulated that should the owner or the architect at any time during the progress of the work request any alterations or deviations in the work provided for, either of them should be at liberty to do so, and that the same should in no manner affect the contract, but that the same should be held to be completed when the work was finished in accordance with the original plans as amended by such changes. There was a conflict in the evidence upon the subject as to the completion of the building according to the plans and specifications, but it is sufficient to support the finding of the trial court that the changes or omissions complained of were either ordered by the architect or were trivial in character. A contractor who has substantially performed his contract will not be held to have forfeited his right to recovery by reason of trivial defects or imperfections in the work performed. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Schindler v. Green*, 149 Cal. 752, 87 Pac. 626. What constitutes "trivial imperfections" is a question of fact in each case, and the decision of the trial court upon proper evidence cannot be reviewed here. *Bianchi v. Hughes*, 124 Cal. 27, 56 Pac. 610.

Respondent also claims that the certificate issued by the architect, who had power to accept or reject the work, is binding and conclusive against appellant. He also claims that the lower court was without jurisdiction to settle appellant's bill of exceptions for the reason that it was presented too late. Considering the conclusion we have reached, a discussion of these questions can answer no useful purpose.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

54 Cal. App. 76

McMORRY et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SUTTER COUNTY. (Civ. 2347.)

(District Court of Appeal, Third District, California, Aug. 24, 1921. Rehearing Denied Sept. 23, 1921. Hearing Denied by Supreme Court Oct. 20, 1921.)

1. Prohibition ☞10(2) — Defendants not granted writ against trial of other previously instituted actions involving same question.

Contractor's sureties, being sued by laborers and materialmen in actions transferred from one county to another, will not be granted writ of prohibition against first county entertaining jurisdiction in actions by the laborers and materialmen against the county, based on stop notice, on theory that same question was involved and that jurisdiction was first acquired in the action against the sureties, where one of the stop notice actions which had not been transferred to the second county was commenced prior to the commencement of actions against the sureties.

2. Prohibition ☞27—Petitioners seeking to prevent trial of actions on theory that other court first acquired jurisdiction have burden of proof.

On application for writ of prohibition to prevent court from trying certain actions on theory that other court acquired prior jurisdiction in actions involving same question, petitioners have the burden of showing that the other actions were filed before the actions the trial of which was sought to be prevented.

3. Courts ☞30—Superior court, by transfer of case to other county, did not divest itself of jurisdiction to try previously filed cases between other parties.

Superior court, by transfer of case to court of other county, did not divest itself of jurisdiction to try other cases between different parties which had been begun before complaints in the transferred actions were filed.

4. Prohibition ☞10(1)—Insufficiency of complaint not ground for issuance of writ to prevent trial.

Writ of prohibition will not be granted to prevent the trial of certain actions on the ground that the complaints of the plaintiffs in such actions did not state a cause of action, since the insufficiency of the complaint does not deprive the court of jurisdiction.

5. Prohibition ☞10(2)—Contractor's sureties held not entitled to writ to prevent trial of materialmen and laborers' stop notice action against county.

Highway contractor's sureties, being sued by laborers and materialmen, under St. 1919, p. 487, held not entitled to writ of prohibition to prevent the trial of actions by the laborers and materialmen against the county pursuant to stop notice given county under Code Civ. Proc. § 1184, to subject reserve fund to payment of their claims, on theory that such stop notice actions involve the same question and that jurisdiction was first acquired in the actions on the bond, since the laborers and

materialmen had no right to such fund, and the sureties, who claimed merely to be subrogated to the rights of laborers and materialmen, could have no right thereto.

6. Highways ☞113(4)—Statute providing for stop notice to owner inapplicable to materialmen and laborers with claims against public contractor.

Code Civ. Proc. § 1184, requiring owner to withhold amount due contractor on service of stop notice, and making fund withheld subject to claims of laborers and materialmen by whom notice was given, held inapplicable to claims of laborers and materialmen against contractor constructing public highway, required to give bond under St. 1919, p. 487.

On Hearing in Supreme Court.

7. Prohibition ☞10(1)—Not granted unless lower court is proceeding in excess of its lawful jurisdiction.

Writ of prohibition directed against superior court to prevent trial of certain actions will not be granted in the absence of a showing that the superior court is proceeding in excess of its lawful jurisdiction.

Application for writ of prohibition by W. H. McMorry and another against the Superior Court of the State of California in and for the County of Sutter. Denied.

Thomas B. Leeper and Robert H. Schwab, both of Sacramento, for petitioners.

Arthur Coats, Dist. Atty., and A. H. Hewitt, both of Yuba City, and Harry Deirup, of Chico, for respondent.

BURNETT, J. The petition shows that in 1920 one D. C. Howard entered into four separate contracts with the county of Sutter for the construction of four different highways in said county; that bonds were given by said contractor as required by the statute (Stats. 1919, p. 487), and that petitioners herein were the sureties on said undertaking; that said contractor failed to complete his contracts and failed to pay a large number of laborers and materialmen who furnished labor and material for said construction; that said laborers and materialmen thereafter filed their respective claims as provided by said act and brought suit therefor against said sureties in the superior court of the county of Sutter; that subsequently said actions were transferred to the superior court of the county of Sacramento for trial; that said laborers and materialmen also served upon the county of Sutter a "stop notice" or "withhold notice," as provided by section 1184 of the Code of Civil Procedure, for the same claims, and have commenced actions against said county to subject to the payment of their claims said reserve fund withheld by the county from the money due upon said contracts; that petitioners are not parties to said ac-

tions against said county, but they are interested in how said money is paid out; that, if said actions against the county are prosecuted separately from the actions upon said bonds, then petitioners will be deprived of their right to preserve said fund for the payment of said claims for which petitioners are liable; that said actions against the sureties were commenced and transferred to Sacramento county prior to the commencement of the actions against the county; that "the Commercial Bank of Durham, a corporation, and the First National Bank of Yuba City, a corporation, have filed their separate complaints in intervention in said stop notice actions, in which they allege they are the owners of the balance withheld by said county on said contracts by reason of an assignment thereof from said contractor, D. C. Howard; that, if said banks were permitted in said actions to recover said money so withheld on said contracts, these petitioners will be denied their rights to have said money applied upon the claims upon which they are being sued; * * * that, if said actions on said claims and on said stop notices are heard and determined by one court, it will avoid a multiplicity of suits and will save all the parties to said action the labor and costs of prosecuting two actions for the same thing."

The foregoing statement comprises all the material facts that appear in the petition, although there are many allegations of legal conclusions, which we deem unnecessary to set out. The theory of petitioners is that the vital question in all this litigation is as to the proper disposition or payment of said reserve fund, in other words, to whom it should be paid by the county, and that two different courts of concurrent jurisdiction have before them in different actions for adjudication this important controversy, and that in such situation the court first acquiring jurisdiction has the exclusive right to dispose of the whole matter. In support of their contention as to the law of the case they cite: *State v. Tallman*, 29 Wash. 411, 69 Pac. 1115; *Spiller v. Wells*, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878; *State v. McClure*, 17 N. M. 694, 133 Pac. 1063, 47 L. R. A. (N. S.) 744, Ann. Cas. 1915B, 1110; *Adams v. Tri-City*, 124 Va. 473, 98 S. E. 647; *Ryan v. Donley*, 69 Neb. 623, 96 N. W. 234; *State v. Davis*, (Mo. App.) 190 S. W. 964; *Reugger v. De Breueys*, 146 La. 283, 83 South. 556; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932; *Sangamon v. Eminger*, 257 Ill. 281, 100 N. E. 906; *Keefe v. Dist. Court*, 16 Wyo. 381, 94 Pac. 459.

We deem it unnecessary to comment upon these decisions. It may be admitted that the rule is as stated by petitioners, and that prohibition may issue in such cases; but we may add that this remedy is allowed, not for

the reason, as is generally true, that the other court has no jurisdiction, but the practice is based upon necessity and comity, and so it is held:

"That when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction." *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

[1] The application of this principle, however, to the situation herein results in the undoing of petitioners. This follows from the fact that the superior court of Sutter county was first in time as to the jurisdiction of the subject-matter. It does not so appear by the petition, but in accordance with the allegations of respondent's answer and the agreement of counsel at the oral argument the facts are these: The action of Diamond Match Company against petitioners on the bond was begun in the superior court of Sutter county on November 29, 1920, and it is still pending therein; no application having been made for a transfer to Sacramento county. On the same day the said company brought an action against said county of Sutter on said stop notice, and it is still pending therein. The action of the Standard Oil Company against the county of Sutter on said stop notice was commenced in the superior court of said county on December 16, 1920, and is still pending therein. These actions were all commenced before any of the actions that were transferred to the superior court of Sacramento county, and, if it can be said that the latter actions involved the proper disposition of said reserve fund, with equal propriety can the same thing be affirmed of said action of Diamond Match Company against petitioners, and with still greater reason may it be said that the superior court of Sutter county acquired dominion over said fund by reason of said actions against the county.

[2] Again, in reference to the actions on the bond which were transferred we may notice this: *Butcher v. McMorry and Kaster* was commenced on February 8, 1921, but on the same day the same plaintiff brought an action against the county on said stop notice. It does not appear which action was filed first, but, of course, the burden is upon petitioners, and we must therefore conclude that the stop notice action is entitled to precedence. The same thing may be said of the two actions filed by Murphy on January 5, 1921.

[3] Moreover, the superior court of Sacramento county did not acquire jurisdiction to try any of these actions until the order of transfer was made, which was subsequent to the filing of all the complaints in Sutter coun-

ty. But, conceding that, for the purposes of this case, its jurisdiction would relate back to the time when said actions were begun, it is manifest that by said order of transfer the superior court of Sutter county did not divest itself of jurisdiction to try the other cases between different parties which had been begun before the complaints in said transferred actions were filed. After the transfer the superior court of Sacramento county could have no greater jurisdiction than if the actions had been originally brought in said court; but, if so brought, under the rule already stated, they would be subject to said prior actions commenced in Sutter county.

[4] Petitioners claim that the so-called "stop notice" actions should not be allowed to weigh in the proceeding, for the reason that, under the decisions of the appellate courts of the state, the laborers and materialmen have no interest in said reserve fund, and therefore their complaints against the county fail to state a cause of action. *Adamson v. Paonessa*, 179 Pac. 880; *Hunt v. Continental Nat. Bank*, 188 Pac. 300; *Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066; *Hunt v. Empire Securities Co.*, 194 Pac. 744. In these cases it is held that—

"Section 1184 of the Code of Civil Procedure does not apply to contracts for the improvements of streets or highways, and that therefore a stop notice given pursuant to that section, under such a contract, does not have the effect of sequestering the funds in the hands of the person who is charged with their disbursement." and that the rights of the assignee of the contractor in and to said fund, where the assignment precedes the contracts for labor and material, are superior to any claim of the laborer or materialman.

As to this contention, however, it may be observed that the insufficiency of the complaint as to its allegations does not deprive the court of jurisdiction to try the action. Besides, if such ground be tenable, it must operate to defeat this proceeding by petitioners. This is true for the reason that the pleadings herein show that they also have no interest in said funds. They are claiming by right of subrogation, but no such right exists, as they have not paid any of the claims of the laborers or materialmen. But if they had paid any such claims they would be subrogated only to such right as existed in favor of such claimant, which, under the said decisions, does not embrace any of said fund in face of the prior assignment of the contractor. Not having made such payment, the sureties could have no greater claim to said fund than the principal, who was the contractor, but he, as we have seen, has no interest in said fund, having assigned it to interveners.

[5, 6] From the foregoing it is apparent that the sureties need not concern themselves about the trial of the actions against the

county of Sutter as to the application of said fund. As said fund cannot be used to reduce their liability on their bond, they are not interested in said actions, and the question of superior jurisdiction is really of no practical importance to petitioners. Their position is based upon an erroneous construction of section 1184 of the Code of Civil Procedure and of said statute of 1919 under which the bonds were executed. Under the decisions in this state, as we have seen, said section of the Code does not afford any relief to laborers and materialmen in a case like this where the work is done upon a public highway. It may also be said that under said statute of 1919 the bond—

"must provide that if the contractor, person, company, or corporation, or his or its subcontractor, fails to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the surety or sureties will pay the same in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon such bond, a reasonable attorney's fee, to be fixed by the court."

It is quite apparent that this bond is entirely for the benefit of the laborers and materialmen, and they must depend for their compensation upon the personal responsibility of the contractor and sureties.

As to the sureties, the bond does not obligate them to complete the work, nor does it make them responsible for the fulfillment of the obligations of the contractor to the state or the county. It follows that, as sureties, they are not authorized to complete an abandoned contract, nor can they claim any interest in the fund, which is reserved primarily for the purpose of securing the completion of said contract and saving the county or state from loss. Under such circumstances, there would be also, of course, no reason for the principle of estoppel to operate in favor of said sureties as against one to whom the contractor has assigned his claim for value. It may be added that we are not here concerned with any claim that the county may urge to any portion of said fund by reason of having to complete the work.

The well-considered cases from Oregon (*Derby v. United States Fidelity & Guaranty Co.*, 87 Or. 34, 169 Pac. 500, and *Wasco County v. New England Equitable Insurance Co.*, 88 Or. 465, 172 Pac. 126, L. R. A. 1918D, 732, Ann. Cas. 1918E, 656) are so essentially different from this as not to impair the confidence we feel in the conclusion which we have reached.

The order to show cause is discharged, and the writ is denied.

We concur: FINCH, P. J.; HART, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. [7] The application for a hearing in this court after decision by the District Court of Appeal of the Third appellate district is denied solely on the ground that there is no sufficient showing that the superior court of Sutter county is proceeding in excess of its lawful jurisdiction.

All concur, except SHAW, J., absent.

54 Cal. App. 301

WALKER v. HARBOR BUSINESS BLOCKS CO. (Civ. 3959.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Appeal and error ⚡1097(1) — **Former opinion is law of case on subsequent appeal.**

An opinion on appeal is the law of the case on subsequent appeal.

2. Appeal and error ⚡1170(7)—**Irregularity in admission of evidence held not ground for reversal.**

Where the merits of the case are overwhelmingly in favor of the plaintiff, and the entire record demonstrates the justice of the decision in his favor irregularity in admitting in evidence a copy of a letter without sufficient preliminary proof would not, under Const. art. 6, § 4½, warrant the court on appeal in reversing the decision.

Appeal from Superior Court, City and County of San Francisco; A. F. St. Sure, Judge.

Action by Archibald Heesom Walker against the Harbor Business Blocks Company. From a judgment for plaintiff for recovery of the money paid as price of certain lots, defendant appeals. Affirmed.

J. F. Riley, of San Francisco, for appellant.

B. M. Jackson, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it in an action brought by the plaintiff to recover on his own behalf, and as the assignee of his sister-in-law, money paid by them under contracts with the defendant for the purchase of two lots, on the ground that the defendant had breached the contracts, in that it had failed to put in street improvements as agreed within the time specified in the contracts.

[1] This case has been before the Supreme Court of this state on a prior appeal, and the opinion of that court appears in 181 Cal. 773, 186 Pac. 356. A reading of that opinion, which is the law of this case, reveals

the fact that it covers all matters disclosed by the evidence in the present record. The legal questions involved are discussed by the Supreme Court from every possible angle, and it would, therefore, be a useless proceeding for us to indulge herein in a similar discussion of the same legal principles.

Upon both appeals, the defendant made the contention that the action was prematurely brought. Upon the former appeal, that argument was answered by the Supreme Court by pointing out that the president of the defendant corporation, on its behalf, had made statements to plaintiff and his assignor which were tantamount to a declaration that the corporation could not and would not perform its obligations under the contract within the time prescribed therein, and the well-settled rule was applied that the failure or refusal to perform an obligation assumed expressly or by implication, or the voluntary abandonment of a contract, * * * gives the obligee an immediate right of action for the breach and to rescind. To meet this situation, in the second trial of the action, the president of the defendant company testified that he had offered to perform the obligations of the defendant corporation under the contracts, but had stated to plaintiff that to do so would be inadvisable, and that the plaintiff had acquiesced in this. The most that can be said for the defendant as a result of this testimony of its president is that a conflict is created in the evidence, which was resolved in favor of plaintiff by the trial court upon this point. For plaintiff testified that the president of defendant corporation had told him, on May 17, 1917, that it would take about three years to do the work required by the contract. The time limited for doing the work expired on June 1, 1917. The defendant had had three and one-half years previous to June 1, 1917, within which to do the work called for by their contracts, and the work had not been done, and, indeed, the record shows that up to the time of the trial (May, 1920) the work had not been done.

Upon the question of waiver by the plaintiff and his assignor of the conditions of the contracts requiring the defendant to put improvements upon this property, the record discloses ample evidence justifying the application of the language and holding of the Supreme Court on this point on the former appeal.

[2] Numerous technical objections are made by appellant, such as the objection that the trial court admitted in evidence a copy of a letter to the defendant by the attorney for the plaintiff upon an insufficient showing. It is urged that the letter was improperly admitted because the witness, who was the attorney for the plaintiff, merely testified that—

"On the 18th of May, I addressed a letter to the Harbor Business Block Company, reading as follows."

It is urged that no presumption of receipt follows from "addressing" a letter, and that the witness should have stated that he placed the letter in the mail. The objection made to the testimony was general, and to the effect that the letter was incompetent, irrelevant, and immaterial. No point was made that the statement of the witness was ambiguous and insufficient in this particular, and it is perfectly clear that, had the point been raised, it would have been met at the trial. There was no attempt by the defendant to deny the receipt of this letter. But conceding an irregularity in the admission of this evidence, the merits of this case are so overwhelmingly in favor of the plaintiff, and the entire record, taken as a whole, so clearly demonstrates that justice has been done by the judgment, that no error in the admission or rejection of evidence, or in the matter of pleading or procedure, would warrant this court in reversing this judgment. Section 4½, art. 6, Const. Cal. The remaining matters urged by the appellant are either specifically covered by the opinion of the Supreme Court on the prior appeal or they are covered by the salutary provisions of the Constitution of this state referred to above.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

54 Cal. App. 300

PRODUCERS' HAY CO. v. HARNEY.
(Civ. 3908.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1921.)

1. Appeal and error ⇨684(2) — Refusal to grant continuance cannot be considered where not shown in the record.

Where the papers contained in the record do not show that a motion for continuance was made, or the grounds of the motion, or the contents of the moving papers, or the ruling of the trial court thereon, a refusal to grant a continuance cannot be considered on appeal.

2. Appeal and error ⇨714(4)—Statements of attorneys outside record may not be considered by appellate court.

Statement of attorneys in briefs concerning a motion for a continuance not contained in the record may not be considered by the appellate court.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nstrand, Judge.

Action by the Producers' Hay Company against Joseph G. Harney. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Clay, of San Francisco, for appellant.

Albert Picard, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant for the sum of \$1,081.50 for a balance due upon a book account for goods sold and delivered by the plaintiff to the defendant. The defendant answered the complaint, and a trial was had by the trial court sitting without a jury in the absence of the defendant and of the attorney for the defendant. The judgment went for the plaintiff, and the defendant has appealed under section 953a of the Code of Civil Procedure. In the record on appeal the appellant has presented to this court copies of the complaint, the answer to the complaint, the judgment, the county clerk's certificate to the judgment roll, the defendant's notice of appeal, the defendant's request for a transcript, and the county clerk's certificate to his transcript. The appellant has also produced the reporter's notes duly certified.

[1, 2] The appellant complains because he was not granted a continuance of the date of the trial. The point is one that we are not at liberty to consider. The papers contained in the record, and which we have enumerated above, do not show to this court that a motion for a continuance was made, or the grounds of the motion, or the contents of the moving papers, or the ruling of the trial court thereon. The attorneys in their briefs have stated certain facts which they respectively claim occurred, but this court may not consider such statements so made outside of the record.

The judgment is affirmed.

We concur: **LANGDON, P. J.; NOURSE, J.**

54 Cal. App. 293

MEYER v. WHITE.

WHITE v. MEYER.

(Civ. 3937.)

(District Court of Appeal, First District, Division 1, California. Sept. 22, 1921.)

1. Sales ⇨389—Findings in action for breach of contract held inconsistent.

In a seller's action for breach of contract, findings that the seller offered to deliver goods and performed all the conditions of the agreement on his part to be performed, and was at all times ready, able, and willing to deliver, but that the buyer, in violation of his contract and without just cause, refused to accept the goods, and that their reasonable market value at the time of the offer of delivery was less than the selling price, and a further finding that the seller had not suffered damage in any amount, and was not entitled to recover damages, were inconsistent.

2. Appeal and error — 1169(7)—Judgment reversed when findings on appeal on judgment roll are contradictory.

On appeal on the judgment roll alone, where the findings are so contradictory and uncertain as to leave the appellate court in doubt as to their meaning, the judgment will be reversed.

3. Appeal and error — 1172(5), 1178(6)—Judgment reversed for further evidence and findings on question of damages.

Where plaintiff sued for the price of goods sold and damages for refusal to accept other goods and recovered judgment on the first count, but not on the second, though the trial court made findings entitling him to recover, also making an inconsistent finding that he had not suffered any damages, the judgment refusing relief under the second count will be reversed, and the cause remanded to the court below to take evidence and make a proper finding as to damages.

Appeals from Superior Court, City and County of San Francisco; Henry C. Gesford, Judge.

Action by Victor E. Meyer, doing business as Victor E. Meyer & Co., against Albert White, and cross-complaint by Albert White against Victor E. Meyer, doing business, etc. From a judgment for plaintiff for an insufficient amount, he appeals. Reversed and remanded.

Charles Baer, of San Francisco, for appellant.

Albert White, in pro. per.

KERRIGAN, J. Action for goods sold and delivered, and also for damages. Plaintiff and defendant entered into an agreement whereby plaintiff agreed to sell and defendant agreed to purchase 48 pieces of cloth known as velour at the agreed price of \$4.17½ a yard for each yard contained in the 48 pieces; and also 40 pieces of broadcloth at the agreed price of \$4.12½ for each yard contained therein. In pursuance of this agreement plaintiff alleges that he delivered to defendant, and defendant accepted as part of the goods so contracted for, 30 pieces of velour, containing 1,598¾ yards, and 4 pieces of broadcloth containing 230½ yards. The purchase price of the portion so delivered amounted to the sum of \$7,626.64, and defendant paid on account thereof the sum of \$3,000, leaving a balance due of the sum of \$4,626.64. This amount constitutes the first count of the complaint. By a second count plaintiff alleges that thereafter he offered to deliver to defendant under the terms of the contract an additional amount of 5 pieces of velour, containing 299¾ yards, and also 5 pieces of broadcloth containing 263¾ yards, both being tendered at the agreed price. Defendant, so it is alleged, refused to accept

these further deliveries; and plaintiff claims that on account of such refusal he has been damaged in the sum of \$709.59. Defendant by answer and cross-complaint claimed that the goods sold and delivered to him were not up to sample, and he prayed for the return of the sum of \$3,000 paid by him under the contract. Relief on both counts was prayed for by plaintiff in the sum of \$5,336.23. Judgment, however, was rendered in his favor for the full amount prayed for in the first cause of action, but the court refused to award any damages under the second count. Plaintiff appeals from that portion of the judgment denying these damages.

Upon the second cause of action the trial court found that plaintiff, in pursuance of his agreement, offered to deliver the 10 pieces of cloth as alleged, but that defendant, in violation of his contract and without any just cause or reason, refused to accept the same. It also found that the reasonable market value of the velour was only \$3 per yard, and the broadcloth \$2.85 per yard at the time of the offer of delivery. Further findings are to the effect that plaintiff performed all the conditions of the agreement on his part to be performed, and was at all times ready, able, and willing to deliver all the merchandise in accordance with the agreement.

The court further found, however, that plaintiff had not suffered damage in the amount claimed or in any other sum by reason of the failure and neglect of the defendant to receive, accept, and pay for the goods mentioned, and was not entitled to recover damages from the defendant on account thereof.

[1, 2] The findings are therefor inconsistent. We are unable to account for this inconsistency; the appeal being on the judgment roll alone. Under such circumstances, and where, as here, the findings are so contradictory and uncertain as to leave the appellate court in doubt as to their meaning, the judgment will be reversed. *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574.

[3] The appeal is directed solely to that portion of the judgment refusing damages under the second count of the complaint. The judgment on the first count will therefore stand, and that portion of the judgment refusing plaintiff the relief sought under his second count will be and the same is hereby reversed, and the cause remanded to the court below to take evidence and make a proper finding upon the question of damages. *Mayberry v. Whittier*, 144 Cal. 322, 78 Pac. 16; 2 Hayne, N. T. & App. p. 1692 et seq.

We concur: WASTE, P. J.; RICHARDS, J.

54 Cal. App. 258

SCHOMAKER v. ROEMER et al. (Civ. 3942.)

(District Court of Appeal, First District, Division 1, California. Sept. 16, 1921.)

1. Appeal and error ⇨110—Order granting new trial not appealable.

Appeals from orders granting motions for new trial in actions such as to quiet title were abolished by Code Civ. Proc. § 963, as amended by St. 1915, p. 209.

2. Appeal and error ⇨870(6)—Order granting new trial not reviewable on appeal from judgment in subsequent trial.

An order of the trial court vacating a judgment and granting a new trial is not reviewable upon an appeal from a second judgment rendered and entered upon the retrial of the cause, under Code Civ. Proc. § 956, as amended by St. 1915, p. 328.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Johann Schomaker against A. P. Roemer and others. From judgment for defendants, plaintiff appeals. Affirmed.

Reisner & Honey, of San Francisco, for appellant.

T. W. Hubbard and Hubbard & Johnson, all of San Francisco, for respondents.

RICHARDS, J. [1] This is an appeal by the plaintiff from a judgment in favor of the defendants in an action to quiet title. There were two trials of this cause. Upon the first trial thereof the court on October 10, 1916, rendered and entered its judgment in the plaintiff's favor, but thereafter and on January 2, 1917, made an order granting the defendant's motion for a new trial. No appeal was or could have been taken from this order, since appeals from orders granting motions for new trials in cases of this character were abolished by the amendment of section 963 of the Code of Civil Procedure made in 1915 (St. 1915, p. 20). A retrial was had of the cause, at the conclusion of which the court on May 19, 1920, rendered and entered its judgment in favor of the defendants. The plaintiff did not move for a new trial, but appealed directly from this judgment, and the only point which the appellant urges upon this appeal is that the trial court was in error in making its order granting the defendant's motion for a new trial after the first judgment in the case.

[2] It is unnecessary to consider the merits of this contention, since the order of the trial court vacating the first judgment and granting a new trial is not reviewable upon an appeal from the second judgment rendered and entered upon the retrial of the cause, for the reasons fully set forth by the Supreme Court in its recent decision of *Furlow Pressed Brick Co. v. Balboa L. & W. Co.*, 200 Pac. 625, reading in part as follows:

"While the second sentence of section 956, Code of Civil Procedure, as amended in 1915, providing that the court may, on an appeal from the judgment, review any order on motion for a new trial, is broad enough, considered alone, to justify the court in reviewing the order granting the new trial in every case, we think it apparent from the entire context and purpose of section 956, taken in connection with the scheme for appeal adopted by the Legislature in 1915, that it was not intended that any order granting a new trial should be reviewed unless it affects the second judgment and where the entire case is tried de novo, the order granting a new trial could not affect the judgment, however much it might affect the parties to the action."

No other point being urged upon this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 795

SCHOMAKER v. ALL PERSONS.
(Civ. 3941.)

(District Court of Appeal, First District, Division 1, California. Sept. 16, 1921.)

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Johann Schomaker against All Persons, etc. From an adverse judgment, plaintiff appeals. Affirmed.

Reisner & Honey, of San Francisco, for appellant.

T. W. Hubbard and Hubbard & Johnson, all of San Francisco, for respondents.

PER CURIAM. Upon the authority of *Schomaker v. Roemer et al.*, 201 Pac. 803, this day decided by this court, the judgment herein is affirmed.

187 Cal. 284

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 9753.)

(Supreme Court of California. Nov. 4, 1921.)

Master and servant §373—Injury by coemployee engaged in play held not one arising "out of and in course of employment."

Where employee of packing plant engaged in putting grapes into a machine threw grape at other employee, which hit and injured the eye of a third employee engaged in sweeping the floor, the injury to such third employee was not an injury arising "out of and in the course of the employment" within the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings under Workmen's Compensation Act (St. 1917, p. 831) by Gus Farsais for compensation for injuries. Opposed by the San Joaquin Packing Company, employer, and the Federal Mutual Liability Insurance Company, insurer. Award for employee by Industrial Accident Commission, and insurer brings certiorari. Award annulled.

Cooley, Crowley & Lachmund, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

PER CURIAM. This is a petition in certiorari to annul an award made by the Industrial Accident Commission in favor of Gus

Farsais and against the petitioner, who was the insurance carrier for the San Joaquin Packing Company, the employer of said Farsais.

At the time of the injury Farsais was working for the packing company, engaged in sweeping the floor of a part of the premises where other employees were putting grapes into a machine as a part of their duty. While Farsais was at work an employee threw some grapes at another employee, and, his aim being bad, he missed the other person, and one of the grapes hit Farsais in the eye, thereby causing his injury. Upon the evidence the Commission made a finding that—

The injury occurred "in the course of and arising out of his employment, as follows: One employee threw some grapes at another employee, and one of the grapes struck the defendant Gus Farsais in the left eye, resulting in the permanent disability hereinafter described."

There was nothing in the nature of the employment in which any workmen present were engaged which required any of them to throw grapes at another. The act was either a playful or malicious act of one employee toward another, having no connection whatever with the work in which he was engaged.

The case is not distinguishable from *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and *Fishering v. Pillsbury*, 172 Cal. 691, 158 Pac. 215. It comes within the general rule of the cases known as the "skylarking" cases or "horse-play" cases. The court did not issue this writ with any desire to overrule those cases. At the time the alternative writ was issued the court had ordered a writ issued in a case previously filed, entitled *General Accident F. & L. A. Co. v. Industrial Accident Commission* (S. F. No. 9633) 200 Pac. 419, in which an opinion was rendered on August 15, 1921, and it was desired to consider that case fully prior to a decision upon the present case. The line of demarcation between cases which come within the definition of an injury "arising out of and in the course of the employment" and those which do not is of necessity a narrow one, and it is not always easy to distinguish the exact point of division without careful consideration. In the case last referred to the employer became engaged in a controversy, amounting to a quarrel, arising immediately out of his business, and while so engaged and before the matter was concluded and because of such controversy he fired a shot at one of the men engaged therein, missing him, but which glanced and hit one of his own employees, thus causing the injury complained of. It is evident that the act which caused the injury was one which arose directly out of the business in which the injured person was employed. As the court said in the opinion in that case, the in-

jury "was received in the course of a series of incidents which had their initiative in a business transaction of his employer, and while the latter was actively and justifiably engaged in defending his business." This was held to be an injury arising out of his employment. In the present case the throwing of grapes had no connection whatever with the general business carried on in the establishment, nor with the particular work of any employee therein. The respondent concedes that the decision of the Commission is inconsistent with the decisions of this court first above cited. It is contended in its behalf that those cases should be overruled. The argument is that in every establishment where a number of workmen are required to be near to each other in the course of their employment for hours at a time "some frolicking is inevitable. It occurs in every plant. The industry, by bringing workmen together in numbers exposes its workmen to this hazard, which is just as much a hazard incident to the employment and 'arising out of the employment' as the danger of slipping upon floors, colliding with other workmen, falling down stairs," and the like.

Although this line of reasoning has support in the decisions of some of the other states, it is contrary to our own, and it seems to us to be an unwarranted extension of the meaning of the controlling language of the Constitution and of the statute defining the character of injuries that are to be compensated out of the earnings of the business in which they occur. In the Coronado Beach Co. Case we said:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."

And after a full review of many authorities on the subject it was held that the injury to the claimant caused by the act of a fellow servant in "tickling" him while he was at work did not "arise out of" his employment. Such injuries have no connection whatever with the work the employee is doing at the time, or with the work the mischievous employee was engaged to do, or with any business carried on in the place of employment, or with any peculiar construction or characteristics of the place of employment for which the employer could be held responsible and which creates "a risk reasonably incident to the employment." All this is true of the case at bar. It is therefore to be decided in accordance with the same rule.

The award is annulled.

SHAW, SHURTLEFF, WILBUR,
SLOANE, and LAWLOR, JJ., concur.

185 Cal. 690

FRAZEE et al. v. RAILROAD COMMISSION OF CALIFORNIA et al.
(L. A. 6601.)

(Supreme Court of California. May 19, 1921.)

1. Certiorari **62—Submission set aside when petition not sufficiently definite.**

On certiorari to review an order of the railroad commission fixing rates to be charged by a water company, submitted on the petition and demurrers, where the petition positively alleges that the company is a private corporation and not a public utility, and that no part of the water has ever been dedicated to public use, but also contains matters of detail concerning the relation of the corporation to the owners of land supplied with water requiring further explanation, the submission will be set aside to permit an amendment.

2. Partition **116(1)—Waters and water courses** **39—Partition did not affect ownership or character of ownership of water rights.**

Where prior to partition an entire rancho was riparian to a stream which flowed into it, the riparian rights in the stream attached to every part of the rancho, and after the partition the proportional rights in the waters continued to be attached to the respective parcels of land set apart in severalty to the different owners, the rights being in their nature riparian rights after the partition the same as before, the character of the water right not changing from a riparian right to a right appurtenant even if the particular tract did not abut upon the stream, and such rights were covered by a subsequent conveyance of the land.

In Bank.

Petition for certiorari by Arthur W. Frazee and others against the Railroad Commission of the State of California and the Citizens' Water Company of San Jacinto to review an order of the Commission fixing water rates. Submission set aside, and 60 days given petitioners to amend.

Ray W. Bruce, of Los Angeles, for petitioners.

Williams & Williams, Goudge, Robinson & Hughes, and Hugh Gordon, all of Los Angeles, for respondents.

SHAW, J. This is a petition by 48 persons claiming to be entitled to receive water for irrigation and domestic use upon their lands from the Citizens' Water Company of San Jacinto, to review an order of the Railroad Commission purporting to fix the rates to be charged by said Citizens' Water Company for the delivery of the water to the respective petitioners and others.

The Commission found that the Citizens' Water Company of San Jacinto was engaged in the administration of a public use, being the delivery of water to the persons owning land under its canals and conduits. The petition alleges that the Citizens' Water Com-

pany is not a public utility; that the water it controls has never been dedicated to public use, but is attached to and a part of the respective tracts of land owned by the petitioners, and other persons who had theretofore been receiving said water. The main, if not the only, question presented is whether or not the said Citizens' Water Company is a public utility, and whether or not the water it controls is subject to public use. The court, upon the filing of the petition, instead of issuing an alternative writ of review requiring a return to the petition, issued an order to show cause why such writ should not be issued. The defendants have filed separate demurrers to the petition upon the ground that it does not state facts sufficient to entitle the petitioners to the relief prayed for.

[1] The petition contains the positive allegation that the Citizens' Water Company is a private corporation, and never has been a public utility, and that no part of the water in question has ever been dedicated to public use. If these allegations are to be given full effect, it would follow, as a matter of law, that the Railroad Commission would have no jurisdiction to interfere with the business of the Citizens' Water Company or with the rights of the petitioners to receive the water, or the rates to be paid therefor. The petition, however, contains some matters of detail which appear to us to require further explanation by averments in the petition, and, therefore, we deem it best to state our views on the subject, and thereupon to require the petitioners to file an amended petition before further proceedings are had in the case.

The petition alleges that the lands to which the Citizens' Water Company delivers the water are all included within a Mexican grant containing some 50,000 acres, known as the Rancho San Jacinto Viejo; that along and into said rancho there naturally flows a stream known as the San Jacinto river; that, in the year 1882, a partition of said rancho was made between the owners thereof, successors of the original grantee, in the superior court of the county of San Diego, and by the judgment of partition in said action the said rancho was divided into 17 parcels, each of which was set apart to a different party in said action, and it was adjudged that each owner of the respective parcels should have a right of way for a ditch or conduit across the land of any other owner lying between him and said stream, for the purpose of securing and using upon equal terms with the owners of allotments abutting upon the said stream, the waters thereof for irrigation and other uses upon the land so allotted to him, and that the petitioners, respectively, are owners of portions of the land so allotted in said partition and of the water rights allotted thereto by said judgment.

[2] It follows from the facts so alleged that, prior to said partition, the entire rancho San Jacinto Viejo was riparian to the stream, and that riparian rights in the stream attached to every part thereof, and that after said partition the proportional rights in the waters continued to be attached to the respective parcels of land set apart in severalty to the different owners. These water rights so attached to these several parcels of land were, in their nature, riparian rights after the partition the same as before. Such a partition "did not change the character of the water right belonging to such land from a riparian right to a right appurtenant," even if the particular tract did not abut upon the stream. The right to the water still remained a riparian right and "parcel of the land itself." The result would be that a subsequent conveyance of the land would carry with it the water right belonging to the particular tract conveyed. *Rose v. Mesmer*, 142 Cal. 328, 75 Pac. 905; *Verdugo*, etc., *Co. v. Verdugo*, 152 Cal. 663, 93 Pac. 1021; *Strong v. Baldwin*, 154 Cal. 157, 97 Pac. 178, 129 Am. St. Rep. 149; *Copeland v. Fairview*, etc., *Co.*, 165 Cal. 161, 131 Pac. 119. It will be seen that the petition by these allegations shows that the respective petitioners are the owners of parcels of the land so partitioned, and that by virtue of such ownership they are the owners of the water right in the said stream attached thereto by the judgment in partition, unless in some way their right to the water has been divested and the water right has been segregated and separated from the land. The petition contains nothing to show that such separation ever occurred, nor does it show that it did not occur. In order to bring about a positive issue, the petition should allege facts bearing upon this point.

The petition then proceeds to allege that, in 1890, a corporation under the name San Jacinto Water Company was organized, and that an agreement was made by the petitioners or their predecessors in interest whereby that corporation agreed to take water from said river, build the necessary diverting works and distributing system, and deliver the same to the petitioners or their predecessors in interest, upon payment by the said petitioners and predecessors of a sum of money for a so-called "water certificate contract" in sufficient numbers to supply the funds with which to build said works and system, and to pay thereafter a stated annual amount for the water so delivered; that this plan was carried out, the certificates were purchased and paid for as arranged, and with the money derived therefrom said corporation built the said works and distributing system, and thereafter furnished water under said arrangement to the petitioners and their predecessors in interest, until August, 1910. These certificates purported to be signed by the secretary and

president of the company, and each declared that the holder thereof was entitled to receive an amount of water equal to one-fifth of an inch to each acre of land mentioned in such certificate for seven months in the year, upon payment of \$3 per acre per year. It further declared that the interest represented by the certificate should—

“not become appurtenant to or pass by voluntary act or by operation of law with any land upon which the water represented may be used; transfer hereof shall only be made by surrender of this certificate to the company and reissuance of a new certificate.”

None of them was signed by any of the landowners. These allegations concerning the disposition and distribution of the water by said water company are uncertain as to the title to the water. It is obvious that the company could not become possessed of title to the water without a conveyance or a transfer in some manner from the landowners, since the title was vested in the latter by virtue of the partition decree aforesaid. There was apparently the not uncommon situation of a large number of landowners, each entitled to a small quantity of water from a common source, finding it necessary to devise some means by which distribution of their respective quantities of water could be made by some common system carried on at the joint expense of all the persons interested. Under these circumstances, there have been various methods devised for accomplishing this result, and different results upon the title to the water follow, depending upon the mode adopted for that purpose. In *Hildreth v. Montecito, etc., Co.*, 139 Cal. 29, 72 Pac. 398, the court said:

“Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property, and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several, and will remain private property. If the persons owning such rights see fit to form a corporation, and delegate to such corporation the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, * * * they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation

becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works, the water remaining the subject of individual ownership and private use as before.”

Examples of this method of serving a common use through a corporate agent may be found in several of our decisions. Descriptions of such systems are set forth in *Arroyo Ditch, etc., Co. v. Bequette*, 149 Cal. 546, 87 Pac. 10, and *Walnut I. D. v. Burke*, 158 Cal. 170, 110 Pac. 518. It has often been held that the water so distributed by such corporate means is not dedicated to public use, unless there is some express or implied declaration of such dedication emanating from the parties who own the land and the water. *Burr v. Maclay, etc., Co.*, 160 Cal. 280, 116 Pac. 715; *Garrison v. North Pasadena, etc., Co.*, 163 Cal. 239, 124 Pac. 1009; *Thayer v. Cal. Dev. Co.*, 164 Cal. 130, 128 Pac. 21; *Franscioni v. Soledad, etc., Co.*, 170 Cal. 225, 149 Pac. 161. In *Franscioni v. Soledad, etc., Co.* it was said that—

“A corporation owning a water supply and engaged in distributing it to persons to whose land it has agreed to deliver it for irrigation, upon a use which is private, and not public, or general,” could “with the consent of the owners of the rights to receive such water, change the use from a private and particular use to a public use, so as to make the service and terms of delivery subject to regulation and control by public authority,” and that, if this was done, “all the parties concerned and consenting thereto, including the corporation engaged in the distribution, will thereafter be bound to conform to such rates, rules, and regulations for the service as may be established by the public body thereunto duly authorized.”

The evidence in that case showed that the change suggested in the foregoing passage had been made, so far as the parties to the action were concerned, but it was said that the judgment in the action would be of no force with respect to other parties owning lands and receiving water from the company. The petition herein is bare of allegations with respect to the title of the water company aforesaid to the water. It does not allege any conveyance or transfer by the owners to the company, nor any submission by the company or the water users to the authority of any public body to fix rates, or anything indicating a change in the character of the use from a private use to a public use. The facts alleged are not inconsistent with an arrangement between the company and the landowners that the company should take charge of the water, build works with the money furnished by the landowners, and thereafter, as agent of the landowners, and as trustee in charge of their property, namely, the water, distributing the water to them annually, keeping the system in repair, and receiving from them the sums

mentioned in the certificates aforesaid as compensation for the service. They are inconsistent with the theory that the company was administering a public use, since it does not appear that it ever acquired title to the water, and it does appear that the water belonged to the respective owners of the land. In the Francioni Case, it is to be noted the water company was the owner of the water in controversy; that it alone disputed the fact of the dedication to public use. The petition should more fully state the facts in regard to these propositions. It does not state or purport to set forth any of the powers of the said corporation, or the dealings between it and the petitioners with respect to the water and the title thereto, if any there were.

It further appears from the petition that, in August, 1910, another company was organized, namely, the Citizens' Water Company of San Jacinto, the defendant herein; that thereupon said San Jacinto Valley Water Company sold, conveyed, and delivered to the Citizens' Water Company of San Jacinto, defendant herein, all the property then owned by it, consisting of said water system, water, water rights, lands, rights of way, and personal property used in connection therewith, subject to all outstanding water certificate contracts, theretofore issued by said San Jacinto Valley Water Company; that thereafter said defendant company purchased a large body of land, all of which was riparian to said stream, and capable of being supplied with water therefrom, and from said system, by extending said system and taking out more water from the stream; that this purchase was made by means of and in the name of another corporation known as the San Jacinto Land Company, the stockholders of which were the same persons as those owning the stock of said Citizens' Water Company, and having the identical proportional interests in said stock; that the water company then issued to said land company sufficient water certificate contracts to cover the lands owned by the land company, and thereafter some of said lands and water certificates were sold together to the petitioners, and other parts of said land were sold to other persons, with water certificate contracts attached thereto, by said land company, and thereby enough money was realized to pay for the extensions of the system necessary to deliver the water to the additional land.

The water certificate contract issued by said defendant company states that the certificate entitled the person named therein to receive water from the system upon certain described land for a fixed period of each year, upon the payment of the dues and water rates prescribed in the certificate. There is no allegation in the petition that any conveyance was made by the landowners to the defendant water company transferring

the respective rights in the water pertaining to the several parcels of land to said defendant company. The certificate issued by the defendant company is set forth in full, but it is obvious that its recitals do not take the place of allegations of fact, particularly since it does not appear that the landowners, or any of them, ever signed such certificate or any other written agreement purporting to convey their respective water rights.

Thus, it will be seen that the condition of the title to the water rights is left altogether undetermined by the allegations of the petition. In view of the well-known scarcity of water in this state, especially in the region of San Jacinto, it seems unlikely that the owners of land having attached thereto riparian rights in a stream, the water from which they were actually using upon the land, would consent to an extension of the distributing system to nonriparian lands, or that they would transfer such water rights to a distributing corporation otherwise than in trust for their convenient use of the water. For the foregoing reasons, we consider it necessary to an intelligent consideration of the case that the petition should be amended so as to set forth the facts, whatever they may be, from which we can determine the question whether or not the water originally belonging to the land has ever become devoted to public use.

It appears from the petition that the defendant water company, in 1914, without the consent or acquiescence of any of the petitioners, applied to the Railroad Commission for an order fixing its rates for the service of the water which it had under its control; that such order had been made, and that thereafter it endeavored to charge the rates so fixed. All of the petitioners except three, namely, C. E. Borst, E. E. Easley, and L. B. Johnson, appeared before the Commission upon said application, and apparently were parties to the proceeding. The three persons named, however, were not parties thereto. The question whether this order of the Commission is an adjudication to the effect that the Citizens' Water Company is a public utility, that the water it controls is dedicated to public use, and that all persons receiving water from it were the recipients of water devoted to a public use, and not owners of private rights which were not subject to the jurisdiction of the Commission, will be an important question in this case, but in the present condition of the petition we do not believe it advisable that we should enter upon the consideration thereof.

It is ordered that the submission be set aside, and that the petitioners have leave to amend their petition, if they are so advised. Sixty days are allowed for that purpose.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

187 Cal. 287

(201 P.)

CHESTER v. CARMICHAEL et al.
(Sac. 3199.)(Supreme Court of California. Nov. 4, 1921.
Rehearing Denied Dec. 1, 1921.)**Municipal corporations** §864(1)—**Acceptance of deed of land to city on condition of specified improvement as part created "liability."**

Acceptance by a city of a deed of land "for and in consideration of the covenants and conditions" expressed therein, which were to the effect that the land should revert to the grantors unless the city should expend not less than \$5,000 each year in improving it as a park, total cost of improvements being estimated at \$50,000, created a "liability" to the grantors for the entire consideration of \$50,000 within the meaning of Const. art. 11, § 18, providing that no city shall incur any indebtedness or liability exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof.

[Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Liability.]

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Theodore W. Chester, for himself and all other persons similarly situated, against D. W. Carmichael and others, as City Commissioners of the City of Sacramento, and others. Judgment for defendants, and the plaintiff appeals. Reversed.

Theodore W. Chester and Meredith, Landis & Chester, all of Sacramento, for appellant.

R. L. Shinn and White, Miller, Needham & Harber, all of Sacramento, for respondents.

ANGELLOTTI, C. J. Plaintiff, a taxpayer of the city of Sacramento, instituted this action on behalf of himself and all other taxpayers, seeking thereby an injunction prohibiting the city of Sacramento and various officers thereof from carrying out the provisions of a certain deed conveying real property to the city for park purposes, and to have such deed declared void; the theory of the action being that such action on the part of the city would be in violation of the provision of our Constitution which declares that—

"No county, city, town * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity." Section 18, art. 11, Const.

Demurrers to the complaint were sustained, and judgment thereupon given for defendants. This is an appeal by plaintiff from the judgment.

The material facts shown by the complaint are as follows: On or about December 1, 1919, defendants George H. Cutter and Carrie M. Cutter, his wife, and defendant Hickman Investment Company, a corporation, executed and delivered to the city of Sacramento, which accepted the same, a conveyance of an oblong tract of land in Sacramento some 360 feet in width by from 2696 to 2772 feet in length, one-half of which was owned by the Cutters and one-half by the Hickman Investment Company. The conveyance was to the city, its successors and assigns forever, for park and recreation purposes. It was declared therein that it was executed "for and in consideration of the covenants and conditions" expressed therein. The conveyance was declared by its terms to be "subject to the following express conditions subsequent," nine such conditions being stated. These were that the premises shall be used and maintained by the city permanently as a public park or as a public park and playground, known and designated as "Wm. Curtis Park"; that the land shall be divided into three subdivisions as shown on a map attached, each subdivision to have a driveway extending through the same, open for public traffic, as indicated upon said map; that the city shall lay out and maintain a driveway at least 25 feet wide on the eastern outer edge of the property, from the northerly to the southerly portions thereof, and a like driveway on the western outer edge, the same to be public and open to the streets which may be constructed upon the adjoining property and extending to said property; each of the three subdivisions shall have next to the two outer or main driveways a border of forty feet in width to be improved by the city or its representatives "to lawns and shrubbery and to be used as a park," the remainder or interior of each subdivision "to be used as a park or for playground purposes, but playgrounds proper are not to extend on the 40-foot borders"; the permanent improvement within five years of said driveways, and the express provision that "the owners of property bordering or abutting on said park are not to pay for any such driveways, or for the curbs or gutters on either side of such driveways," and that, "in the event that any assessments should be levied against" such owners for any of such purposes, the same shall be paid by the city; that "there shall be expended by" the city "a minimum sum of five thousand dollars (\$5,000) per year for the improvement of the parks and playground in said park"; that "the first five thousand dollars (\$5,000) is to be expended during the year

beginning January 1, 1920, and a like sum is to be expended each year thereafter until the entire property has been improved as a park"; and that the taxes which became a lien on the first Monday of March, 1919, shall be paid by the city. It was then provided that, should the city "fail to conform to or comply with any of the above conditions," the grantors, their successors or assigns, "may, at any time thereafter, give written notice" to the city of such failure, and, if the same are not complied with within six months thereafter, "then said property shall revert to and become again the property of" the grantors, their successors or assigns. The cost of the work of construction and improvement required will exceed the sum of \$50,000, and the cost of maintenance will exceed \$5,000 per annum. Defendants have commenced the work of improvement, having already expended therein over \$1,000 from the income and revenue of the city for the fiscal year 1920, and unless restrained by the courts will carry out all the terms and provisions of the deed. All the funds of the city for the year 1919 were exhausted before December 31, 1919. All of the moneys incident to the proposed work will be paid out of revenue and income received during the year 1920 and each subsequent year. There has been no assent on the part of the qualified electors of the city, or any part thereof, to the carrying out of the proposed plan or any part thereof.

From the foregoing it is apparent that, in so far as the grantors are concerned, the city, in consideration of the conveyance, has agreed, among other things, to expend a minimum sum of \$5,000 annually in the work of improving the park site in a designated way and in constructing two driveways for public traffic through the same and also driveways at least 25 feet wide along the whole length on each side, "the same to be public and open to the streets which may be constructed upon the adjoining property," free of cost of any kind to any owner of property bordering or abutting on the park. This work in the aggregate will cost, it is alleged, \$50,000. Whether or not the performance of this obligation will benefit the city is an immaterial matter in this controversy. The obligation created by the contract is one in favor and for the benefit of the grantors, who have fully executed their part by the conveyance and delivery of the property, their successors and assigns. As matter of fact, the provisions of the conveyance indicate that the doing of the proposed work in the manner provided was deemed by the grantors to be of special value to the property adjoining on both sides, and the undertaking by the city to do such work was the real consideration for the transfer. This is especially true as to the driveways and the 40-foot strip of

garden on each side especially reserved from playground or recreational uses. Performance of the obligation would be, in substance and effect, payment to the grantors, in the way stipulated in the deed, for the property conveyed by them. By means of conditions subsequent expressed in the deed, the property conveyed was practically pledged to the grantors as security for the performance of the undertaking, the title to revert to them, their successors or assigns, in the event of nonperformance, if they so elect. It may be assumed that the city cannot be held liable in damages for failure to carry out this contract, or specifically compelled to perform, and that the only penalty for failure to perform is the reversion of the property to the grantors, their successors or assigns. This being the situation, the question is whether the transaction, the giving and acceptance by the city of the deed, involved the incurring by the city of "any indebtedness or liability in any manner or for any purpose" with relation to the grantors, their successors or assigns, within the meaning of section 18 of article 11 of our Constitution. If it did, admittedly, in the light of the facts alleged in the complaint, the liability exceeded the income and revenue provided for the year 1919, the year in which the transaction was had.

Assuming the validity of the transaction between the parties apart from any question as to the effect of the constitutional provision, it seems clear that an obligation was imposed thereby upon the city, in favor of the grantors, their successors and assigns, to expend in the specified work at least \$5,000 per annum for a period of years and until the completion thereof. To this extent the income and revenue of future years was attempted to be appropriated for the performance of this obligation in favor of the grantors, an obligation assumed by the city in consideration of the transfer to it of the property. Assuming the complete carrying out of its part of the agreement by the city, there will have been such an appropriation. The doing of this work, with a prescribed minimum expenditure therefor each year, was, as we have said, the purchase price for the land, payable in yearly installments, the grantors having fully performed their part by conveyance and delivery of the land. Notwithstanding the absence of any liability for damages for failure to perform, and the fact that the obligation could not be specifically enforced, there was an obligation in favor of and for the benefit of the grantors, involving the expenditure in a certain way, and for specified purposes, of future revenues of the city, accompanied by what was in substance a pledge of the property conveyed as security for its performance. That the matter was cast in the form of conditions subsequent is unimportant. In substance and

effect the transaction was as we have stated it.

So regarding the transaction, we are of opinion that it falls within the inhibition of section 18 of article 11 of the Constitution, which precludes any city from incurring "any indebtedness or liability in any manner or for any purpose" exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof. That there was a liability in favor of the grantors imposed on the city upon the acceptance by it of the conveyance seems clear. The ability of the creditor to enforce a claim by a judgment for money is not essential to a "liability" as that term is used in such constitutional provisions as ours. As the consideration of the executed conveyance to the city there was an obligation in favor of the grantors to expend \$5,000 yearly in the completion of the specified work, which, according to the complaint, would cost \$50,000, and the property that had been conveyed to the city was pledged for full performance of the obligation. The city must either expend all the money necessary to complete the work from its future revenues, or lose the property with all it may have paid to the time of loss in improving the same. Numerous cases cited holding that, where a city acquires property subject to a mortgage or trust deed with a stipulation that the city is not to be held liable in any way for the payment of the debt thereby secured other than by the enforcement of the lien on the property, such debt constitutes a part of the indebtedness of the city within the meaning of that word as contained in constitutional provisions confining the indebtedness of the city within a proscribed limit, illustrate how such an indebtedness may be incurred without any means of enforcement other than loss of the property. In *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934, the court said of such a transaction:

"But the property, when conveyed, will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them, or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers will ultimately be obliged to pay it as contemplated. * * *

"The object of the statute is to protect the taxpayer by confining the indebtedness of a city within a prescribed limit. The manner in which the indebtedness is created is immaterial, if the result is to subject the city to a present liability, direct or indirect, which the taxpayers eventually will be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think that the statute cannot be evaded in the manner proposed."

See, also, *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978; *Eddy Valve Co. v. Town of Crown Point*, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684; *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* (C. C.) 113 Fed. 560, 568; *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839, 43 L. R. A. (N. S.) 839. We have here the obligation to expend certain specified sums annually, secured by the provision for reversion of the property in the event of nonperformance. The words "any * * * liability in any manner or for any purpose" in our constitutional provision are words of broad import, and we think that, fairly construed, they include such an obligation as the one here involved.

The facts of this case present what at first blush appears a rather novel application of the constitutional provision, but, when the real transaction between the parties is fully understood, the matter appears simple enough. We are not concerned here with the indebtedness to be created in favor of contractors, materialmen, and workmen when the city each year contracts for the doing of certain work, or buys material and employs labor for the doing of the same. We have here simply the liability to the grantors, created by the acceptance of the conveyance. As to them, the transaction was simply one of sale and purchase, completely executed by the grantors, the consideration being the future improvement by the city of the conveyed premises in a specified way for the benefit of the grantors, their successors and assigns, at an expenditure of at least \$5,000 per year. Learned counsel for respondents admit that—

"Where a purchase is made upon the installment plan, even though the only remedy for the enforcement by the seller of the payments is the right to declare a forfeiture, yet a debt has been created at the time the contract is entered into for all the sums subsequently to be paid."

Such, as we have said, was in substance this transaction. That the money was to be paid by the city to those actually doing the work deemed by the grantors to be of sufficient benefit to them to warrant them in making it the consideration for their conveyance, instead of to the grantors themselves, is immaterial. It was the construction of the improvement at the specified cost per year, presumably to the benefit of their property, that constituted the consideration for their conveyance. Likewise it is altogether immaterial, in so far as the liability to the grantors is concerned, that the city will own the improved park.

In the view we take of the nature of this transaction, it is obvious that such cases as *McBean v. Fresno*, 112 Cal. 160, 44 Pac. 358,

31 L. R. A. 794, 53 Am. St. Rep. 191, *Smilie v. Fresno*, 112 Cal. 311, 44 Pac. 556, and *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958, are in no way in point. Here the full liability to the grantors was created upon the acceptance of the deed; the entire consideration therefor having been furnished. The cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the meaning of the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made. The distinction is clear, and is recognized by many decisions. It is concisely stated in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 19 Sup. Ct. 77, 43 L. Ed. 341, as follows:

"In the one case the indebtedness is not created until the consideration has been furnished; in the other [where the consideration on the other side is fully furnished at the time of the transaction] the debt is created at once, the time of payment being only postponed."

In support of the claim that the construction of the constitutional provision invoked by appellant is unreasonable in the light of its results, learned counsel for respondents say that to sustain it would mean that a city could not expend money on land granted on condition simply that it be maintained as a park or highway, etc.; in other words, that a city could not expend money on land conveyed solely for park or highway purposes. To our minds this result would not follow. That a city may accept land to be used by it for a specified purpose, and thereafter expend such money thereon as it, in the exercise of its discretion, deems proper in the use to which it is devoted, cannot be doubted. But that would be a very different case from this, wherein the doing of certain prescribed future work in a specified way and at a specified cost to the city per annum is made the consideration for the conveyance.

We are of opinion that the complaint stated a cause of action.

The judgment is reversed.

We concur: SHURTLEFF, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.; SHAW, J.

187 Cal. 313

PEOPLE v. TROUTMAN. (Cr. 2366.)

(Supreme Court of California. Nov. 7, 1921.)

1. Criminal law § 1159(2)—Conviction supported by evidence not reversible for insufficiency because of abnormality of crime.

Where conviction of an abnormal crime is supported by evidence, the court on appeal cannot reverse on the ground that the abnormality is so extreme as to be unbelievable.

2. Criminal law § 13—Statute held not invalid as uncertain for clerical error.

That Pen. Code, § 288, relating to offenses not constituting other crimes provided for in part 2 of the Code, plainly meaning part 1, was not such an uncertainty as to render it invalid.

3. Criminal law § 507(7)—Child of age protected by statute held not "accomplice" within rules of evidence.

Children under the age of 14 years of age protected against lewd acts by Pen. Code, § 288, are not accomplices within the meaning of rules of evidence requiring corroboration; they not being within section 1111, defining an "accomplice" as one liable to prosecution for the identical offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplish.]

4. Infants § 20—Corroboration not necessary in prosecution for offense against.

No corroboration of testimony of an infant under 14 years of age protected against lewd acts by Pen. Code, § 288, is necessary.

5. Criminal law § 510—Corroborating evidence of accomplice's testimony of other offenses held not necessary.

In a prosecution under Pen. Code, § 288, for lewd acts against a child under 14 years of age, testimony of the prosecuting witness as to other similar offenses after he became more than 14 years of age was receivable without corroboration; it not being necessary to prove any offense, except the one selected by the district attorney occurring before the age of 14.

6. Infants § 20—Instruction to give letters to child innocent construction given by its mother held properly refused.

In a prosecution under Pen. Code, § 288, for a lewd act on or with an infant, a requested instruction that the jury should give the same innocent construction to certain letters written by the defendant to the infant prosecuting witness as was given such letters by the infant's mother was properly refused.

7. Criminal law § 763, 764(17)—Instruction as to evidence of other offenses held not in effect a direction of verdict.

In a prosecution for lewd acts on or with a child, an instruction that testimony has been introduced tending to prove other acts of lewd conduct of defendant prior to and subsequent to the act relied on for conviction, that evidence was introduced to prove the lewd disposition and tendency of defendant to commit the acts, and not introduced to prove distinct offenses, but "is corroborative evidence tending to support the one specific offense," was not bad as positively asserting that the proof corroborated the main charge, and was not in effect the direction of a verdict against the defendant.

8. Criminal law § 1186(4)—Defendant, not exhausting peremptory challenges, cannot complain that district attorney was permitted to pass his peremptory challenges.

That the district attorney was permitted to pass his peremptory challenges on certain oc-

cations and then permitted to exercise one, in violation of Pen. Code, § 1088, cannot be held reversible error in view of section 1404, providing that neither departure in form or mode of proceedings renders it invalid without actual prejudice to substantial rights, where no prejudice was shown, and where the defendant complaining had not exercised all his peremptory challenges.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Holmes F. Troutman was convicted of a lewd act with a child under Penal Code, § 288, and appeals. Affirmed.

Ostrander & Carey, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LENNON, J. The order granting a rehearing of this case was prompted by the earnest and persuasive petition for a rehearing after decision by the District Court of Appeal. Here, as in the Court of Appeal, a reversal was sought primarily upon the contention that the evidence adduced in support of the people's case was so inherently improbable as to be unworthy of belief, and therefore insufficient to support the jury's verdict of guilty. Accordingly we have, in addition to giving due consideration to the remaining points made in support of the appeal, painstakingly reviewed and considered in every detail the evidence adduced upon the whole case, with the result that we are constrained to hold, as did the District Court of Appeal, that the evidence is sufficient to support the verdict and judgment.

[1] Conceding, as is contended, that at the time of the commission of the crime charged the physical condition of the boy, not necessary to be detailed here, upon whose person the crime charged was found by the jury to have been committed by the defendant, was so diseased as to be abhorrent, and therefore was calculated to repulse, rather than arouse the unnatural lascivious desires even of an extremely morally degenerate man, nevertheless we are not satisfied that the evidence upon which the conviction was had is so inherently improbable as to be altogether unworthy of belief. While the testimony of the complaining witness concerning the details of the commission of the crime is so out of the ordinary in its revelation of revolting details as to be startling in the extreme and difficult to believe, still it cannot be held to be unbelievable merely because it reveals an exceptional depth of moral degeneracy. To so hold would be "purely a speculative attempt to sound the depths of human depravity and to assign arbitrary rules beyond which desire and passion are held incapable of seducing or impelling human nature." People

v. Von Perhacs, 20 Cal. App. 48, 127 Pac. 1048; Stout v. State, 22 Tex. App. 339, 3 S. W. 231. It will be unnecessary to prolong a discussion of this phase of the case; for, apart from what we have said, we are satisfied that the case is adequately dealt with in so far as the sufficiency of the evidence is concerned and correctly decided from every point of view by the District Court of Appeal in the opinion of Mr. Presiding Justice Langdon, which we quote and adopt as follows:

"This is an appeal by the defendant from a judgment of conviction of violation of section 288 of the Penal Code. A motion for a new trial was denied, from which order an appeal is also taken.

"A discussion of the facts does not seem to us necessary, and, in view of the nature of the testimony, detailed consideration of the evidence will not be made in this opinion. It is sufficient to say that the evidence has been read with care, and that we cannot agree with the appellant that the testimony of the boy against whom the crime is alleged to have been committed presents such inherent improbabilities as to entitle it to no credence as a matter of law, and thus leave the record with no legal evidence to sustain the conviction. It is, of course, true that all offenses under this section, by their very abnormality, are improbable, measured by the standard of the normal; but the observation and experience of any court handling criminal records demonstrates that many such cases do occur, and their facts are therefore not inherently improbable, as that phrase is used in the law. As to the especially revolting facts in this case in connection with the alleged acts, which are urged by appellant as making the testimony of the boy unbelievable and inconceivable, it is sufficient to observe that once a man slips away from normal, once he enters the uncharted region of abnormality, the details and depths of degradation which his actions will show can no longer be measured. For the normal man we have a standard from human experience; but for the abnormal, there are no rules of conduct. The argument of inherent improbability was doubtless made to the jury, where it was a proper one, but these men and women believed the testimony of the boy, and even under the unusual conditions shown by the evidence did not find the facts unbelievable. We cannot, therefore, as a matter of law, say that the revolting conditions surrounding the abnormal acts in this case, render the commission of them by the defendant inherently improbable.

[2] "Objection is made by appellant that no crime is charged in the information against the defendant because section 288 of the Penal Code is unconstitutional upon the ground that it is vague, ambiguous, indefinite, and uncertain. The specific objection to the section is that the language, 'Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this code,' etc., is unintelligible in that 'part two' of the Code referred to relates solely to criminal procedure and does not describe acts constituting other crimes. This precise objection was considered in the

case of *People v. Bradford*, 1 Cal. App. 42, 81 Pac. 712, where the court said that it was evident that either by legislative oversight or by clerical misprision the words 'part two' were inserted for the words 'part one' in such section, and that it should be so construed. Appellant refers to this case in his brief, but asks this court to overrule it. We see no justification for so doing, and we consider the question of the validity of this section against such an attack as settled in this state.

[3] "Appellant makes various objections to instructions given and refused by the trial court. His main objection is that the evidence shows the prosecuting witness to be an accomplice, regardless of his age, because of his intelligence, education, and understanding of moral questions, and that the refusal of the court to leave the question of whether or not the boy was an accomplice to the jury, and to instruct the jury that, if they so found, his testimony would require corroboration to sustain a conviction, was prejudicial error. Much argument is indulged in by the appellant regarding the law relating to accomplices and the responsibility of minors for crimes, etc. We are of the opinion that none of the rules discussed governing these matters are applicable to a case such as the present one. The inquiry here is not at all as to the guilt or moral responsibility of the child, and under the section of the Code under which the conviction here was had the minor is guilty of no legal offense, regardless of his mental capacity or moral insight and regardless of his acquiescence. A different situation might exist if the defendant here was of the age of 13 years and charged with any act included in section 288 against 'a child under the age of 14 years.' Then the question of the defendant's knowledge of right and wrong would be important. It would be a question of fact, and the disputable presumption regarding the responsibility of infants between the ages of 7 and 14 years for crimes might be rebutted by the evidence. But the gist of the offense under section 288 is the crime against a 'child under the age of 14 years', and in the present case the prosecuting witness, even if it were overwhelmingly proved that he had full knowledge of right and wrong and that he had innumerable vicious and criminal tendencies himself, and that he had suggested to the defendant (a man of 38 years of age) the commission of the act charged against said defendant, yet he would not be guilty of an offense under section 288, for the gist of that offense is that the act is committed with one under the age of 14 years.

"Section 1111 of the Penal Code, while requiring the testimony of an accomplice to be corroborated in order to sustain a conviction, expressly defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'

[4] "However, in addition to the foregoing reasons, it has been expressly decided in this state, in the case of *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907, that there is no statute or other rule of law which calls for the corroboration of the testimony of a complaining witness in a case of this character. Also in the case of *People v. Thourwald* (App.) 189 Pac.

124, it is said, in considering a conviction under this same section, 'Upon her testimony [the prosecutrix] alone a verdict of conviction may securely rest,' and it is then pointed out that no corroboration is required in cases of rape, and that the same rule applies to cases under section 288 of the Penal Code. Furthermore, there is some corroboration of the boy's testimony in the letters appearing in the record which were written to him by the defendant from time to time. The appellant contends that under certain cases in this state such corroborating evidence is insufficient. But, be that as it may in a case where corroboration is required, under the ruling in the cases of *People v. Raich* and *People v. Thourwald*, supra, corroboration of the testimony of the prosecuting witness is unnecessary in a case like the present one, and, therefore we are not concerned with whether or not the possible inference which the jury might draw from the letters would have sufficiently corroborated the boy's story.

[5] "A somewhat different, though a closely related, proposition to the one just discussed is involved in the further contention of counsel that testimony of the boy relating to the commission of similar acts by the defendant subsequent to the act charged, and after October 30, when the boy became 14 years of age, was improperly admitted to show the disposition of the defendant to commit the act charged. It is appellant's contention that, even though it be held that the boy was not an accomplice while he was under the age of 14 years and while he came within the scope of section 288, Penal Code, nevertheless, as to acts committed after he reached the age of 14 years, he would be an accomplice, and as to such acts, at least, the court should have instructed the jury that his testimony must be corroborated. There is no merit in this contention, as it was not necessary to prove any offense except the one selected by the district attorney as the charge upon which the state relied for a conviction. The instruction given by the court of which complaint is made did not refer to other 'crimes,' but referred to other 'acts' which it was stated were introduced to show the disposition of the defendant to commit the act charged, and as corroborative evidence of the main charge.

[6] "Reference has been made herein to certain letters written by the defendant to the prosecuting witness. These letters were introduced in evidence, and appellant contends that the jury should have been instructed specifically that they must give the letters an innocent construction for the reason that the mother of the boy saw these letters as they were received by him, and gave to them an entirely innocent construction. We do not see how the jury could be bound by the construction given to the letters by the mother before she was in possession of the information given by her son's testimony. The letters are not isolated from all other facts when being construed by the jury; they are interpreted in the light of all the other testimony in the case. It is perfectly clear from the record that, when the mother was informed by her son of the alleged acts, she no longer gave to the letters of the defendant an innocent construction, but that thereupon such letters became exceedingly significant to her. We

see no error in the action of the trial court in permitting the letters to go to the jury.

[7] "Complaint is made of the following instruction: 'Testimony has been introduced by the prosecution tending to prove other acts of lewd and lascivious conduct of the defendant toward Herbert Cramer prior to and subsequent to the acts relied upon for conviction. This evidence is introduced for the purpose of proving the lewd and lascivious disposition and tendency of the defendant to commit the lewd and lascivious acts. This evidence is not introduced to prove distinct offenses, but is corroborative evidence tending to support the one specific offense for which the defendant is being tried.' Appellant contends that this instruction positively asserts the existence of a fact, i. e., that the proof of similar offenses is corroborative of the main charge. Practically the same instruction was approved in the case of *People v. Gasser*, 34 Cal. App. 541, 544, 168 Pac. 157. Certainly it is well recognized that in cases of this character evidence of similar acts tending to prove a lewd and lascivious disposition and the tendency of the defendant to commit lewd and lascivious acts would be corroborative of the specific charge. There is nothing in this instruction, nor in the other instructions, which would prevent the jury from disbelieving the entire testimony of the prosecuting witness, both as to the main charge and the other offenses tending to show a lascivious disposition; and we think that appellant's contention that this instruction is, in effect, a direction to the jury to find the defendant guilty is without merit.

"Numerous objections are made with reference to other instructions of the trial court. It can serve no useful purpose to consider, specifically, each of these. The instructions as a whole must be read together, and after such reading we are convinced that no error prejudicial to the defendant was made. Under the instructions, taken as a whole, his rights were fully protected. The simple fact is that the jury believed the story of the boy and did not believe the story of the defendant. There is no other direct evidence upon the charge. We do not think it can be said that the evidence was such that reasonable men could not have reached the conclusion arrived at in this case.

[8] "It is further urged by the appellant that error was committed in selecting the jury in this case, and that the trial court should have required the district attorney to exercise his peremptory challenge before the defendant was called upon to exercise his challenge. The district attorney was permitted to pass his peremptory challenge on several occasions, and after passing his challenge more than five times was permitted to exercise one peremptory challenge. Appellant contends that this is a violation of section 1088, Penal Code, which provides that 'first the people and then the defendant shall take a peremptory challenge.' Section 1404 of the Penal Code provides that 'neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.' If an error in procedure was committed by this practice of the

trial court, we fail to see how such an error tended to the prejudice of the defendant, and certainly there is no showing made of any actual prejudice suffered by him therefrom.

"Furthermore, it appears from the record that defendant exercised only nine of his peremptory challenges, thus leaving one unexercised. The state exercised only one such challenge. The record shows that after these challenges were exercised the attorney for the defendant stated, 'We are satisfied,' whereupon the district attorney stated, 'So are we.' It appears, therefore, that the defendant had an additional challenge unexercised which he did not desire to use because the jury as constituted was satisfactory to him. Under such circumstances, he cannot complain here of any irregularity, if irregularity there was, in allowing his peremptory challenge to the people. It was held in *Baird v. Duane*, 1 Cal. Unrep. 492, that error in refusing to allow a challenge for cause is not prejudicial if the party, although forced thereby to use a peremptory challenge, has a peremptory challenge to spare when the jury is completed. It was held in the case of *People v. Schafer*, 161 Cal. 573, 119 Pac. 920, that the disallowance of a challenge for cause on the ground of actual bias, interposed to a juror who was subsequently peremptorily challenged, will not be reviewed on appeal for error, where the record, while it shows that the defendant exhausted his ten peremptory challenges, including the one used on such juror, fails to show that he had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. The reason for the rule announced in the last-cited case, and the full discussion of the subject therein, apply with equal force in the present case. The defendant having expressly stated that the jury was satisfactory to him, and having one of his peremptory challenges unexercised at the time the jury was accepted, his objection here is without merit.

"We find no errors in the record which would warrant a reversal of this judgment under all the facts in evidence, and the same is affirmed."

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; SHAW, J.

187 Cal. 295

GREAT WESTERN POWER CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9758.)

(Supreme Court of California. Nov. 5, 1921.)

Master and servant — 373—Employee's injury by fellow workmen wrestling held not one "arising out of employment" within Compensation Act.

Where a workman in the performance of his duties passed over a platform when two fellow workmen engaged in a friendly wrestling match accidentally fell on him and broke his leg, such injury did not arise out of his employ-

ment within Workmen's Compensation, Insurance, and Safety Act of 1917; no claim being made that the wrestling was habitual, or that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings under the Workmen's Compensation Act by E. S. Holbrook against the Great Western Power Company of California, Award allowed by the Industrial Accident Commission, and defendant brings certiorari. Award annulled.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LAWLOR, J. This is a proceeding in certiorari on a petition by the Great Western Power Company of California, a corporation, to review the action of the respondent Industrial Accident Commission allowing an award against petitioner in favor of respondent E. L. Holbrook for injuries received by him while employed by petitioner.

Respondent Holbrook was employed by petitioner in the capacity of pumpman at Bel-don, Cal. While in the performance of his duties, he was walking from the toolhouse to a shaft or tunnel in which he was working. On his way to the shaft he passed over a board platform on which two fellow workmen were engaged in a friendly wrestling match. The scuffling was not caused by any dispute or altercation over the work or over anything connected with the employment, and respondent was not participating in it. The wrestlers accidentally fell on him and broke his left leg. He was incapacitated for two months, and applied to the Industrial Accident Commission for compensation under the Workmen's Compensation, Insurance, and Safety Act. A hearing was had by that body, and it was found the respondent sustained injury occurring in the course of and arising out of his employment, and that he was entitled to a benefit of \$160.69. Petitioner applied for a rehearing before the Industrial Accident Commission, which was denied. This petition followed.

Petitioner contends:

That "said Commission in rendering said decision and entering said award acted without and in excess of its powers, and that the order and decision are unreasonable, and that the findings of fact of the said Commission in said proceeding do not support the order, decision, or award here sought to be reviewed."

It insists that—

"In the case at bar there are absolutely no facts or circumstances to take this case out of

the general rule uniformly followed both in England and in the United States that injuries resulting from 'horseplay' among employees, whether the injured party is a participant or not, do not 'arise out of the employment.'"

In support of this position are cited *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; *Fishing v. Pillsbury*, 172 Cal. 690, 158 Pac. 215.

Respondents assert:

"We frankly concede that the decision of the Commission is inconsistent with the ruling of this court in *Coronado Beach Co. v. Pillsbury et al.*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and *Fishing v. Industrial Accident Commission*, 172 Cal. 690, 158 Pac. 215, both cases being decided the same day. In view of the fact that these cases were early decisions upon the question of horseplay rendered in 1916, and before the doctrine was well established in other states, and that since that time the leading states upon the doctrine have taken the opposite view, so we take the liberty of urging upon the court a reconsideration of the views therein expressed;" that, "where an employee is attending properly to his own work without diversion for purposes of horseplay, and is injured by the frolicking act of another employee, such injury, except in exceptional cases, may be said to arise out of the employment for the reason that the danger of ordinary frolicking by employees is a danger incident to every business which brings employees together in numbers;" and that "hazards due to the usual propensities of workmen being brought together in numbers for the purpose of employment should be the hazards insured against both to protect the individual and the community."

In support of this position respondents cite authorities from other jurisdictions decided since the above-mentioned cases. Petitioner, however, asserts that—

"These last-mentioned cases have been cited with approval in a very large number of decisions from the highest courts of many of the states of the land. In the decisions referred to by respondents herein, which do not follow the foregoing cases, the court has had great labor to create and point out circumstances differentiating the cases from these two leading cases."

The Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 834) provides:

"Liability for the compensation provided by this act, in lieu of any other liability, whatsoever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment.
* * *

Coronado Beach Co. v. Pillsbury, supra, is a case where an employee, who was particularly susceptible to tickling, while in the course of his employment was going downstairs when he was tickled in the ribs by

another employee. As a result he fell down the stairs, sustaining injury. The court held he was not entitled to compensation, saying:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. * * * In the matter at bar the employment of Flint exposed him to no greater danger from being tickled by a fellow servant than would a guest in the hotel of his employer have been so exposed."

In *Fishing v. Pillsbury*, supra, an employee, about 17 years of age, pointed a trick camera at another employee and caused a spring to be ejected from it. The spring struck the other in the eye, injuring him. The court held he was not entitled to compensation, on the authority of *Coronado Beach Co. v. Pillsbury*, supra.

Respondents rely chiefly upon two cases which follow the rule they ask us to adopt. One of these is *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522. In that case an employee, while engaged in the performance of his duties, was struck in the eye by an apple thrown by a fellow servant at another. The court, in upholding the award, said:

"Whatever men and boys will do, when gathered together in such surroundings, at all events, if it is something reasonably to be expected, was one of the perils of his service."

Another authority is *Willis v. State Industrial Accident Commission*, 78 Okl. 216, 190 Pac. 92, in which case an employee was, with several others warming himself by an open fire during an interval in his work, and was injured because of the explosion of a piece of dynamite which a fellow employee threw into the fire to see if it would explode. It was declared:

"We think the correct rule is, and so hold in these cases, that, if a workman is an active participant in what has been denominated 'horseplay,' he is not entitled to compensation, but if, while going about his duties, he is the victim of another's prank, to which he is not in the least a party, he should not be denied compensation."

An authority similar to these is *Verschleiser v. Stern*, 229 N. Y. 192, 128 N. E. 126.

The other cases cited by respondents do not fully support the rule contended for by them. While in some of them compensation was awarded for injuries resulting from skylarking, in the cases where such compensation has been awarded special circumstances have appeared which made the skylarking peculiarly one of the risks of the employment. In other cases the compensation was awarded for injuries received by employees as the result of altercations or quarrels, but

in each of those cases the controversy had its origin in some misunderstanding or incident connected with the work. These cases decide that, while ordinarily compensation will not be allowed where injuries are caused by skylarking or are the result of a dispute between employees, yet an injury may be so caused and still be held to arise out of the employment. Thus, in the case of *In re Loper*, 64 Ind. App. 571, 116 N. E. 324, an employee, while going about his duties, was injured by another's sportive use of an air compressor. The injured employee was not participating in the horseplay. The evidence showed the compressor was habitually used in this way. The court declared:

"We are not dealing here with a sporadic, occasional, or unanticipated use of the air hose in play. * * * The employer, with knowledge of the facts, permitted such practice to continue. It was within his power to have prohibited it. By failing to do so, it became an element of the conditions under which the employee was required to work."

A similar case was *State v. District Court*, 140 Minn. 75, 167 N. W. 283, L. R. A. 1918E, 502. There an employee was struck in the eye by a sash pin thrown by a fellow employee at another, not the injured workman. The injured employee was not engaging in the horseplay. It was customary for the employees to throw things at each other, and it was found that the employer knew or should have known of the custom. The court said:

"The rule is well enough settled that, where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results, and in general where one in sport or mischief does some act resulting in injury to a fellow worker, the injury is not one arising out of the employment within the meaning of compensation acts. [Citing cases.] Here we conceive the situation to be different. Filas was exposed by his employment to the risk of injury from the throwing of sash pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missile throwing proclivities of some of Filas' fellow workers and was a risk of the work as it was conducted."

In *Mueller v. Klingman* (Ind. App.) 125 N. E. 464, also cited by respondent, the deceased employee and a fellow employee were working together. The fellow worker became angered at a remark made by deceased concerning the doing of the work, and threw a hammer at him, striking him in the head. The injury inflicted caused his death. The court held that the injury arose out of the employment, basing the decision on *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530, and quoting from that case as follows:

"Where men are working together at the same work, disagreements may be expected to

arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmary of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

Of the other cases cited by respondent, *Stuart v. Kansas City*, 103 Kan. 307, 563, 171 Pac. 913, *Marchiatello v. Lynch Realty Co.*, 94 Conn. 260, 108 Atl. 799, and *Colucci v. Edison Portland Cement Company*, 93 N. J. Law, 332, 108 Atl. 313, are similar to *In re Loper*, supra, and *State v. District Court*, supra. The others resemble *Mueller v. Klingman*, supra, and were decided on the theory that injury resulted from an altercation concerning the work. These cases are *Heitz v. Rupert*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, *American Steel Foundries v. Melinik* (Ind. App.) 126 N. E. 33, *Polar Ice & Fuel Co. v. Mulray*, 67 Ind. App. 270, 119 N. E. 149, and *Pekin Cooperage Co. v. Industrial Commission*, supra. Another case, *Stasmos v. Industrial Commission*, 80 Okl. 221, 195 Pac. 762, although decided on the authority of *Leonbruno v. Champlain Silk Mills*, supra, was clearly a case where the injury was caused by an altercation concerning the employment, inasmuch as the employee was injured as the result of an altercation with his foreman over which of two lifts he should use in leaving the shaft in which he was working, the mine having been shut down suddenly and the employees ordered to the surface. The English cases of *Thom v. Sinclair* [1917] App. Cas. 127, and *Dennis v. White and Company* [1917] App. Cas. 479, contain valuable discussion of the phrase "arising out of the employment," but the facts are dissimilar, and they do not assist in a decision of the case at bar.

While the authorities cited above from New York and Oklahoma lay down the rule contended for by respondents, we are not prepared to concede that they represent the general trend of authority on the subject. We do not think, therefore, that these authorities would justify us in overruling the settled law of this state as laid down in *Coronado Beach Co. v. Pillsbury*, supra, and *Fishing v. Pillsbury*, supra, approved in the late case of *Federal Mutual Liability Insurance Company v. Industrial Accident Commission*, 201 Pac. 920, on the subject of injuries received by an employee through horseplay. It cannot be held that all injuries so received in the course of the employment arise out of the employment. It may be remarked that the recent case of *General Accident, Fire & Life Insurance Corporation v. Industrial Accident Commission*, 200 Pac. 419, is in har-

mony with the rule expressed in *Mueller v. Klingman*, supra, and the similar cases. In that case the injured employee was repairing a tire in a garage a short distance from where his employer and a stranger became engaged in a quarrel over the purchase of gasoline by the latter. The employer shot at the stranger, and the bullet glanced and struck the injured employee, who had not participated in the quarrel. The question presented in that case was whether the injury arose out of the employment. Mr. Justice Shurtleff, in writing the opinion of the court, said:

"In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline. That it ultimately resulted in a personal difference or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. * * * What are termed the 'horseplay' cases, and the rule in them announced, have no application here. The injury sustained by Shrout was not due to skylarking or a frolic, but was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business."

In the case at bar it is not claimed or shown that the scuffling was habitual, that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment. The injury was an unfortunate accident which had no connection with the employment, and did not arise out of it. The employer should not be held liable.

The award is annulled.

We concur: WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; SHAW, J.

(54 Cal. App. 384)

SARGENT v. ULLSPERGER.
(Civ. 3448.)

(District Court of Appeal, Second District, Division 1, California. Sept. 27, 1921.)

Brokers ⇨ 56(3)—Negotiations before employment of broker held to preclude recovery of commissions.

Though plaintiff broker suggested to defendant that a third person might be willing to trade other property for that listed by defendant with plaintiff for a sale for cash, and also suggested to such third person that defendant might make the trade, plaintiff was not entitled to a commission where the trade was actually consummated between defendant and such third person, where the latter and

defendant had negotiated for such a trade before plaintiff was employed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by L. P. Sargent against Anton Ullsperger. Judgment for plaintiff, and defendant appeals. Reversed.

Patrick J. Cooney and J. T. Reed, both of Calexico, for appellant.

E. R. Simon, of El Centro, for respondent.

CONREY, P. J. On July 24, 1918, the defendant executed and delivered to the plaintiff an agreement in the terms following:

"L. P. Sargent, El Centro, Calif.: In consideration of \$1.00, receipt whereof is hereby acknowledged. You are authorized to sell for me the following described property and if sold by you I agree to pay you a commission of 5 per cent. on any deal I may accept for the same. Said commission to be paid out of the first money received on sale. You are hereby authorized to contract sale for me as shown herein. Price \$21,600. Terms \$7,400.00 down and balance ——. I will give possession when sold 191—. List for 90 days and thereafter until notified in writing of the withdrawal from the market. I will exchange for ———subject to my approval."

Here followed a description of defendant's property and the signature of defendant.

Plaintiff brought this action to recover a commission claimed to have been earned by performance of the foregoing contract, in that the plaintiff procured and brought about an exchange of properties between the defendant and one John Zenos, wherein and whereby defendant transferred to Zenos the property described in said agreement and in consideration thereof received from Zenos other property of the alleged value of \$21,600. The court made findings in favor of the plaintiff, except that the value of the property received by defendant from Zenos was fixed at \$12,000, and the commission allowed to plaintiff was based on that valuation instead of the valuation stated in the complaint.

Defendant contends that the contract, under the circumstances surrounding its execution, was limited to sale only, and did not authorize the broker to make or effect an exchange. It is not necessary to discuss this question, which no doubt is debatable. Assuming that the contract did authorize an exchange, and that defendant agreed to pay a commission on any exchange procured by appellant of defendant's property, nevertheless we are of the opinion that the service contracted for was not rendered by plaintiff.

To entitle an agent to recover commissions, the fact must be established that the

efforts of the agent were the procuring cause of the sale or exchange, and that through his agency the parties to the transaction of sale or exchange were brought into communication with each other, although those parties themselves negotiated the transaction. *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067; *Justy v. Erro*, 16 Cal. App. 519, 117 Pac. 575; *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *Brown v. Mason*, 155 Cal. 155, 158, 99 Pac. 867, 21 L. R. A. (N. S.) 328; *Roth v. Thomson*, 40 Cal. App. 208, 215, 180 Pac. 656.

It was found by the court that on the 5th day of August, 1918, the plaintiff informed Zenos that he had listed for sale or exchange the said real property of the defendant, and suggested and proposed to Zenos that he trade his property (being the property afterwards exchanged with defendant) to the defendant for the described real property of the defendant; that the plaintiff then and there informed Zenos that defendant was the owner of the described real property and stated that he believed that the defendant would trade his said property for the real property of Zenos; "that thereafter, and a few days following, the said plaintiff informed the said Anton Ullsperger, the defendant, that he had proposed to the said John Zenos that the defendant Anton Ullsperger would trade the real property hereinafter described to the said John Zenos for the real property owned by the said John Zenos;" that thereafter the defendant and Zenos proceeded to deal together and consummated an exchange of their said properties. These findings give a chronological order of events, but they do not declare that the two principals in the trade were introduced or brought together, or that the transaction between them was initiated by reason of anything said or done by appellant. It appears by the uncontradicted testimony of defendant and his son, John Ullsperger, and of John Zenos, that during several months before defendant listed his property with the plaintiff, the defendant and John Zenos, in numerous interviews, had been discussing an exchange of those properties. Zenos was seeking to acquire defendant's property by exchange, but Ullsperger was trying to make a sale. It was not by reason of the plaintiff's efforts that they continued their negotiations and made the exchange.

The answer of the defendant squarely raised the issue by alleging that the plaintiff had nothing whatever to do with the bringing about or the consummation of said exchange of properties, and that said exchange was entirely arrived at and completed by said Zenos and defendant only. The findings do not cover this issue except in the manner hereinabove stated. Perhaps they are sufficient under the rule that findings are to be construed favorably, in support of a

judgment. But if so, these findings are not sustained by the evidence.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

54 Cal. App. 387

CAINE et al. v. POLKINGHORN. (Civ. 3510.)

(District Court of Appeal, Second District, Division 1, California. Sept. 27, 1921.)

1. Appeal and error ⇨1071(4)—Clerical error in findings disregarded on appeal.

In broker's action for commission, a finding that "defendants" procured purchaser will be considered a clerical error on appeal, where shown to be such by other statements in the findings, and where there is no doubt under the evidence but that the brokers procured the purchaser.

2. Appeal and error ⇨204(3)—Plaintiffs could not complain of parol evidence not objected to.

Brokers seeking to hold administratrix personally liable on contract, signed individually, on court's refusal to approve sale by administratrix to purchaser procured by brokers, could not complain of parol testimony that administratrix signed contract in her representative capacity, where such evidence was received without question and was given in contradiction of testimony given by brokers themselves.

3. Executors and administrators ⇨97—Administratrix who signed brokerage contract individually did not waive statute relieving her from personal liability on court's refusal to confirm sale.

Where administratrix signed brokerage contract for sale of intestate's land, individually and not as administratrix, but signed receipt on purchaser's deposit in her capacity as administratrix, she was not personally liable to brokers for commission on court's refusal to approve sale, not having waived protection of Code Civ. Proc. § 1559.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by C. L. Caine and E. F. Loescher, doing business under the firm name and style of Caine & Loescher, against Mrs. W. A. Polkinghorn, also known as Alice E. Polkinghorn. Judgment for defendant, and plaintiffs appeal. Affirmed.

N. Lindsay South, of Fresno, and Hugh M. Bole, of Los Angeles, for appellants.

L. M. Chapman and Ward Chapman, both of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover upon an alleged contract to pay a commission to the plaintiffs as agents for the sale of real property. The defendant, against whom

personally the plaintiffs seek to obtain judgment, was administratrix of the estate of W. A. Polkinghorn, deceased, to which estate the land belonged. Under date August 7, 1919, the defendant signed an agreement authorizing the plaintiffs to sell the land for the sum of \$20,000, or any less amount thereafter authorized by her, on terms therein stated, and agreed that if the plaintiffs should sell such property, or be instrumental in selling the same, she would pay them 5 per cent. commission on the selling price. Defendant signed the contract individually, without any indication of her representative capacity. The contract contained no reference to the fact that the land was property of the estate. Nevertheless, the court found that at the time of signing said contract the plaintiffs were informed by defendant that the property belonged to the estate of W. A. Polkinghorn, deceased, and knew that she was administratrix thereof; that prior to the execution of the agreement of date October 29, 1919, next hereafter mentioned, and before the plaintiffs had secured and presented a purchaser of the property, the plaintiffs were informed by the defendant that the sale thereof must be confirmed by the court, and that she was offering the property for sale as administratrix of said estate. This finding is supported by the testimony of the defendant, introduced without objection. In fact, the first oral evidence on these matters was that of Mr. Caine, and was presented on behalf of the plaintiffs. Mr. Caine testified that on August 7 Mrs. Polkinghorn stated that the land was her property and did not mention an estate. Mrs. Polkinghorn, on the contrary, testified that she told them that she was administratrix, and was selling the property in order to close the estate.

On October 29, 1919, plaintiffs received from one Otto Loescher the sum of \$1,000 as deposit and partial payment on sale to him of said land for the full purchase price of \$19,000, remainder to be paid upon execution of deed, together with abstract or certificate of title "showing title in said property to be in the said owner." The owner was not named in this receipt, but the defendant signed an acceptance thereof, wherein she further stated that she agreed to pay the plaintiffs \$1,000 "as their commission for negotiating said sale, to be paid from the first money received on the purchase price." Her signature to this acceptance was "Alice E. Polkinghorn, Adm."

At that time the defendant told the plaintiffs that it was necessary for her to get an order from the court and that she would go right ahead with it. Before anything further was done, the administratrix received from another party a bid of \$20,000 for this property, which she accepted and reported to the court for confirmation. When the mat-

ter came before the court, Otto Loescher appeared and made an offer to the court in the sum of \$22,000, which by order of the court was accepted, and the land officially sold to him for that sum. In the proceedings before the court no order was made for the allowance or payment of any agency commission.

[1, 2] The findings in this action state that the "defendants" procured Otto Loescher to make said agreement of October 29th. Other statements in the findings indicate that this was a clerical error and that the court intended to find that this was done by the plaintiffs. Under the evidence there is no doubt that the plaintiffs did procure Loescher to make that agreement. Assuming this to be the fact, we have to consider whether or not the judgment should be affirmed. Section 1559, Code of Civil Procedure, as then in force, read as follows:

"Any executor or administrator may enter into a contract with any bona fide real estate agent to secure a purchaser for any real property belonging to an estate, which contract shall provide for payment to such agent out of the proceeds of sale to any purchaser secured by him of a commission, the amount of which must be fixed and allowed by the court upon confirmation of the sale. If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so fixed and allowed by the court. By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed."

In view of these provisions of the Code, it is clear that the defendant did not become personally liable to pay commissions to the plaintiffs, unless the words of the contract, together with the attendant circumstances, established beyond successful denial that the administratrix intended to waive the benefit of the protection thus afforded to her by the statute, and intended to and did contract to become personally liable to the plaintiffs for commissions on the sale if made through their instrumentality. It is contended by appellants that she did make such an agreement and that the defendant should not have been permitted to show by parol evidence contrary to the terms of the contract as written that personal responsibility of the defendant was not intended. But, as we have seen, that evidence was received without objection, and was given in contradiction of testimony given by the plaintiffs. Therefore appellants cannot now be heard to say that the court erred in receiving such evidence. In addition to the testimony of the defendant, we have the further fact that in the agreement of October 29th, when the deposit was made by Otto Loescher, the plaintiffs took the signature of the defendant with words of

addition showing that she was administratrix. This agreement differed from the written agreement of August 7th in three particulars—viz., in changing the proposed sale price, in the form of signature of the defendant, and in the measure of compensation to be received by the plaintiffs.

[3] Under the facts thus proved, the defendant is entitled to claim the benefit of the provisions of the Code, hereinbefore quoted, to the effect that no personal liability shall attach to an administrator upon a contract entered into by the administrator, to pay an agent's commission for securing a purchaser for property belonging to the estate.

In *Hay v. McDonald*, 33 Cal. App. 572, 165 Pac. 1030, this court reviewed the authorities bearing upon the subject of liability upon a contract made by an agent in his own name, and held that for the purpose of establishing the liability of the principal where an agent contracts in terms not fully expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound. But it was further stated that—

"While parol evidence in such a case as this is competent, it is not competent for the purpose of exonerating the signer from personal liability, but is competent for the purpose of extending the liability to other parties for whom the signer may have intended to contract and for whom he had authority to contract."

A rehearing in that case was denied by the Supreme Court. It must be admitted, however, that that decision, as quoted, must be limited in its application, or else it will not be consistent with some prior expressions of opinion by the Supreme Court. We have in mind the case of *Bean v. Pioneer Mining Co.*, et al., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106, wherein the action was upon a promissory note signed "Pioneer Mining Company, John E. Mason, Sup't.," and it was sought to charge the defendant Mason personally. The court held that where the contract bears on its face no suggestion of agency, parol evidence is not competent for the purpose of exonerating the signer from personal liability if the other party to the instrument chooses to hold him personally liable, "unless there was evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone." The court further said:

"Even if it could be said that there were no indications suggestive of agency on the face of the note herein sued, evidence was admissible tending to prove that the consideration for the note was received by the Pioneer Company, and the credit extended to the company alone. The absence of proof of the other circumstance—his actual power to act for the corporation—would not render Mason personally liable, under the decisions in this

state. If it was known to the payee that the note was given by Mason as superintendent of the company, and in recognition of an indebtedness of the company, Mason is not bound on the note, even if he had no power to execute the instrument for the company. *Blanchard v. Kaul*, 44 Cal. 440; *Lander v. Castro*, 43 Cal. 497; *Hall v. Crandall*, 29 Cal. 568."

In the present action it must be conceded that the defendant had authority to sell the land, subject only to the approval of the court; likewise, under the section of the Code hereinabove quoted, she had authority to employ an agent and to agree to pay a commission, the amount of which, however, must be fixed and allowed by the court. Since the Code section further exempted the executrix from personal liability on such contract, that provision of the Code must be read into the contract in connection with the evidence that the plaintiffs knew that they were dealing with an administratrix. Since it does not appear from the evidence, or the findings of the court, that the conduct of the defendant in contracting with the plaintiffs was other than the ordinary conduct of an administrator in dealing with the property of an estate, our conclusion is that personal liability of the defendant has not been established.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

BUELL v. BUELL. (Civ. 3970.)*

(District Court of Appeal, First District, Division 2, California. Sept. 29, 1921.)

1. Quieting title $\S$ 44(4)—Findings for plaintiff held unsupported.

Evidence in suit to quiet title to real estate standing in the name of defendant's intestate held not to support findings that deceased had no interest in the property, that plaintiff and deceased had agreed that the equity in other property, standing in plaintiff's name and traded for the property in suit, should be the property of plaintiff alone, and that deceased had put no more than \$300 of his money into the property so traded.

2. Appeal and error $\S$ 173(2)—Claim of fraud not pleaded and asserted for first time on appeal, not available.

A claim of fraud, not pleaded and asserted for the first time in respondent's brief, is not open to consideration.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by E. E. Buell against R. L. Buell, as administratrix of E. S. Buell, deceased, and individually. Judgment for plaintiff, and defendant appeals. Reversed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellants.

L. N. Barber and W. N. Gilliam, both of Fresno, for respondent.

NOURSE, J. Plaintiff commenced this action to quiet title to an undivided one-third interest in a certain piece of real property and improvements situated in the city of Reedley, the title standing in the name of E. S. Buell, the deceased husband of defendant. The theory of the complaint was that the property was purchased by the transfer to the vendors of plaintiff's equity in a contract for the purchase of a certain piece of property located in Columbia Colony No. 2, which contract stood in the name of plaintiff, and was assigned to the vendors of the property in suit at the request of the deceased. The value of the plaintiff's equity in the contract was \$2,800, and the value of the property in suit was about \$4,000. The defendant, who was sued both as administratrix of her husband's estate and as an individual, alleged in her answer that the contract for the Columbia Colony property was acquired by the transfer of property belonging to her deceased husband, which was taken in the name of plaintiff at the request of deceased solely for the purpose of protecting and securing plaintiff for the repayment to her of a loan of \$1,250, money borrowed by the deceased. This indebtedness was evidenced by a promissory note in the sum of \$1,250, executed by defendant and her deceased husband, and dated February 26, 1917. Prior to the filing of the amended complaint upon which the suit is based plaintiff presented her claim, based upon this note, to the defendant as administratrix of said estate, and the same was duly approved. The trial court found that on December 20, 1918, the plaintiff, as purchaser, entered into a contract for the purchase of the Columbia Colony property, agreeing to pay the sum of \$8,000 therefor; that in pursuance of said contract the sum of \$2,800 was paid to the vendors thereof by plaintiff; that neither the deceased nor his estate had any right, title, or interest therein or thereto; that on the 27th day of February, 1919, the deceased at the request of plaintiff negotiated the transfer of her equity in said contract for an undivided one-third interest in the Reedley property, and against the will of defendant and without her knowledge obtained from the vendors thereof title to said property in the name of said deceased; that the deceased paid to the vendors thereof the sum of \$2,800, received by them as first payment under the said contract of purchase, but that the same was so paid for the use and benefit of the plaintiff, and under and in pursuance of an agreement between plaintiff and deceased that the property so purchased should be her property, and

that the said sum was so paid for the purpose of effecting a settlement between plaintiff and deceased. The court also found that the property so conveyed by deceased to the vendors of the Columbia Colony property was obtained by him through a series of exchanges for which the original consideration was property acquired from plaintiff and the sum of \$300 of the funds of said deceased. Judgment was entered upon the findings, decreeing that plaintiff was the owner of the property in suit, that the defendant was barred from asserting or claiming any title or interest therein, that a deed thereof be executed, conveying the property to plaintiff, and that the defendant be required to account to plaintiff for the rents and profits received from said property from the date of the transfer to the date of said deed. Defendant appealed from the judgment, basing her attack upon the ground that the findings of fact are not supported by the evidence.

The portions of the findings which are made the basis of appellant's attack are that the estate of deceased has no right, title, or interest in the property in suit; that the contract for the purchase of the Columbia Colony property was taken in the name of plaintiff in pursuance of an agreement between plaintiff and the deceased that the property purchased should be her property, and that the property conveyed to the vendors thereof, by deceased as consideration for the equity which plaintiff received from that contract was obtained by deceased through a series of exchanges into which deceased put \$300 of his own funds.

Counsel for respondent has made no effort to sustain the findings by citation of evidence supporting them, and as the appeal has been taken under section 953a, Code of Civil Procedure, a complete examination of the typewritten transcript has been made necessary. From this examination it appears that each one of the findings under attack is unsupported by the evidence.

The story of the case as disclosed by the evidence, which is not conflicting, is that in the year 1908 respondent acquired a piece of property in the county of Fresno with an original investment of \$900. This was exchanged for other property through the efforts of deceased, and through a series of exchanges respondent acquired what is known as the Jensen property and the property referred to as her home site. Through the exchange of the Jensen property respondent acquired the piece of property designated as the Le Grand property. About this time an agreement was drawn between respondent and deceased whereby he was given an interest in the Le Grand property or in the stock and farming implements thereon, but this agreement was canceled, and respondent entered into a contract disposing of the Le Grand property and taking in exchange

therefor a piece of property in Maricopa and \$6,000 on the contract of purchase, while the son obtained an interest in a rooming house in Fresno, some 40 acres of land in Texas, a lot in Seattle, and two lots in what is designated the Robinson tract. Respondent testified that at the time of this exchange she knew that deceased had acquired the rooming house and the Texas property, but that she did not know about the lots in Seattle or in the Robinson tract. Though the contract drawn by respondent and deceased recognized an interest of deceased in the Le Grand property of the value of \$4,000, the value of what was then conveyed to him has not been shown. Respondent testified that the lot in Seattle was worth about \$50, and it appears from the abstract included in the transcript that the Robinson deal was merely a contract of sale, with an equity of about \$150. The burden of respondent's argument is that the deceased, being the son of respondent and her confidential agent, had thus obtained an unfair advantage over her, and that the Le Grand transaction was a fraud upon her, and from this it is argued that all the subsequent transactions were tainted with fraud, and that all property thereafter acquired by the son was acquired and held by him in trust for his mother. This is merely mentioned in passing, and will be the subject of further discussion.

Returning to the story of the case, it appears that after this exchange was made (on February 16, 1916), the son continued to act for his mother in other exchanges through which she acquired a large amount of property; that at the same time he was making exchanges on his own behalf, some of which grew out of the property which he acquired in the Le Grand deal. These transactions were carried on until the death of the son on March 10, 1919. On March 21, 1918, respondent conveyed to deceased a piece of property designated as Long Bros. addition. She testified that this deed was made at the request of deceased solely for the purpose of enabling him to make an easy transfer, and with the understanding that he would deed to her the property procured in exchange therefor. Other testimony was given that it was in the nature of a settlement of a long-standing dispute which the son had with his mother as to their respective interests. However, the son taking this property and other property which he had acquired from the Le Grand exchanges, and an automobile which he owned in his own right, made various exchanges until he acquired in his own name all the property which was transferred to the vendors of the Columbia Colony property for their equity in the contract of purchase thereof. This contract, as has been said, was taken in the name of respondent; but that her son had some interest therein cannot be denied, and, in fact, this was ex-

pressly admitted by the mother on numerous occasions, both before and after his death, as well as when a witness upon the stand. Before this action was commenced she frequently stated that the Columbia Colony property, which was in her name, was owned by her son, but that she held the title for the purpose of securing payment of her promissory note. In this connection respondent testified as follows:

"Well, the only thing I ever did say was that if the property [at Reedley, the property in suit], was in my name, that I would take out what was coming to me for interest and principal and settle the boy's affair all up, and then I would divide the rest of the money between the two children. I thought the little boy, as it was his father's estate, that he was getting from me, that he ought to have his share as well as the little girl."

And again:

"Q. You stated you wanted to see the two children of your son get equal shares in his estate, did you not? A. Yes, sir. Q. And you recognized that he had an estate at that time? A. The estate—it was mine, but when he took this land over I told him if he never returned it that that would be all he would get of my estate, and I didn't intend to take any of it to myself; I intended to divide it equally, what was over after paying his debts, to divide it equally between the two children. Q. You didn't think or want to take any of this property as your own? A. Nothing only what he owed me."

And further:

"Q. Didn't care about any of it for yourself at all? A. No, sir; I had told him it should go to his children and nothing else, he should get no more from the estate."

In explanation of this testimony it should be added that the deceased had a son by a former marriage and a daughter by his second wife, who is the appellant in this case. After separation from his first wife the son was adopted outside of the family, and immediately after the death of deceased respondent made inquiries as to the right of that child to participate in the estate of her son, and when advised that by reason of the adoption he could not participate, she then, for the first time, asserted that the property here in suit was in fact her property, and insisted upon the right to sell it, take from the proceeds thereof the amount of her claim of \$1,250, and divide the remainder thereof equally between the two grandchildren. On numerous occasions before this suit was filed she admitted that her interest in the property was to the extent of her loan only, and that she desired the remainder to be equally divided between these grandchildren, and it appears from the entire record that this desire was the real cause of this litigation.

[1] From a full examination of the entire

record it appears that there is no evidence to support the finding that the deceased had no interest in the property; that there was any agreement between deceased and respondent that the equity in the Columbia Colony property should be the property of respondent alone, or that deceased did not put more than \$300 of his funds into the property thus taken in the name of his mother.

[2] As to the claim of fraud or breach of trust, which respondent asserts in her brief for the first time, it is sufficient to say that neither were pleaded nor proved. The claim is based upon the transactions which grew out of the exchange of the Le Grand property on February 16, 1916, full knowledge of which respondent testified she received within a month thereafter. If, therefore, fraud had been pleaded, it is reasonable to assume that the appellant would have interposed the plea of the statute of limitations. However, not having pleaded it, it is not open to consideration at this time.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 210
STEFANICH v. PAYNE, Presidential Agent.
(Civ. 3851; S. F. 10025.)

(District Court of Appeal, First District, Division 1, California. Sept. 14, 1921. Opinion of Supreme Court in Bank Denying Hearing Nov. 10, 1921.)

1. Railroads ⚡308—Violation of ordinance requiring flagman negligence.

Railroad was guilty of negligence where it violated a city ordinance requiring flagman at crossing, and burden was on it to explain absence of flagman at time of accident.

2. Railroads ⚡335(5) — Contributory negligence proximately causing injury bars recovery.

One injured at a railroad crossing cannot recover though the railroad was negligent, if his own contributory negligence was the proximate cause of the accident.

3. Railroads ⚡329—Auto truck driver, knowing danger, must use reasonable care.

An auto truck driver, knowing that cars are being shunted over a net of tracks crossing the street, is bound to use reasonable care in crossing, and is not absolved from such care by the railroad's negligence in not having its flagman in place, as required by ordinance, and in not giving the signals required by Civ. Code, § 486.

4. Railroads ⚡350(6)—Negligence in shunting cars question of fact.

Whether it was negligence to shunt cars over tracks at a crossing in a certain manner was a question of fact for the court, sitting as a jury, to determine.

5. Railroads — 350(13)—Negligence of truck driver held question of fact.

In action for damages to motor truck at street crossing, contributory negligence of the driver of truck *held* properly submitted to the trial court sitting as a jury.

On Hearing in the Supreme Court.

6. Appeal and error — 1011(1) — Finding of contributory negligence on conflicting evidence sustained.

Finding by trial court of contributory negligence as the proximate cause of a collision at a railroad crossing must be sustained on appeal, if there is substantial evidence to support it, even where there is also substantial evidence to contradict it.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Frank Stefanich against John Barton Payne, as Presidential Agent under Transportation Act 1920, § 206 (41 Stat. 456). Judgment for defendant and plaintiff appeals. Affirmed in District Court of Appeal and hearing denied in Supreme Court.

M. K. Harris and Harris & Hayhurst, all of Fresno, for appellant.

L. L. Cory, of Fresno, for respondent.

WASTE, P. J. This is an action for damages caused by a freight car of the defendant running into and damaging an auto truck belonging to the plaintiff. The case was tried by the court without a jury. It found that the accident was caused solely and alone by the contributory negligence and want of care of the driver of the truck; that he carelessly and negligently attempted to cross the tracks without looking or listening for approaching cars, which were in plain view, and that if he had looked he would and could have seen the approaching cars in ample time to have stopped the truck and prevented the accident. Judgment was entered in favor of the defendant, from which this appeal is taken.

The facts are not disputed. The accident happened at a point where some 16 main line and side tracks of the defendant railroad company cross Eldorado street in the city of Fresno. By ordinance of the city the railroad was required to keep a flagman at this crossing, but at the time of the accident the flagman was absent from his place of duty. In the evening of the 10th of May, 1919, a loaded auto truck belonging to the plaintiff was driven by one Jack Walton along Eldorado street, going east. He reached the railroad crossing, noticed the absence of the flagman, but drove slowly across several tracks, looking, as he testified, in all directions. When he had reached and was on or about the sixth track from the west, he saw some freight cars being shunted, or kicked, in a southerly direction along

several of the railroad tracks immediately in front of him. On seeing these cars he stopped his truck in order that they might pass. Five other cars had been shunted down the track upon which Walton stopped, by the locomotive, which was some 500 feet away from and to Walton's left. These cars moved slowly, at the rate of about three or four miles an hour, and bore down directly on the truck. Walton testified that he did not notice their approach until they were within about 40 feet of him, when his attention was called to them by a passer-by. When he saw the approaching cars Walton attempted to move his truck from off the track in front of them, but in his hurry and excitement he killed his engine, and, to save himself from injury, leaped from the truck, which was demolished by the collision.

There was no brakeman or other person upon the cars as they neared the place where Walton's truck stood. No bell was rung or whistle sounded to give warning of their approach. A switchman of the defendant had dropped off the train of cars which was being switched for the purpose of protecting the Eldorado street crossing. He saw Walton about 200 feet away, and signaled to him and called to him to stop. Walton stopped his auto truck in front of the approaching cars at a point where there was nothing to obstruct his view, and the moving cars were in plain sight. Walton himself said in a statement taken down immediately after the occurrence that if he had looked north along the railroad tracks he would have seen the cars coming, and the accident might have been avoided, but that he was watching the cars approaching in front and to his left, and for this reason he kept the truck going, as everything seemed clear ahead of him. At the trial he testified that he must have seen the cars on the track on which the automobile was standing; that the cars were undoubtedly there; and that he evidently saw them, but he did not know, until they were pointed out by the passer-by, that they were moving.

[1-3] Plaintiff lays great stress upon the fact that the flagman was not at his usual post at the time of the accident. The ordinance of the city required the defendant to keep a flagman at the crossing. None was there, and no explanation or reason was given by the defendant to account for his absence. The failure of the defendant to perform the duty imposed upon it by the ordinance was negligence of itself. But the fact that the usual precautions were omitted, and that the defendant was negligent, does not require a reversal of the judgment if the other circumstances indicate, as a matter of law, that from the most favorable view of the facts the trial court must have concluded that the negligence of the driver, Walton,

was the proximate cause of the injury. *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 620, 149 Pac. 175. Walton was familiar with the crossing. He knew the tracks were there, and that cars were being shunted over the network of tracks and across Eldorado street at that particular moment. He was therefore bound to use reasonable care, and was not absolved from such care by the negligence of the defendant in not having the flagman in his place at that moment. *Davis v. California Street Cable Co.*, 105 Cal. 131, 138, 38 Pac. 647.

The plaintiff places some reliance on the alleged violation by the defendant of section 486 of the Civil Code, which provides that the bell of a locomotive must be rung, or its whistle sounded (except in cities), at a distance of at least 80 rods from the place where the railroad crosses any street, and be kept ringing, or sounding, until the locomotive has crossed the same. But in such cases, as in the matter of the violation of the city ordinance, the situation is governed by the principles of law we have just stated.

[4] Whether it was negligence or not for the servants of the railroad company to shunt the cars over the various tracks at the crossing of Eldorado street in the manner in which they did was a question of fact for the court to determine, sitting as it did without a jury. *Dunne v. Hines*, 195 Pac. 276; *Carraher v. S. F. Bridge Co.*, 81 Cal. 98, 102, 22 Pac. 480. The attending circumstances in *Chung Sing v. Southern Pacific Co.*, 59 Cal. Dec. 439, render the holding in that case on that point inapplicable here.

[5] The question of contributory negligence of the driver, Walton, was properly submitted to the trial court. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513. With all the facts and circumstances before it, and with the nearby scene of the accident placed clearly in its view, it has determined that Walton was guilty of contributory negligence which proximately caused the accident. The case is not one in which that conclusion may be rejected by the appellate court.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [6] In the statement in the opinion of the District Court of Appeal that "the fact that the usual precautions were omitted, and that the defendant was negligent, does not require a reversal of the judgment if the other circumstances indicate, as a matter of law, that from the most favorable view of the facts the trial court must have concluded that the negligence of the

driver, Walton, was the proximate cause of the injury," the phrase "as a matter of law" should have been omitted. It implies that a finding of contributory negligence must be sustained on appeal unless the facts proven establish such negligence beyond controversy and "as a matter of law." The true rule is that such finding must be sustained if there is substantial evidence to support it, and that is so, even where there is also substantial evidence to contradict it; a mere conflict of evidence not being sufficient on appeal to overthrow a finding of the court. This appears from other passages in the opinion, and the insertion of the above-quoted phrase at that place was doubtless an inadvertence.

The petition for a rehearing in this court is denied.

All concur.

54 Cal. App. 295

HALLENSLEBEN v. HEINE PIANO CO. (Civ. 3877.)

(District Court of Appeal, First District, Division 1, California. Sept. 23, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Novation ⇨4—Deposit of checks for balance due contractor for delivery when defects were remedied held not a "novation."

Where defendant, by agreement with a contractor, deposited checks for an amount due him with a third party for delivery to the contractor, when certain alleged defects in the work were remedied and the contractor regarded the deposit of the checks as the method adopted by defendant for discharging its obligation, and agreed to remedy the defects merely for the purpose of securing payment, there was no novation under Civ. Code, §§ 1530, 1531, as there was neither a substitution of a new obligation nor a waiver of the original obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

2. Contracts ⇨295(1)—Where checks were to be delivered to contractor when defects were remedied, substantial compliance was sufficient.

Where by agreement with a contractor defendant deposited checks for the amount due the contractor with a third person, to be delivered when certain defects were remedied, a substantial compliance with the conditions upon which the checks were to be delivered was sufficient.

3. Accord and satisfaction ⇨1—Deposit of checks for delivery to contractor when defects remedied not an "accord and satisfaction."

Where by agreement with a contractor defendant deposited checks with a third person, to be delivered to the contractor when certain defects in the work were remedied, and the checks were for the amount claimed by the contractor, and were subsequently re-

turned to defendant by the depository, there was no accord and satisfaction under Civ. Code, § 1521, defining accord, and section 1523, defining satisfaction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accord and Satisfaction.]

Appeal from Superior Court, City and County of San Francisco; W. M. Finch, Judge.

Action by Hermann Hallensleben against the Heine Piano Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Werner V. Olschewski, of San Francisco, for appellant.

G. R. Perkins, of San Francisco, for respondent.

RICHARDS, J. This is an appeal by the defendant from a money judgment in favor of the plaintiff. The parties had entered into a written contract by which the plaintiff undertook to perform certain work in connection with the installation of the elevators in a building being erected by the defendant. The plaintiff, as he claimed, completed the work and had received certain payments thereon, leaving a balance due of \$385.77. There were also due him two small items of \$7 and \$4.50 for extra work. The defendant refused to pay these sums until the plaintiff had remedied certain claimed defects in the work, but on condition that he do so offered to deposit with a third party certified checks for the several amounts claimed by the plaintiff, to be turned over to him upon such compliance. The plaintiff agreed to the course suggested. Thereupon the defendant wrote and delivered to the Pacific Elevator & Equipment Company the following letter:

"April 22, 1920.

"Gentlemen: We inclose you herewith three checks for the sum of \$397.27, payable to Herman Hallensleben. Will you please upon the following conditions being performed deliver said checks to Herman Hallensleben and require him to sign a receipt which is also inclosed herewith:

"Conditions.

"[Here follow seven specifications of defects claimed to exist in plaintiff's work.]

"(8) Upon said work being properly done and done in a good workmanlike manner, and upon said work being done to the satisfaction of Shea & Lofquist, architects for said building, and upon the same being pronounced as properly done by the Pacific Elevator & Equipment Company. * * *

"If Mr. Hallensleben does not perform the conditions herein set forth you are to return the hereinbefore mentioned checks to the Heine Piano Company without delay."

Thereafter the plaintiff, having, as he claimed, complied with the conditions of this

letter, demanded of the Pacific Elevator & Equipment Company that it deliver said checks to him; but the additional work not being entirely satisfactory to the persons named under condition numbered 8 of said writing, the said company refused such demand, and returned the certified checks to the defendant.

Upon the trial the court found that the plaintiff had, with one trifling exception, fulfilled the so-called conditions to the letter, and rendered its judgment in plaintiff's favor for the aggregate amount of said certified checks, less the sum of \$10, which latter sum it found to be the reasonable cost of bringing the work to the desired state of perfection.

[1] In support of its appeal the defendant contends first that the letter of April 22, 1920, written by it to the Pacific Elevator & Equipment Company, to the terms of which the plaintiff had orally agreed, constitutes a novation of the original contract between the parties, and that it was error on the part of the trial court to found its judgment upon the original contract, if in fact it did so.

With this contention we are not able to agree. Novation is the substitution of a new obligation for an existing one; and such substitution must be with intent to extinguish the old obligation. Civ. Code, §§ 1530, 1531; Young v. Benton, 21 Cal. App. 382, 131 Pac. 1051; 29 Cyc. 1130. The evidence in this case contains nothing to show that the plaintiff ever agreed to waive the defendant's original obligation to him. Indeed, it is quite plain that he regarded the deposit by the defendant with the Pacific Elevator & Equipment Company of the three certified checks as the method adopted by it for the discharge of that obligation; and it is also plain from the evidence that the plaintiff's oral agreement to remedy the defects in his work claimed by the defendant to exist was simply for the purpose of securing payment of the amount claimed by him to be due under his original contract.

We think also there was no substitution of a new obligation for an existing one. The defendant's obligation under the original agreement was to pay to the plaintiff \$397.27 upon the completion of the work specified in its contract, including the trifling amount of extra work, and this is precisely what it purported to do by its written instructions to its depository. Nor was the plaintiff's obligation changed, since the so-called conditions referred merely to matters which the defendant itself claimed were defects in the performance of the written contract between the parties. The essentials of a novation are entirely lacking in the present transaction.

[2] It is also contended by the appellant in the same connection that the evidence shows that the plaintiff did not comply with the conditions of the letter of April 22, 1920, so as to entitle him to be paid the amount of

the certified checks. The court, as we have seen, found a substantial compliance, which finding is abundantly supported by the evidence. A substantial compliance was sufficient. *Connell v. Higgins*, 170 Cal. 556, 150 Pac. 769; *Rischard v. Miller*, 182 Cal. 351, 188 Pac. 50; *Collins v. Ramish*, 182 Cal. 360, 188 Pac. 550.

The appellant's next contention that, having deposited the certified checks, it had done all that it was required to do, and hence that it was not a proper party defendant, depends upon the establishment of the appellant's first proposition, which having fallen, this must fall with it.

[3] Finally the appellant urges that the letter of April, 1920, written by it to the Pacific Elevator & Equipment Company outlining the conditions under which the certified checks were to be delivered to the plaintiff, and the plaintiff's verbal acquiescence in those conditions, constituted an accord and satisfaction.

We think this contention even wider of the mark than that of novation.

"An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled." Civ. Code, § 1521.

And satisfaction is the acceptance by the creditor of the consideration specified in the accord. Civ. Code, § 1523. Here there was no agreement by the plaintiff to accept anything different or less than the amount claimed to be due to him; and the element of satisfaction is entirely lacking, since the certified checks were not turned over to the plaintiff, but were returned by the deposi- tary to the defendant.

We find no merit in the appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 423

In re JONES. (Cr. 840.)

(District Court of Appeal, Second District, Division I, California. Oct. 3, 1921.)

1. Habeas corpus ☞ 85(2)—Evidence held insufficient to show conspiracy to have prisoner brought illegally from Mexico to United States.

In habeas corpus proceeding pending extradition of petitioner following his arrest for felony committed in other state, after deportation from Mexico, in which petitioner claimed that he had not been found within the state in view of illegal deportation, evidence that United States officials presented proof to Mexican officials that person living in Mexico had been convicted of a felony in the United States and was a fugitive from justice at the time of his

entry into Mexico, without requesting Mexican officials to illegally deport such person, held insufficient to justify a finding that United States officials conspired with Mexican officials to have such person illegally brought from Mexico to the United States.

2. Extradition ☞ 28½—Prisoner arrested immediately after illegal deportation from Mexico not "found within this state" within statutes and federal Constitution.

If person convicted of felony in another state who had escaped and was living in Mexico was brought into California pursuant to an unlawful conspiracy between United States officials and Mexican officials to have him brought into the United States without compliance with Mexican law relating to deportation, and was arrested immediately after being placed across boundary, he was not "found within this state," within the statutes and the federal Constitution relating to extradition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Within the State.]

3. Extradition ☞ 28½—Prisoner arrested immediately after being placed across Mexican boundary "found within this state," regardless of irregularities of foreign officials in deportation.

Person convicted of felony in other state arrested in this state immediately after being placed across Mexican boundary line by Mexican officials with authority to deport him, after having escaped into Mexico, was "found within this state" within provisions of the statute and the federal Constitution relating to extradition, regardless of irregularities committed by Mexican officials in deporting him, in the absence of conspiracy between United States officials and Mexican officials to have him illegally brought into United States from Mexico.

4. Evidence ☞ 81—Mexican authority assumed to have had authority to deport fugitive from justice.

In habeas corpus proceeding pending extradition in which petitioner claimed to have been illegally deported from Mexico, into which he had escaped after conviction of a felony in the United States, within three years prior to deportation, it will be assumed, in the absence of evidence as to the law of Mexico, that the Mexican authorities had authority to deport him, in view of Immigration Law (U. S. Comp. St. § 4242 et seq.).

Application for writ of habeas corpus by Xenophon Jones against the Sheriff of San Diego County. Writ discharged, and petitioner remanded to custody.

Dana R. Weller, of Los Angeles, and Sample & Harden, of San Diego, for petitioner.

Lawler & Degnan, of Los Angeles, for respondent.

JAMES, J. Petitioner herein is held in custody as a fugitive from justice. Upon the demand of the Governor of the State of Oklahoma, the Governor of California has is-

(201 P.)

sued his warrant of rendition and the state officer of Oklahoma is ready to execute the process. There is no dispute as to the preliminary facts involved, nor any question as to the regularity in form and substance of the warrant issued by the Governor of California, except that it is insisted that petitioner was not, at the time of the issuance of said warrant, within the state of California, and that his presence herein was fraudulently and forcibly obtained without his consent. Petitioner was convicted of the crime of manslaughter in the state of Oklahoma and, without satisfying the judgment rendered upon his conviction, fled from that state and went to Tia Juana, in the republic of Mexico. He continued to reside at the place mentioned until officers of the Mexican government arrested him and forcibly placed him across the line and to a place within the state of California. An officer of the immigration department and another (Gershon) attached to the Department of Justice of the United States then took charge of petitioner, kept him under arrest, and he shortly was received into the custody of respondent here. It appears that one of the military officers in command and on duty at the international line informed Gershon that he had been called upon by the Mexican immigration officials to assist in the deportation of petitioner, and that he had ordered the arrest of petitioner and would deport him the same evening from Mexicali. The Mexican immigration office at Tia Juana, several days in advance of the day when petitioner was placed across the international boundary line, advised the witness Hanna, who was the United States immigration official to whom we have referred, that petitioner was to be deported from Mexico. Petitioner was in fact placed under arrest by Mexican soldiers, and taken with his automobile to a point some miles outside the town of Mexicali. The two United States officials mentioned, by agreement, were waiting across the line and petitioner was delivered by the Mexican soldiers over a bridge and upon United States territory. There was no interval of freedom allowed him from custody, for he was immediately taken under arrest to a nearby California town and placed in jail. He protested both to the Mexican soldiers against being transported from the country and to the American officials against being subjected to arrest by them. The evidence further showed that some time prior to the deportation of petitioner from Mexico an officer from the state of Oklahoma had exhibited to Gershon, the department of justice agent, a warrant and proof of the fact that Jones had been convicted of manslaughter in Oklahoma and was wanted there as a fugitive from justice. Gershon had exhibited this documentary evidence to Mexican officials at Tia Juana. There was no evidence that any request was

made by Gershon or the Oklahoma officer that the Mexican officials should deport petitioner or illegally or in any wise cause him to be placed across the boundary line so that he might be subjected to arrest in the United States.

[1, 2] Petitioner's contention is that there was an unlawful conspiracy entered into between the officers of the separate governments with the purpose of causing him to be kidnapped and illegally brought within the United States. Under such a state of facts, he insists that he could not be deemed to have been "found within this state," as that term is used both in the federal Constitution and the statute of California. Assuming that the facts sufficiently show the case contended for, we would readily agree with the conclusion drawn. However, we think that the evidence does not justify a finding of an unlawful conspiracy formed and executed with the purpose of bringing petitioner within the limits of the United States. So far as appears, the federal officers went no further than to present to Mexican officials proof of the fact that at the time of petitioner's entry into Mexico he was a fugitive from justice, having been convicted of a felony. The evidence fell short of showing in the least particular or degree any importunities or solicitations on the part of the American officials to induce the Mexican authorities to commit any improper act in the case of this petitioner.

[3] Passing for a moment the question argued as to the authority of the Mexican officials to deport petitioner, we are quite clear that, assuming that such authority existed, the moment petitioner reached American soil he became subject to the extradition law as a fugitive from justice, and as having been "found" within the state of California. It is earnestly contended that the officials of Mexico acted without authority in ejecting petitioner from their territory.

[4] As the law of Mexico governing such matters was not produced or shown in evidence, petitioner relies upon the presumption that that law will be deemed to be the same as that of the United States. He contends that there is no authority under that law to deport a person except upon due warrant issued and hearing had. He admitted that under the law of this country convicts may be excluded and also deported within three years from date of their entry into the country. Immigration Law, Fed. Stat. Ann. (2d Ed.) vol. 3, p. 637; U. S. Comp. St. § 4242 et seq. We must assume then that ample authority existed, for the cause shown, to support an order that petitioner be deported from Mexico. For ought that appears, an order and warrant in due form may have been made authorizing the action taken, notwithstanding that petitioner says that none was exhibited to him. He further testified

that he was allowed no hearing, and that may be conceded to be the fact, for want of any contradicting evidence. The matters of which he complains, as to the course of conduct on the part of Mexican officials, amount to irregularities in the administration of the law of Mexico and the question as to whether the acts of the Mexican officials, in placing the person of petitioner outside the confines of their country, were sanctioned by that law, we think must be considered as immaterial here. Instances are not wanting, and a number are cited in text-books on extradition, where, outside of treaty obligations and in the absence of them, foreign governments have acceded to a simple request made upon them to deliver up or return to the requesting government persons charged with heinous crimes committed within the jurisdiction of the last-mentioned governments. The proposition is fully established by the authorities that in such cases, and assuming that the acts of the surrendering governments were irregular under their own law and procedure, the person surrendered could not question the regularity of such acts in the courts of the country having jurisdiction of the crime committed and to which such person may have been returned. This rule has been extended far enough to cover cases where citizens of the United States have by artifice caused a person who has fled from our jurisdiction to cross the line and come within reach of state process. The law so established is in emphasis of the doctrine that there is given to no fugitive from justice the right to claim an asylum in a foreign country. In the case of *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, this law is given full exposition, and we here cite, as pertinent to the questions just discussed, the further decisions: *Ex parte Brown* (D. C.) 28 Fed. 653; *Ex parte Wilson*, 63 Tex. Cr. R. 281, 140 S. W. 98, 36 L. R. A. (N. S.) 243.

As already stated, had it appeared that the agent representing the state of Oklahoma had gone into Mexican territory, seized the petitioner, and brought him into the state of California, we would then conclude that a warrant of rendition issued by the Governor of this state would be inoperative, because the condition of the law that such warrant may be issued only where a fugitive is "found" within the state would not be satisfied. We have already determined that the evidence did not establish such a state of facts. The power under which petitioner was removed from Mexican territory was that of Mexican officials claiming to act under the right of the immigration laws of that country. Whether they did in fact act regularly under such laws remains to be questioned only by that government. When petitioner was delivered upon California soil he

was then subject to arrest as a fugitive from justice, and a warrant of rendition issued by the Governor of California became operative and effective for the purpose of authorizing the Oklahoma officer to remove him from the state.

The writ is discharged, and petitioner remanded to the custody in which he was at the time of the return made herein.

I concur: CONREY, P. J.

I concur in the judgment: SHAW, J.

54 Cal. App. 379

EPHRAIM et ux. v. OAKLAND TITLE INS. & GUARANTY CO. (Civ. 3806.)

(District Court of Appeal, First District, Division 1, California. Sept 27, 1921. Hearing Denied by Supreme Court Nov. 25, 1921.)

1. Escrows ⇐10—When depositary recorded deeds and sent purchaser's check to vendor, transaction could not be reopened because of doubt as to title.

Where a grantor deposited a deed with a title insurance company for delivery to the grantee on payment of the price and the grantee deposited a check to be paid to the grantor when the company could guarantee the title, and the company recorded the deeds and sent the check to the grantor, there was a delivery of the deed, and the transaction was closed, and it was too late to reopen it by stopping payment on the check because of a doubt as to the grantor's title or because a third person subsequently commenced suit to quiet her title.

2. Escrows ⇐10—Proof of recording held sufficient proof of delivery to sustain verdict.

Proof that a title insurance company, with which a deed and check for the purchase price had been deposited, placed the deed of record as agent for the purchaser, established the delivery of the deed so as to support a verdict for the grantor in a suit to recover the price after payment on the check had been stopped in view of Code Civ. Proc. § 2061, subd. 2, providing that the jury need not decide in conformity with the declarations of any number of witnesses as against a presumption, there being a presumption of delivery when the deed is executed, acknowledged, and recorded.

3. Appeal and error ⇐1066—Instruction as to execution of deed saying nothing of delivery harmless where there was no issue as to delivery.

In a grantor's suit to compel payment of the price by defendant with which it had been left by the grantee, an instruction that, if the deed to the grantor from a third person was duly signed or acknowledged, it vested title when thereafter recorded, though ignoring the necessity of a delivery, was not misleading, and did not affect defendants' substantial rights where the only issue was as to execution, and not concerning delivery.

4. Deeds 194(2)—Possession by grantee sufficient to establish delivery in absence of contradictory evidence.

The possession of a deed by the grantee is some evidence of its delivery, and sufficient in the absence of any contradictory evidence to establish it.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by W. K. Ephraim and wife against The Oakland Title Insurance & Guaranty Company and another. From a judgment for plaintiffs, the defendant named appeals. Affirmed.

Wilson & Wilson, R. Porter Ashe, and Arnold C. Lackenbach, all of San Francisco, for appellants.

Keyes & Erskine, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of plaintiffs for the sum of \$1,800.

In the latter part of May, 1919, the plaintiff, Mrs. A. F. Ephraim, authorized one S. M. Sample to sell the parcel of land described in the complaint for the sum of \$1,800, Sample's compensation to be 5 per cent. of said amount. Said agent sold said land to Lionel Wachs at the price thus fixed, who directed that the title thereto be placed in the name of Milton Mazor. Accordingly Mrs. Ephraim executed a deed to Mazor, and on May 26, 1919, she and the purchaser visited the office of the defendant, Oakland Title Insurance & Guaranty Company, and gave instructions as to the completion of the transaction, which took the common form of the deposit of the deed in escrow to be delivered to the grantee upon payment of the purchase price. At this time Mrs. Ephraim produced an unrecorded deed to the property to herself from Marie Uhl, dated November 22, 1918. Apparently the plaintiff made a satisfactory explanation to the secretary and manager of the title company, Ira Abraham, as to why her deed had not been recorded. In any event she deposited the two deeds with the defendant, receiving from it a receipt which provided that the deed from Mrs. Ephraim to Mazor was to be delivered to Mazor upon payment of \$1,800, less \$95, the commission payable to the agent. On the following day Wachs notified Sample that he had decided to take the title in his own name, instead of in the name of his friend Mazor. Accordingly a deed conveying the property to Wachs was executed by Mazor. On May 28th this deed was sent by Wachs to the title company, together with a check for \$1,800, with instructions to pay the amount thereof to the plaintiff, A. F. Ephraim, when the title company could issue its policy showing

record title to the lot in himself. On the afternoon of the same day the title company filed for record all three deeds, and handed Mrs. Ephraim a check for \$1,705, and to Sample a check for \$95.

Shortly thereafter Mrs. Ephraim telephoned to the defendant's secretary requesting him to return to her when recorded, and to no one else, the deed from Marie Uhl to herself. He replied that the transaction was closed, that she had no interest in the deed nor in anything except the money, check for which had been given to her. This communication aroused the suspicion of Mr. Abraham, and he requested Mrs. Ephraim not to cash the check, but to call at the office of the title company the following morning. He stopped payment of both checks and directed the county recorder not to let the deeds out of his possession. The next morning, at a meeting in the office of the title company which was attended by Marie Uhl, the plaintiff's purported grantor, she declared that she had not conveyed the property to Mrs. Ephraim, and about a week later commenced an action against Mrs. Ephraim and others to quiet title to the lot, and to have her alleged deed declared void. A lis pendens was immediately recorded. Thereupon the plaintiffs commenced this action against the title company, and Marie Uhl, alleging in their complaint, in part, the facts above narrated as to the deposit in escrow of the deeds, the receipt by the title company of the purchase price of the property for her use and benefit, and its refusal to pay over said money. The defendants filed separate answers, in both of which it is alleged that the plaintiff, intending to cheat and defraud Milton Mazor, falsely and fraudulently represented that she was the owner of the lot of land described in the pleadings, whereas said lot was the property of Marie Uhl, who had not executed any conveyance thereof to the plaintiff, A. F. Ephraim, and consequently said plaintiff was not entitled to receive the money lodged with the title company by the purchaser of said lot.

[1] Under the issues thus framed the principal question before the trial court was whether or not Marie Uhl had in fact executed this deed to the plaintiff, A. F. Ephraim. The jury found affirmatively upon this question, and we are of the opinion that the evidence abundantly supports the verdict of the jury. Indeed, the sufficiency of the evidence upon this point is not attacked, the only serious contention made upon this appeal being that there is no evidence of a delivery of the plaintiff's deed to her grantee, or his successor—the actual purchaser, Wachs. The instructions of Mrs. Ephraim, the grantor, were that her deed should be delivered upon receipt from the purchaser of \$1,800.

The instructions to the title company given by the purchaser were that the \$1,800 should be paid over to Mrs. Ephraim when that company could issue its policy of title insurance guaranteeing title to stand in Wachs. When the depository recorded the deeds and sent its check for the purchase price of the lot to the grantor, the transaction was concluded, and similarly, when it was in receipt of the purchase money, and placed the deeds upon the record, there was in effect a delivery of the plaintiff's deed to her grantee, and the title company was in a position to insure the record title as being in Wachs. It was then too late, upon the suspicion of the secretary of the company being aroused as to the genuineness of the title in Mrs. Ephraim, to prevent the consummation of the transaction, for, as stated by that gentleman, it was already closed. Nor does it appear that Wachs desired to rescind the purchase; and the title company, acting for Wachs, refused upon demand to return to Mrs. Ephraim the deeds or to pay her the purchase price. It is true, as claimed by the defendants, that the action commenced by Marie Uhl cast a cloud upon the title to the lot, but this was after the delivery of the deed to Wachs and after the plaintiff was entitled to receive the purchase money, and hence too late to be available to the title company as a defense to this action if, as was determined by the jury, the deed from Uhl to Ephraim was valid.

[2] Proof that the title company, as the agent of the purchaser, placed the deeds of record, sufficiently established the delivery of the plaintiff's deed to Wachs or his nominee. A presumption of delivery arises where a deed is shown to have been executed, acknowledged, and recorded. In 8 R. C. L. § 66, p. 1004, speaking of the effect of a recording of a deed, it is said:

"Likewise, the fact that a deed is on record is *prima facie* evidence of delivery, or, as otherwise stated, warrants a presumption of delivery and acceptance, so that whoever makes assertion to the contrary has the burden of proving it. Moreover, since recording takes the place of the solemn ceremonies accompanying delivery of seisin at common law, it has been called evidence of delivery of the most cogent character, requiring the countervailing proof to be clear and persuasive."

And in section 67 of the same work, at page 1006, the author says:

"Delivery of the deed by the grantor, with the grantee's consent, to the proper officer, with the intention that thereby it shall pass the title, constitutes an effective delivery, the officer being deemed in such case the grantee's agent, as where a corrected deed was delivered to the register for record by the grantor to whom the original deed had been returned by the grantee for correction, the officer's possession after recording being regarded as that of the grantee."

While there was other evidence tending to show a delivery of the deed, this presumption alone was sufficient to sustain the verdict of the jury. Code Civ. Proc. § 2061, subd. 2; *Moore v. Gould*, 151 Cal. 723, 91 Pac. 616; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677.

[3, 4] Defendant company complains of one of the instructions to the jury, which was to the effect that, if the deed to the plaintiff was duly signed or duly acknowledged by Marie Uhl, when it was thereafter recorded it vested title to the property in the plaintiff, A. F. Ephraim, pointing out that this instruction completely ignores the necessity of a delivery of the deed. This instruction, it must be admitted, would have been highly prejudicial to the defendant if there had been any question before the jury as to such delivery. In fact, there was not, the issue, so far as the evidence is concerned, being confined to the due execution of that instrument. The possession of the deed by the plaintiff was some evidence of its delivery, and was sufficient in the absence of any contradictory evidence to establish it. The instruction complained of, therefore, while erroneous in form, did not mislead the jury or affect the substantial rights of the defendants.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

54 Cal. App. 326

**NAPA UNION HIGH SCHOOL DIST. OF
NAPA COUNTY v. BOARD OF SUPER-
VISORS et al. (Civ. 2353.)**

(District Court of Appeal, Third District, California. Sept. 24, 1921.)

1. Mandamus ☞7—Not writ of right, but of discretion.

The writ of mandamus is not a writ of right granted as of course, but is allowed only in the sound discretion of the court, not to be exercised unless some just or useful purpose is subserved.

2. Mandamus ☞3(9), 172—Equitable action to prevent sale of school bonds, and not defense to mandamus to compel issuance, held proper remedy to raise all issues affecting validity of bonds.

Since it is the duty of the board of supervisors of a high school district to issue bonds on a regular return on an election therefor, the scope of inquiry on mandamus to compel the issuance of the bonds by the board is limited to the regularity of the returns; hence parties seeking to question the validity of the election for reasons not appearing from the record should proceed by an equitable action to prevent sale of the bonds, wherein all issues that may affect the integrity of the declared result may be tried.

(201 P.)

3. Schools and school districts ☞97(4)—High school board must issue bonds if election returns are regular on their face.

Under Pol. Code, § 1746, it is the duty of the Board of Supervisors of a high school district to issue bonds therefor if the returns of the election for that purpose, as certified to them, are regular on their face.

4. Schools and school districts ☞97(4)—Notice of election on bond issue need not state time of payment of interest.

The statutes relative to elections for issuance of bonds of high school districts do not require that the proposition as printed on the ballots should show the times for payment of interest, whether annual or semiannual, though such fact should appear in the notices of election to be posted and published.

5. Schools and school districts ☞97(4)—High school board properly required officers in election on bond issue to complete returns.

The action of the high school board in requiring the officers of election on the question of issuance of bonds to complete their returns *held* proper, this being authorized by Pol. Code, § 1281a, applicable to high school elections.

Application by the Napa Union High School District of Napa County for mandamus against the Board of Supervisors and others. Writ granted.

Clarence N. Riggins, of Napa, for petitioners.

Henry C. Gesford, of Napa, for respondents.

BURNETT, J. An application was made in the first instance to this court for a writ of mandate to require respondents to issue the bonds of said high school district in the sum of \$300,000, "for the purpose of purchasing a suitable high school lot, building thereon a new high school building, supplying said high school building with furniture and necessary apparatus, and improving the high school grounds." In response to the alternative writ respondents have filed herein a demurrer to the petition, and an answer in which is challenged on various grounds the legality of the bond election, and in further justification of their course in declining to issue said bonds respondents allege that they were advised by the district attorney of said county to sustain the objection to any action on their part made by certain taxpayers who appeared before them, and "to proceed no further in the matter of said high school bonds at that time." In support of this last allegation, they attach a transcript of the notes taken by the official reporter, from which we quote the suggestion of the district attorney to the supervisors as follows:

"We have no desire to issue bonds that are illegal, or which were not legally voted upon.

We believe the election was legal, and, in order to get quick determination, I have a plan to suggest. We want the case decided, and if it is perfectly agreeable to you now to indicate how the board of trustees of the Napa school district and myself feel about this proposition, I will say that it will be perfectly agreeable to us if the board of supervisors will sustain Judge Gesford's objection, and refuse to pass or issue the bonds. We are not consenting now that the election was held in an illegal manner, but just simply suggesting this as a simple way of expediting matters. Then I will mandamus the board, and the District Court of Appeal or the Supreme Court will compel the issuance of these bonds and will pass upon the validity of these proceedings. By that method I can get the matter quickly disposed of."

This was agreed to, and by consent the board of supervisors sustained the objection and declined to proceed further. By reason of this agreement we might be justified in refusing the writ, as the courts will not ordinarily hear a party when he asks to have undone an act which he advised to be done. We are satisfied, however that the parties acted in good faith with a laudable desire to have the validity of the bond election determined as speedily and economically as possible, and we are not disposed to dismiss them without considering other points made in the briefs.

[1] It is conceded that the writ of mandamus is not a writ of right, granted as of course, but is allowed only in the sound discretion of the court. This discretion will never be exercised in favor of a party unless some just or useful purpose will be answered thereby, and it must not only serve some just and useful purpose, but it must be necessary to secure the ends of justice. Many decisions in support of the foregoing propositions are cited by respondents, but the question is hardly open to dispute.

[2, 3] With this general statement of the rule, indeed, the authorities are practically unanimous, but it is sometimes difficult to determine the scope of the proper inquiry as to the regularity of the proceedings which are sought to be reviewed in the application for the writ. However, in a case like this, the duty of the supervisors being purely ministerial, if the returns of the high school board are regular and no vital infirmity appears upon the face of the proceedings, the bonds must be issued, and the party who desires to question the validity of the election for reasons which do not appear from the record must seek his remedy in an equitable action to prevent the sale of the bonds, wherein all issues that may affect the integrity of the declared result may be tried and determined. *Gibson v. Board of Supervisors*, 80 Cal. 359, 22 Pac. 225. If the inquiry of the board of supervisors can ex-

tend no farther than we have indicated, and it thereby appears to be their duty to issue the bonds, it necessarily follows that the court's inquiry upon an application for a writ to compel them to proceed must be confined to the same limits; that is, to an inspection of the record. Otherwise, the court might determine that it is not the duty of the board to do what the law plainly requires of them. Necessarily the board exercises some discretion, and their judgment is called into play in the determination of whether the prior proceedings have been regular, but, properly speaking, that does not involve a judicial function. The particular record upon which the action of the supervisors is based is the certificate of the high school board, and when that is presented to them in proper form, "thereupon said board of supervisors shall be and it is hereby authorized and directed to issue the bonds of such high school district." Section 1746, Pol. Code. The duty of the supervisors is similar to that of a canvassing board, and it is well settled that the latter is bound by the returns. 15 Cyc. 379, 381, 384, 386, 387; 9 R. C. L. 1110-1113; 20 C. J. 200. It is sufficient to quote from the first of these as follows:

"County canvassers have the quasi judicial power to determine whether the papers transmitted to them are genuine election returns, signed by the duly appointed officers in the various precincts; but beyond this their duties are purely ministerial, involving simply the labor of counting the votes returned to them and determining the number of votes received by each candidate or proposition. They are governed by the returns made by the inspectors of the several precincts as to the number of votes cast and for whom cast, and if these returns be in due form they have not the power to go behind them and ascertain the qualification of voters or otherwise to inquire into the regularity of the election. They must simply add together the votes of the several precincts cast for each candidate as the same are shown in the certified returns and declare the result. * * * And if they attempt to travel beyond the limit of their ministerial duties, and enter upon a judicial investigation of the regularity of the election, they may be compelled by mandamus to canvass the returns as they have them before them."

It is further stated by these authorities that, if the canvassers neglect or refuse to canvass the returns sent to them, mandamus will lie to compel them to do so, but that upon an application for a writ of mandate the court is not authorized to go beyond the returns and consider questions touching the legality of the election. A multitude of cases could be cited to the same effect, but we refer only to *Leary v. Jones*, 51 Colo. 185, 116 Pac. 130, and *Pacheco v. Beck*, 52 Cal. 3. In the former the subject received careful consideration by the Supreme Court

of Colorado. Therein pertinent comment is made as to *State ex rel. v. Stevens*, 23 Kan. 456, 33 Am. Rep. 175, upon which respondents relied. In the *Kansas Case*, indeed, the invalidity of the election appeared upon the face of the returns, since it was a matter of common knowledge that "a monstrous fraud had been perpetrated" in the return of a total vote of 2,947, when there were only about 800 legal voters in the county.

In the *Pacheco Case*, supra, the writ was directed to the secretary of state to compel him to estimate the votes given for members of Congress, as shown in the records of the counties transmitted to him by the clerks, and to issue a certificate to the person having the highest number of votes. Therein it was said:

"The law does not vest him with authority to inquire whether the board of supervisors correctly canvassed the returns from the several precincts, or whether the record correctly states the result of the canvass, as made or declared, or whether the record was properly made up; nor to investigate any question relating to the proceedings which were had prior to the making of the certified abstract. That document, being in the form prescribed by law, is the only one upon which he is required or authorized to act in his official capacity in estimating the vote of the district."

We conclude that in this proceeding the questions of fraud and illegal voting that are presented by the answer of respondents cannot be considered, and that our attention must be limited to those matters that appear upon the face of the returns.

[4] It is claimed that, within this limitation, we should hold that the election was invalid, for the reason "that the proposition as printed on the ballot does not show that the interest was to be paid semiannually." The argument is that thereby the voter may have been misled into thinking that the interest was not to be paid until the maturity of the bonds, and hence would be more inclined to vote for them. We do not attach such importance to this circumstance. It is only a summary of the provisions, as is customary, that was printed on the ballot, and the voters are presumed to have understood the practice in that respect. The law does not require the time for the payment of the interest to be printed upon the ballot, but it does provide that it shall appear in the notices of the election to be posted and published. The law was observed in giving such notices, and we must assume that the voters were apprised of their contents. It appears, also, that this detail appeared in the resolution calling the election. The case of *Hollywood Union High School District v. Keyes*, 12 Cal. App. 172, 107 Pac. 129, is not in point, as therein the time of payment was not stated in the notice, as is required by section 1745 of the Political Code.

This objection, as suggested by petitioner, should not prevail unless unavoidable, for the reason that it would invalidate millions of dollars worth of bonds that have been sold in the various counties of the state. However, we do not consider the objection as serious, although, manifestly, it would be the better practice to publish on the ballot the time of payment of the interest.

[5] Likewise, we see no particular merit in the objection to the action of the high school board in requiring the election offices to complete their returns. This was authorized by section 1281a of the Political Code, which is applicable to high school elections. *Bernardo v. Rue*, 26 Cal. App. 108, 146 Pac. 79. Respondents are apparently in error in the statement that—

"The tally list and poll list of every precinct in the high school district was changed, corrected and reauthenticated."

The petition shows:

"Said election officers thereupon made and signed amended certificates to the poll lists and amended certificates to the tally list of the returns of said election in their respective precincts already filed by them with the board, thereby correcting and completing their returns and the authentication thereof so as to truly show the votes that were cast in their respective precincts at such election for and against each proposition voted upon thereat."

We think, also, that the record shows a sufficient compliance by the high school board with the law requiring them to cause an entry in their minutes of the fact that two-thirds of the votes were cast in favor of the bonds and to certify to the board of supervisors "all the proceedings had in the premises." Section 1746, Pol. Code.

Indeed, without further specification we may state that by an inspection of the record we discover nothing to justify the supervisors in declining to issue the bonds.

We may add that it seems to us that none of the special defenses set up in the answer possesses substantial merit except the allegations of fraud and illegal voting contained in the seventh, eighth, and ninth counts. In other words, the other objections do not appear material. Still, we do not desire to foreclose inquiry as to any of them in a proper proceeding.

As far as any delay is concerned in the final determination of the merits of the controversy, it would probably be as great if the issues were tried in this proceeding as in the usual and regular course. As we view the matter, it would be of no advantage for Mr. Graves, a taxpayer, to intervene herein. He will have an opportunity to be heard if a proper suit is brought to test the validity of the election.

We think the demurrer to the petition should be overruled, the demurrer to the answer sustained, and a peremptory writ issue requiring the supervisors to issue said bonds. It is so ordered.

We concur: FINCH, P. J.; HART, J.

54 Cal. App. 29

CADY v. SANFORD. (Civ. 3670.)

(District Court of Appeal, Second District, Division 2, California. Aug. 16, 1921.)

Appeal and error $\Leftrightarrow$ 622—**Transcript is not overdue before notice of denial of new trial.**

Under Code Civ. Proc. § 650, allowing 10 days after notice of denial of new trial to settle exceptions taken at the trial, and rule 2 of the Rules of the Supreme and District Courts of Appeal, providing that the time for filing a transcript shall not begin to run until the bill of exceptions has been filed or the time has expired for such proceeding, an appeal cannot be dismissed for failure to file the transcript, where the record shows that the only bill of exceptions filed was that relating to proceedings on a motion to vacate judgment, and that no notice of the denial of new trial was in the clerk's office.

Appeal from Superior Court, Los Angeles County.

Action by William H. Cady against G. A. Sanford. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal. Motion denied.

Henry T. Gage and Ingall W. Bull, both of Los Angeles, for appellant.

E. E. Kirk, of Los Angeles, for respondent.

WORKS, J. This is a motion to dismiss an appeal on the ground that no printed transcript of the record, nor any transcript prepared under the provisions of section 953a, Code of Civil Procedure, was filed within the time required by law. Our records show that no printed transcript of the record has ever been filed. A certificate of the clerk of the trial court shows, among other things, that a notice of appeal from the judgment was filed in time, the form or contents of the notice, however, not being disclosed; that a bill of exceptions was settled and filed, that a motion for a new trial was denied on April 7, 1921, and that no steps have been taken to procure a transcript under section 953a, Code of Civil Procedure. A supplemental certificate of the clerk, procured to be filed by appellant, shows that the bill of exceptions mentioned in the earlier certificate was not a bill of the exceptions taken during the trial of the cause, but a bill of exceptions on an order denying a motion to vacate judgment. The supplemental certificate also

shows that there is on file in the office of the clerk of the trial court no notice of the ruling denying the motion for a new trial.

Section 650, Code of Civil Procedure, provides that a party may have settled, within 10 days after notice of decision denying his motion for a new trial, exceptions taken at a trial. Rule 2 of the Rules of the Supreme Court (176 Pac. vii) and of the District Courts of Appeal provides that if a proceeding for the settlement of a bill of exceptions which may be used in support of an appeal is pending, or may still be instituted, the time for filing a transcript shall not begin to run until the bill has been filed, or the time in which a proceeding for a bill may be instituted has expired, or such proceeding, if instituted, has been dismissed by the trial court. The supplemental certificate of the clerk of the trial court brings the present case directly within these provisions of section 650 and of rule 2. The time within which a proceeding for a bill of exceptions may be instituted has not yet expired, nor, perforce, has the time for the filing of the transcript.

Motion to dismiss appeal denied.

We concur: FINLAYSON, P. J.;
CRAIG, J.

54 Cal. App. 102

BOARD OF TRUSTEES OF LELAND STANFORD, JR., UNIVERSITY v. MILLER et al. (Civ. 2308.)

(District Court of Appeal, Third District, California, Aug. 26, 1921. Hearing Denied by Supreme Court, Oct. 24, 1921.)

1. Boundaries ☞37(5)—Evidence held sufficient to sustain finding of establishment by mutual agreement.

In action to quiet title to land, where defendants claimed to a fence 660 feet west of the true boundary, which fence had been acquiesced in as the boundary for 40 years, evidence held to sustain a finding that the boundary claimed by defendant was established by mutual agreement.

2. Boundaries ☞46(1)—Doctrine of agreed boundary held not to mean that inference of agreement as to boundary from acquiescence does not support added inference that it was based on questioned boundary.

The doctrine of an agreed boundary line and its valid effect on coterminous owners rests on the fact that there is believed by the parties to be an uncertainty as to the location of the true line, but this does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary.

3. Boundaries ☞46(3)—Agreed boundary inures to benefit of subsequent owners.

An agreed boundary line inured to the benefit of subsequent owners, regardless of

whether or not they purchased with the understanding that the fence on such line marked the true boundary.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Board of Trustees of the Leland Stanford, Jr., University against W. H. Miller and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wilson & Wilson, of San Francisco, and McCoy & Gans, of Red Bluff, for appellant.

Guy R. Kennedy, of Chico, and George F. Jones, of Oroville, for respondents.

FINCH, P. J. The defendants were given judgment quieting their title to 39.85 acres of land in Butte county, and the plaintiff appeals.

[1] The plaintiff holds the record title to the southeast quarter of section 23, and the defendants have the record title to 150 acres of land in the southwest quarter of section 24 in the same township, including all of the west half thereof. The land in dispute is approximately the east half of the east half of said southeast quarter. The trial court found in favor of the defendants on the issues of adverse possession and agreed boundary. Since the defendants have paid taxes in accordance with their record title only, it is conceded that the finding in favor of adverse possession cannot stand unless that of an agreed boundary is upheld. The question, therefore, is whether there is evidence to support the finding that the predecessors in title of the parties established such boundary line by mutual agreement. There is no direct evidence of such an agreement, and the question must, therefore, be determined from the conduct of the respective owners of the lands, viewed in the light of the surrounding circumstances.

It appears that the plaintiff's lands, as well as those of the defendants, originally were a part of the Bosquejo rancho. When this rancho was subdivided does not appear. As early as 1876 Wm. Howard and P. B. Fox had acquired the south half of section 24, and in the year 1881 Leland Stanford acquired some 4000 acres of the rancho, including the southeast quarter of section 23; that quarter being in the extreme southerly end of the tract.

The court found that about the year 1878 the predecessors in interest of the parties, being uncertain as to the boundary line between their respective lands, mutually agreed upon the location thereof, constructed a substantial fence upon such agreed line, and that the respective owners of said parcels of land have ever since jointly maintained and repaired such fence, and recognized it as marking the true boundary line between their lands. The evidence shows without

conflict that the fence stood in its present location as early as 1886, and that it then had the appearance of being 10 or 12 years old; that as far back as any witness knew the plaintiff and its predecessors have occupied the lands to the west of the fence, and the defendants and their grantors those to the east; that many years ago the latter cleared the lands on the east side up to the fence, and have thereafter cultivated the same, at one time having about half of the disputed strip in alfalfa; and that they have never been disturbed in their possession and use of such lands, nor have their rights thereto been questioned prior to the commencement of this action. At all times the respective parcels of land have been assessed, and the owners thereof have paid taxes thereon according to their record titles. In the year 1904 the plaintiff made a written lease to Geo. W. and Chas. Dicus, grantors of defendants, of the southeast quarter of section 23, and therein recited that the lands leased contained 100 acres, more or less. This lease was renewed from year to year up to 1913. The actual area west of the line claimed by the defendants is about 112 acres. A growth of timber covers the lands to the west of the fence, and such lands have at all times been used for pasture. By actual survey it was ascertained that the fence is 10 chains west of the section line as established by the original survey of the rancho.

Is acquiescence for 40 years, under the circumstances stated, sufficient evidence to sustain the finding of the court? The evidence is not so conclusive in its nature as to compel the trial court to find in favor of an agreed boundary. The fact that the line alleged to have been established by agreement is 660 feet west of the surveyed section line is a strong circumstance against the defendants' claim. In the absence of that circumstance the evidence would seem to be conclusive in favor of the defendants. Whether that circumstance is sufficient to overcome the justifiable inference from long acquiescence under other circumstances shown involves the weighing of conflicting evidence, a function exclusively of the trial court, and is not a question of law within the province of the court of appeal.

"An agreement fixing a boundary line need not be shown by direct evidence, but may be inferred from conduct, and especially from long acquiescence." 9 C. J. 232; 5 Cyc. 933.

The "agreement must be express or implied from the acts of the parties and acquiesced

in for the period fixed by the statute of limitations." *Wheatley v. San Pedro, etc., R. R. Co.*, 169 Cal. 514, 147 Pac. 138.

"A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both of the adjoining owners have definitely defined such line by erecting a fence or other monument on it, and that both have treated the same as fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location." 4 R. C. L. 129.

[2] Appellant urges that there is no proof that there ever was any uncertainty as to the location of the true boundary line. There is no direct evidence to that effect, but, as stated, the facts found to exist justify the inference that the adjoining owners had agreed upon the location of the boundary. This inference is of a valid agreement, and necessarily implies that there was an uncertainty as to the true line. "The doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. * * * This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line." *Clapp v. Churchill*, 164 Cal. 745, 130 Pac. 1062.

It is contended that the court erred in the admission in evidence of the lease referred to. While not entitled to great weight the recital of the lease as to the acreage embraced within the southeast quarter of section 23 is inconsistent with appellant's present claim of title, and the instrument was admissible as a declaration against interest.

[3] It is argued that there is no evidence to support the finding that the defendants purchased with the understanding that the fence marked the true boundary. The finding, however, is not necessary to the conclusion reached. The defendants acquired title in the year 1914. If the boundary line was established by agreement as found by the court, that agreement inured to the benefit of the defendants. *Young v. Blakeman*, 153 Cal. 477, 95 Pac. 888.

The judgment appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

54 Cal. App. 304

JENSEN et al. v. FISH et al. (Civ. 3964.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1921.)

1. Appeal and error ⇨1002—General verdict for injury on highway sustained by evidence and special verdicts.

In action for personal injury caused by defendants' bus forcing plaintiffs' Ford off the highway, a general verdict for plaintiff will not be disturbed where the evidence was conflicting, and the general verdict is supported by special verdicts.

2. Trial ⇨359(1)—General verdict sustained by some of the answers to special issues upheld.

A general verdict sustained by answers to two special issues must stand, though answer to another special issue is not sustained by evidence.

3. Highways ⇨176—Mistake in judgment in emergency not contributory negligence.

In an action for injury caused by defendants' bus forcing plaintiffs' car off the highway, plaintiff cannot be charged with contributory negligence in that his action at the time of the collision was such that a careful calculation afterward would show that he could have avoided the collision.

4. Highways ⇨184(4) — Instructions as to probative elements of negligence pleaded in general terms are not erroneous.

In action for injury, the complaint charging that defendants so negligently drove their bus that it forced plaintiffs' car off the highway, instructions regarding the duty of the driver of a vehicle to give suitable signals when about to pass another and regarding the legal rate of speed at the time and place of the accident were not error, since they concerned the probative elements of the negligence charged.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Alma A. Jensen and another against Fred W. Fish and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Dunn, White & Aiken, of Oakland, for appellants.

T. J. Ledwich and Peter J. Crosby, both of Oakland, for respondents.

STURTEVANT, J. The plaintiffs, as husband and wife, brought an action against the defendants to recover damages for personal injuries sustained by the plaintiff wife in an automobile accident. The plaintiffs recovered a judgment, and the defendants have appealed under the new method.

In the charging part of their complaint, the plaintiffs aver that at the time of the accident they were traveling in a Ford sedan in the public road leading from San Jose to

Oakland; that the defendants were operating a certain automobile bus; that at the time of the accident the defendants so carelessly, negligently, and unskillfully drove, operated, and ran said automobile bus that said bus collided with and struck the Ford sedan, and forced, crowded, and knocked it and the occupants thereof off the road. In support of their pleading evidence was introduced by the plaintiffs to the effect that the defendants' bus approached from the rear at a speed estimated by different witnesses at from 30 to 37 miles an hour; that the driver gave no signal of warning; that on meeting up with the Ford sedan the driver of the bus turned to the left, and, when immediately ahead of the Ford sedan, swerved the bus to the right at an angle estimated at from 60 to 70 degrees, and that the Ford sedan, although at that time traveling with its left wheels on the roadbed proper and its right wheels on the right-hand shoulder, swerved still more to the right and later turned over in a ditch on the right-hand side.

[1, 2] The jury returned a general verdict and certain special verdicts. The general verdict was in favor of the plaintiffs, and the special verdicts were as follows: (1) The defendants' stage did not actually strike and knock plaintiffs' automobile from the highway; (2) it did strike or come in contact with the plaintiffs' car; (3) it did force plaintiffs' automobile off the highway; and (4) it did crowd plaintiffs' automobile off the highway. In their first point the appellants strenuously insist that the automobile bus did not touch the Ford sedan. However, there was evidence both ways, and the jury, in its special verdict No. 2, found against the defendants on that issue. There was such a reasonable conflict in the testimony that we are not at all inclined to take the view that this case, in this respect, does not fall within the rule so often repeated that appellate courts have no right to disturb the verdict of the jury when the evidence is conflicting. Furthermore, if we should hold that the second special verdict is not sustained by the evidence, nevertheless the judgment must stand, for it is supported by the general verdict, and special verdicts 3 and 4.

[3] The appellants contend that the driver of plaintiffs' automobile was guilty of contributory negligence. This contention rests on the argument that the driver of the Ford sedan did not use the very best of judgment at the time he saw the automobile bus attempting to cross in front of him. The Supreme Court said, in *Karr v. Parks*, 40 Cal. 188, 193:

"* * * It would be absurd to hold that even an adult person, in time of imminent danger, is negligent, unless he takes every precaution that a careful calculation afterward will show he might have taken."

That case was recently cited with approval in *Shupe v. Rodolph* (Sup.) 197 Pac. 57. Moreover, looking at the record at this time, many months after the accident, we are unable to see that the driver of the Ford sedan did anything he should not have done, or omitted to do anything he should have done.

[4] The trial court gave an instruction to the jury regarding the duty of the driver of the vehicle to give a suitable and audible signal when he is about to pass another vehicle on the public highway. It also gave an instruction regarding the rate of speed which was legal at the time and place of the accident. It is conceded that both instructions were, in the abstract, correct statements of law; however, it is contended that the subject of each of the instructions was not involved in the issues made by the pleadings. In passing it may be said that much evidence was introduced at the time of the trial on both subjects by both parties, without any objection. The record does not show whether the instructions in question were tendered by the plaintiff or by the defendant, or were given by the court of its own motion. The appellants claim that the complaint, which we quoted above, charges specific negligence, and that it does not charge excessive speed or failure to give a signal. This contention may be conceded, and yet the contention does not lead to the conclusion which the appellants contend for. Whatever else may be charged in the complaint, it is patent that the complaint charges that the defendants so negligently drove their bus that it forced the Ford sedan off the highway. The probative elements of that negligent act are, among other things, the size, the speed, the want of signal, and the close proximity in which the bus attempted to pass at an angle of 60 or 70 degrees across the path of the Ford sedan. Instructions on each and every one of these probative elements were pertinent to the rights and liabilities of the litigants. There was no error in giving either of the instructions.

We find no error whatsoever in the record. The judgment is affirmed.

We concur: LANDGON, P. J.; NOURSE, J.

54 Cal. App. 372

PEOPLE v. ZARATE. (Cr. 791.)

(District Court of Appeal, Second District, Division 2, California. Sept. 26, 1921.)

1. Criminal law §1130(5)—Points held insufficiently presented for consideration.

Points that "court erred in overruling defendant's objection," followed by a reference to the transcript without argument or citation in support of the points, and that the

court erred in the refusal to give instructions, followed by reference to the transcript for the text of the requested instructions, with citation of cases, but without statement as to what principle or rule the cases enunciate, will not be considered.

2. Criminal law §1130(5)—Points not supported by argument not considered.

Points, though fully stated, will not be considered, where not supported by the slightest argument.

3. Criminal law §1172(2)—Instruction, giving insufficient definition of a confession, held harmless in view of the evidence.

Instruction, giving incomplete definition of what constitutes a confession, held harmless in view of defendant's plain and direct statement in written confession that he committed the crime.

4. Criminal law §822(4)—Instruction as to confession of defendant held not misleading.

In prosecution for forgery, instruction as to defendant's confession held not to lead jurors to think that the court had passed upon the question of the free and voluntary character of the confession, in view of instructions as a whole.

5. Criminal law §736(2)—Court required to pass on voluntary character of confession in first instance to determine whether it is admissible.

It is the duty of the trial court to determine in the first instance whether a confession was free and voluntarily made as a basis for a determination of the question of its admissibility in evidence.

6. Forgery §42—Evidence that person who had name similar to that forged was not a resident of particular town held admissible.

In prosecution for forgery, testimony of residents of small town, of which person whose name defendant was alleged to have forged was represented to be a resident, as to whether there was such person in such town, held admissible to show fictitious character of name alleged to have been forged.

7. Criminal law §1186(4)—Judgment not reversed for technical error.

Under Const. art. 6, § 4½, judgment will not be reversed for an error which has not resulted in a miscarriage of justice.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

P. S. Zarate was convicted of forgery, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

WORKS, J. This is an appeal from a judgment of conviction of the crime of forgery. Joseph L. Thing and Charles E. Thing

conducted a mercantile business under the name of Thing Bros., in the little town of Tecate, part of which place is in San Diego county and part in the republic of Mexico. On account of the lack of banking facilities in the village, it was the custom of Thing Bros. to issue their checks on a San Diego bank to the people of the place in exchange for cash, the paper then being used in the transaction of business with the outside world. The checks were always drawn by the brothers themselves, one being accustomed to write them by hand, while the other used a typewriter for the purpose. The typewritten paper was drawn from a red and a black ribbon, each of the colors being used, invariably, on a certain and definite portion of each check. Appellant procured one of these typewritten checks in the sum of \$5, through a third person, paying that amount for it. Next, through a conductor on the railroad running from Tecate to San Diego, he procured both a black and a red typewriter ribbon from the latter place, and also a pad of blank checks upon the bank on which Thing Bros. were accustomed to draw their paper. Appellant then wrote a letter, purporting to be signed by one E. E. Snyder, to another bank in San Diego, inclosing two checks and asking the bank to make collection of them. The checks were, respectively, for the sums of \$1,010 and \$992, were drawn on the bank with which Thing Bros. did business, were payable to E. E. Snyder, were signed "Thing Bros., by J. L. Thing," and were typewritten in two colors, in exact accord with the custom followed by Joseph L. Thing, the brother whose practice it was to draw the typewritten paper issued by the firm. The bank was instructed, after collecting the proceeds of the checks, to send \$1,700 in currency to the alleged Snyder at Tecate by the railway conductor above mentioned. It was stated in the letter that the money was to be used for the purpose of paying Snyder's men. The remaining \$302 was directed to be deposited in the bank to which the letter was addressed, in the name of Snyder. The currency was sent to Tecate, not by the conductor, however, but by registered mail, and was delivered to appellant, who receipted for it in Snyder's name, by himself as agent. The balance of the proceeds of the two checks, \$302, was placed on deposit in the bank as directed, and \$300 of it was later withdrawn on a check bearing the signature of the alleged Snyder, but the money was, as before, delivered to appellant as Snyder's agent. It was shown at the trial that neither of the two checks sent to the San Diego bank was signed by either of the brothers Thing, and appellant made written confession that the signature was appended to each of them by him. No such person as E. E. Snyder appeared at the trial, and several witnesses from Tecate testified that

they knew of no such person. Some days after procuring the original check for \$5 from Thing Bros., which paper the prosecution, of course, claims appellant used as an exemplar, he endeavored to sell it to one Blanco for \$4, but Blanco did not buy it. This check must have been finally destroyed, as it was never presented for payment. The charge against appellant was for forging the check for \$1,010.

[1] Appellant makes at least eight points upon rulings during the trial, each of them stated in this manner, "The court erred in overruling defendant's objection," followed by a reference to the transcript. Not only, in each instance, does counsel fail to state the question to which objection is made, or the objection itself, but none of the points is argued and no authority is cited in support of any of them. Such a casual presentation of points, if followed up, would impose upon us a labor which is within the peculiar province of counsel, and which does not come within the range of our duty. We are not called upon to consider points so presented. *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278.

In more than a half dozen instances appellant charges error in the refusal of the trial court to give instructions, contenting himself with a reference to the transcript for the text of the requested instructions, and citing cases in each place without giving us any information as to what principle or rule the cases enunciate. Points so presented will not be considered. In a case in which counsel referred to instructions in a similar manner and cited sections of the Code by number in support of his claim that they should have been given, the Supreme Court said:

"If counsel will not take the time to point out the particular instruction or instructions upon which he predicates error, and the law which he invokes, we will not do so." *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340.

[2] There are other questions which are stated in appellant's brief by mere reference to the transcript, without attempt to acquaint us with their nature by anything whatever shown upon the face of the brief; and there are still others which, even though they are more fully stated, are not supported by the slightest argument. Under the authorities already cited, we are bound to consider none of these.

[3] It is contended that the trial court erred in instructing the jury that a "confession, in criminal law, is a voluntary declaration made by a person who has committed a crime, to another one." This definition is, indeed, fragmentary and incomplete, but it does not appear to us that its presentation to the jury could have prejudiced appellant. In his written confession, after acknowledging the authorship of the letter to the San

Diego bank with which the two checks were inclosed, appellant says:

"I also forged the signature of Thing Brothers, by J. L. Thing, to the two checks mentioned in said letter, aggregating 2002."

With this plain and direct statement before the jury, it made little difference whether any instruction was given upon the meaning of the word "confession." It must have been obvious to them, without definition from the court, that a positive confession of the commission of the crime, not to be misunderstood by an intelligent mind, was before them. Appellant could have suffered no substantial injury from the instruction given.

[4] The next claim made by appellant is that the trial court erred in stating to the jury that the court had passed upon the question of the free and voluntary character of the confession of appellant. In order that this point may be intelligently considered, it is necessary to set forth the entire instruction to the jury concerning the confession, as it is in that instruction that the alleged erroneous statement occurs. The instruction follows:

"You are further instructed that part of the evidence relied upon in this case by the prosecution is what is termed a confession, or what is claimed by the prosecution to be a confession by the defendant, and a confession, in criminal law, is a voluntary declaration made by a person who has committed a crime, to another one, and the law of this state requires that before the confession may be admitted in evidence and considered by you that it be a free and voluntary confession; that is, that it be not induced by either a promise of reward or by a threat, or by any duress. It must be, in other words, what is stated, a free and voluntary statement on his part, before that confession is admitted in evidence in this case and brought to your attention and permitted to examine it. The court has passed upon that question, and has ruled that the confession is evidence by reason of the fact that it was free and voluntarily made, and that it is legally admissible and legally and properly to be considered by you. Therefore, if you after having heard the evidence in the case and believe that there is a conflict of evidence as to whether or not that confession was freely and voluntarily made, you have the right and privilege of passing upon that question of fact yourselves, as to whether or not it was freely and voluntarily made, and to reject the confession from your consideration if you believe that it was not freely or voluntarily made; or, perhaps stating it more correctly, unless you do believe beyond a reasonable doubt that it was freely and voluntarily made."

It is to be observed that in the course of the instruction the court remarked that—

"The court has passed upon that question, and has ruled that the confession is evidence by reason of the fact that it was free [sic]

and voluntarily made, and that it is legally admissible and legally and properly to be considered by you."

It is this statement that appellant assails as objectionable. While it were better that the condemned matter had not been included in the instruction, it does not appear to us that its use operated to the prejudice of appellant, considering it in connection with what followed it. The statement itself, while it did contain the assertion that the court had passed upon the question, was softened by the expressions to the effect that the court "has ruled that the confession is evidence," "that it is legally admissible," and that it is "legally and properly to be considered" by the jury. Following these statements, immediately, the jury was told:

"Therefore, if * * * you believe that there is a conflict of evidence as to whether or not that confession was freely and voluntarily made, you have the right and privilege of passing on that question of fact yourselves, as to whether or not it was freely and voluntarily made, and to reject the confession from your consideration * * * unless you * * * believe beyond a reasonable doubt that it was freely and voluntarily made."

[5] In the last analysis, and considering the entire instruction together, it appears to us that it amounts to nothing more than a statement that the court had passed upon the question only for the purpose of determining whether the confession was admissible in evidence, that it had been admitted, and that the members of the jury, as judges of the facts, were finally to pass upon the question whether it was freely and voluntarily made. Thus understood, the instruction was proper, for it is the duty of a trial court to consider, in the first instance, whether a confession was freely and voluntarily made, as a basis for a determination of the question of its admissibility in evidence. *People v. Jim Ti*, 32 Cal. 60; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772.

[6] Several of the witnesses at the trial were asked by the prosecution whether they knew such a person as E. E. Snyder, and in each instance the question was met by an objection, which was overruled. It is contended that these rulings were erroneous. While a forger, naturally, might employ the name of a known person in the commission of the crime of which he is guilty, in the manner in which Snyder's name was used here, there is, perhaps, a greater likelihood that he will employ a fictitious name. At any rate, the fact that one charged with the crime has used a fictitious name in his work would be a circumstance to be considered, in connection with others, in determining his guilt or innocence. The question whether Snyder was known as an actual person was addressed to three residents of Tecate, which the evidence shows was a very small place.

Under these circumstances the question was entirely proper.

[7] On account of the great number of errors claimed by appellant to have been committed by the trial court, principally, however, in the very general manner upon which we have passed comment, we have made examination of the entire cause, including the evidence. Const. art. 6, § 4½. From such examination we are abundantly satisfied that if any error was committed by the trial court, which we are far from deciding, such error has not resulted in a miscarriage of justice.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 315

ROBERTS v. SOUTHERN PAC. CO. et al.
(Civ. 3926.)

(District Court of Appeal, First District, Division 1, California. Sept. 24, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Appeal and error 977(3)—Order granting new trial reversed only where discretion abused.

Only when the discretion of the trial court has been abused will the appellate court reverse an order granting a new trial.

2. Appeal and error 854(6)—Order granting new trial, general in its terms, affirmed if properly granted on any of grounds assigned.

Where the motion for new trial was based on all the statutory grounds, and the order granting the new trial was made before the amendment of 1919 (St. 1919, p. 141) to section 657 of Code Civ. Proc., and was general in its terms, it must be affirmed if it could properly have been granted on any of the grounds assigned.

3. New trial 65—If the court was not satisfied with the verdict, its duty was to grant motion for new trial.

If the trial court was not satisfied with the verdict, it was its duty to grant the motion for a new trial.

4. Negligence 136(26)—Contributory negligence for jury.

Question of contributory negligence is one of fact for the jury, except in those cases in which, judged in light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform, and in these cases failure to reach that standard is contributory negligence as a matter of law.

5. Appeal and error 1015(2)—On conflicting evidence or when the question of probative force of the evidence arises, grant of new trial is not reviewable.

Where there is appreciable conflict in the evidence or where the question as to probative

force or evidentiary value of the testimony arises, the action of the trial court in granting a new trial is not reviewable on appeal.

6. Appeal and error 933(1)—Presumption is in favor of correctness of an order granting a new trial.

In considering the question of the correctness of an order granting a new trial, the presumption on appeal is in favor of the order.

7. Appeal and error 933(4)—Presumed that new trial was granted because verdict was against the weight of the evidence.

In an action for causing the death of a brakeman, an experienced railroad man, who placed himself between two cars while they were in motion, in view of conduct of deceased, on an appeal from an order granting a new trial, it will be assumed that the trial court was satisfied that the verdict was contrary to the weight of the evidence.

8. Appeal and error 977(3)—Grant of new trial not set aside where case shows a reasonable or debatable justification for it.

Where the case shows a reasonable, or even a fairly debatable justification, for the action taken, an order of the trial court granting a motion for a new trial will not be set aside on appeal.

9. Railroads 262—Not liable for injury by defective car under control of connecting road.

A railway company delivering a defective freight car to a connecting carrier, which accepts it with knowledge of the defect, is not liable to employees of the connecting carrier for injuries caused by the defect.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Geno P. Roberts against the Southern Pacific Company and another. From an order granting a motion for new trial, plaintiff appeals. Affirmed.

Theodore A. Bell, of San Francisco (C. A. Linn, of Napa, of counsel), for appellant.

Ford & Johnson, of San Francisco, for respondents.

WASTE, P. J. The plaintiff brought this action to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. He now appeals from the order granting the defendant a new trial, after verdict and judgment in his favor.

Plaintiff's decedent, his son, William Reilly Roberts, was a switchman in the employ of the California State Belt Railway, which is operated along the San Francisco water front, receiving freight cars from various transportation companies for delivery to the piers and docks. It is connected with the tracks of the respondent at a point known as the King street transfer. On the evening of October 9, 1914, two cars were placed on the transfer track by employees

of the respondent. One of these cars was in bad order. The drawhead and everything pertaining to the coupling was missing. This car was fastened to another by means of a chain wound around its axle, and connected with the drawhead of the other car with from 2½ to 3 feet of slack between the two cars. Later in the day these cars were taken off the transfer track by the belt line railway, with full knowledge of their defective condition, to be delivered at pier 32. On the afternoon of the next day the two cars, still chained together, were placed at the end of a train, to be redelivered by the belt line to the respondent. While being thus transported, the car with the defective coupler was derailed, but after running off the track for about 250 feet, it re-railed itself. Roberts, the deceased, who was then acting as a switchman on the belt line, gave the engineer a signal to stop the train while he went to investigate the trouble, and to remove an amount of debris which had collected on the axle of the car while running derailed. When the train stopped the absence of the coupling permitted the two end cars to come together. Roberts then gave the engineer a signal to back the train in order to separate the cars and enable him to look underneath them and discover the cause of the accident. As the train backed and the cars separated, he leaned forward and placed his head between the two cars. With the backing of the train, the rear car, which was the one with the defective coupler, continued to back until it took up the slack in the chain, when it suddenly rebounded, the two cars coming together, crushing Roberts' skull and causing his death. The absence of the coupling was a defect which was readily noticeable. It was known to the employees of the belt line, and its foreman told Roberts two cars were in bad order. Roberts, himself, was an experienced railroad man.

On these facts the case went to the jury, which rendered a verdict in favor of plaintiff in the sum of \$5,000. Defendants moved for a new trial, which was granted. From the order granting the motion for a new trial, this appeal is prosecuted.

The appellant takes the position that the order granting the motion for a new trial must be reversed upon two grounds. His first contention is that the evidence so conclusively establishes that the plaintiff's intestate was not guilty of any contributory negligence, as to preclude the court from setting aside the verdict upon the ground of the insufficiency of the evidence to support its finding to that effect. He next contends that the respondent was guilty of negligence, as a matter of law, in delivering the cars with the defective coupling to the belt line railway, and that that negligence proximately caused the death of Roberts, and was not excused by the act of the belt line company

in accepting the cars with notice of their faulty condition.

[1, 2] The rule is well settled by a long line of decisions in this state that the granting or refusing of a new trial is a matter largely within the discretion of the trial court, and it is only when this discretion has been abused that the appellate court will reverse the order. *Merralls v. Southern Pacific Co.*, 182 Cal. 19, 22, 186 Pac. 778. In the instant case the motion was based on all the statutory grounds, and the order granting the new trial, made before the amendment of 1919 (St. 1919, p. 141) to section 657 of the Code of Civil Procedure, is general in its terms. It must therefore be affirmed if it could properly have been granted on any of the grounds assigned. *Gordon v. Roberts*, 162 Cal. 506, 508, 123 Pac. 288.

[3-8] Disposing of appellant's first contention, we think we may safely assume that the question of the insufficiency of the evidence to support the finding of the jury that the decedent, Roberts, was free from contributory negligence, had much to do with the trial court's action in granting the motion for a new trial. No motion for a nonsuit was made, and the question of the contributory negligence of the decedent was submitted to the jury. But if the trial court was not satisfied with the verdict, it was its duty to grant the motion for a new trial. *Marr v. Whistler*, 193 Pac. 519; *Condee v. Gyger*, 126 Cal. 546, 547, 59 Pac. 26. True it is that the question of contributory negligence is one of fact for the jury, under proper instructions, and not one of law, save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. In such cases failure to reach that standard is contributory negligence as a matter of law. *Williams v. Pacific Electric Co.*, 177 Cal. 235, 238, 170 Pac. 423. If there be any appreciable conflict in the evidence, the action of the trial court in granting a new trial is not open to review. Even in those cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to one or the other of the parties litigant, the question as to the probative force, or evidentiary value of the testimony, is one the determination of which is with the trial court in a proceeding on a motion for a new trial, where, as here, one of the grounds is the insufficiency of the evidence to justify the verdict. *Otten v. Spreckles*, 24 Cal. App. 251, 257, 141 Pac. 224. In considering the question of the correctness of an order granting a new trial, the presumption on appeal is in favor of the order and against the verdict. *Marr v. Whistler*, *supra*. In the light of the wide discretion permitted to the trial court in such matters, and in view of the conduct of the decedent, an experienced railroad man,

in placing himself between the two cars as he did, we must assume that the trial court was satisfied that the verdict of the jury rendered in favor of the plaintiff was contrary to the weight of the evidence. *Shilling v. Dodge*, 22 Cal. App. 517, 518, 135 Pac. 299. Where the court, in the exercise of its wide discretion, has granted a new trial, and the case shows a reasonable, or even a fairly debatable justification under the law, for the action taken, the order will not be set aside on appeal. *Preluzsky v. Rittigstein*, 196 Pac. 917.

[9] For another reason the order granting a new trial in this case must be affirmed. On of the defenses sought to be established by the respondent was that it had given notice to the belt line railway that the car was in a defective condition, and that the respondent proposed to repair it before delivery, but that with knowledge of these facts the belt line, desiring haste in the matter so that the ship for which the contents of the car were destined might be loaded without delay, directed and accepted the delivery of the car in its known defective condition. The trial court would not permit the introduction of any evidence in support of this defense. It also refused to give an instruction requested by the respondent in keeping with its proposed separate defense, but did instruct the jury to the effect that the respondent was guilty of negligence in delivering the defective car to the belt line railway, and that such negligence could not be justified or excused by showing that the connecting line was equally or more careless in the premises. This action of the trial court was error.

The appellant seeks to recover in this action upon the theory that the injury and death of Roberts was the natural and probable consequence of the delivery by the respondent of the defective car to the belt line and such a consequence as should have been foreseen in the light of the attendant circumstances; and, further, that the delivery of such defective car was the primary and proximate cause of Roberts' death. The trial court accepted this view, and confined the issues strictly within the lines of appellant's contention, as indicated by the rulings just referred to. There are cases holding, as contended by the appellant, that where there is an arrangement between the connecting roads for the interchange of cars, it is the duty of each, on transferring the car to the other, to see that it is in a safe and suitable condition for the use for which it is intended, which duty extends not only to the receiving company as such, but to its employees who are to handle the car, and such employees may recover from the company delivering the car for injuries due to its defective condition, notwithstanding the company employing them was also negligent in regard to inspecting and receiving the car.

An examination of these decisions, however, discloses that some of them were directly overruled by the same court in later decisions, and others may be distinguished to the extent that they have little or no application here. They are in conflict with the weight of authority.

What seems to be the generally accepted doctrine—contrary to that contended for by the appellant—is well established by a number of leading cases. *Lellis v. Michigan Central Railway*, 124 Mich. 37, 82 N. W. 828, 70 L. R. A. 598; *Glynn v. Central Ry. Co.*, 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507. The Supreme Court of Missouri had occasion to consider the precise question we have now before us, both before and after the rendition of the two decisions last cited. In its first opinion in the case it held exactly as appellant would have us hold. See *Missouri, K. & T. Ry. Co. v. Merrill*, 61 Kan. 671, 675, 60 Pac. 819, which is one of the decisions given as authority by the author of the work relied on by this appellant. But upon rehearing (65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287) the court said:

"We are now fully convinced that the doctrine announced in our former decision on the subject in hand runs counter to an unbroken current of authorities, and fails to stand the test of reason."

It then proceeded to make a critical examination of the cases cited by it in its former opinion to sustain the view then taken by it, and showed that they were to be distinguished from the case at its bar. Some of the cases there reviewed and distinguished are relied upon by the appellant here. After such full and comprehensive study of the question, the court reached and laid down the rule that a railway company which delivers a defective freight car to a connecting line is not liable in damages to an employee of the latter, who is injured after the car has been inspected by the company receiving it. The loss of control over the car, and over the servants having it in charge, relieves the furnishing company from responsibility to the employees of the receiving company. *Missouri, K. & T. Ry. Co. v. Merrill*, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287. The basis of the decision seems so sound, and the reasoning so clear, that we think it useless to attempt to go over the same ground here, but refer to it as a complete answer to appellant's contention. It, and the others cases cited above, have been followed or quoted approvingly in *McCallion v. Missouri Pacific Ry.*, 74 Kan. 785, 88 Pac. 50; *Schneider v. Little Co.*, 184 Mich. 315, 151 N. W. 587, 589; *Luck Const. Co. v. Chicago & A. Ry. Co.*, 200 Mo. App. 450, 452, 207 S. W. 840, 841; *McNamara v. Boston & M. R. R. Co.*, 202 Mass. 491, 500, 89 N. E. 131, 135; *Continental Fruit Express v. Leas*, 50 Tex. Civ. App. 584, 110 S. W. 129, 132; *West Jersey & S. R. Co. v. Cochran*

(C. C. A.) 266 Fed. 609, 611. Under the rule laid down in these cases, it seems clear that the plaintiff would have no cause of action against the respondent railway company under the facts attempted to be shown by it in its separate defense, which was ruled out by the trial court. The defective condition of the car was neither secret nor hidden. We think, therefore, the causal connection between the act of the respondent and the injury to plaintiff's intestate was severed by the interposition of an independent agency, the belt line railway, if the facts urged by respondent in its separate defense were proved. Several of the cases above cited so hold. See particularly *Missouri, K. & T. Ry. Co. v. Merrill*, supra, and *McCallion v. Missouri Pacific Ry. Co.*, supra.

The order granting the motion for a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 285

LEVIN et al. v. SAROFF et al. (Civ. 3922.)

(District Court of Appeal, First District, Division 2, California. Sept. 22, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Landlord and tenant §24(1)—Essentials of valid lease stated.

It is only essential to the creation of a valid lease that it contain a definite agreement as to the extent and boundary of the property leased, a definite and agreed term, a definite and agreed price of rental, and the time and manner of payment.

2. Landlord and tenant §22(2)—Whether instrument is lease or agreement to make lease is largely question of intention.

Whether an instrument is a present lease or an agreement to execute a lease in future is largely a question of the intention of the parties.

3. Contracts §32—Agreement on essential facts is binding contract, though formal contract is to be prepared.

Where parties have agreed upon all essential facts, there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later.

4. Landlord and tenant §22(1)—Agreement to make lease is binding, notwithstanding intent to make formal lease, and may be relied upon when party will not execute lease.

Where an agreement to make a lease contained all the essentials of a valid lease, the mere fact that a written lease was in contemplation did not relieve either party from responsibility on the contract already made, and, when the lessor refused to execute a lease according to the contract, the lessee had a right to fall back on the written propositions as originally made, and the absence of the formal agreement was immaterial.

5. Landlord and tenant §22(1)—Failure of agreement to specify city and state did not render it unenforceable where lessee had taken possession.

An agreement for a lease was not too vague and uncertain to be enforced because of the failure to specify the city and state in which the property was located, where the agreement had been acted upon and the lessee had gone into possession, so that there could be no dispute about the location of the property.

6. Landlord and tenant §22(3)—Refusal to execute lease containing provisions not in agreement not violation of agreement.

An agreement to make a lease was not violated by the lessee by his refusal to execute a lease submitted by the lessor containing provisions not in the agreement, and such refusal gave the lessor no right to rescind and cancel the agreement, to change the tenancy to one from month to month, or to increase the rent.

7. Appeal and error §158(2)—Payment of judgment to prevent execution sale does not prevent appeal.

Where defendant, on a hearing in supplementary proceedings, to save his property from a forced sale under execution, and on the assurance of his attorney that he could recover his money in the event of a reversal, satisfied the money judgment against him, the payment was not voluntary so as to prevent an appeal by him.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Joseph Levin and others, doing business as M. Levin & Sons, against M. Saroff and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Marcus D. Wolff and A. H. Crook, both of San Francisco, for appellants.

Edgar C. Levey, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action of unlawful detainer.

The plaintiffs' predecessor in interest made and executed the following contract with the defendant Saroff:

"This agreement made and entered into this 29th day of October, 1919, between M. Saroff, the party of the first part, and M. Levin & Sons, the parties of the second part, witnesseth:

"That whereas the parties of the second part are the owners of the certain buildings located on the north side of Folsom street between Sixth and Seventh streets, formerly occupied by them as 'junk dealers' and whereas the party of the first part is desirous of leasing said premises, it is hereby agreed as follows:

"The party of the first part agrees to lease said premises for a term of five (5) years at a monthly rental of \$250.00 and further agrees to pay the first four months' rent of said lease in advance.

"The party of the second part agrees to lease said premises to the party of the first part for the said term of five (5) years at the said monthly rental of \$250.00, and further agrees that the said party of the first part has the option of releasing said property for an additional term of five years at the same monthly rental.

"The party of the second part further agrees to whitewash the entire interior of both the brick and corrugated iron buildings; inclose with sheet metal, or other material, the lower portion of the corrugated iron buildings; place openings for windows and doors where requested by said party of the first part; also to place windows in the second story of said corrugated iron building where requested by the party of the first part; also to place two toilets on second floor and 1 toilet on third floor of the brick building; the ground floor of the corrugated iron building to have cement floor with wood covering; 1 sink to be placed in second and third floors of brick building.

"It is further agreed and understood that the party of the second part will keep roof in repair and should corrugated iron rust said party of the second part will repair same, put elevator in condition that will be passed by the elevator inspector and do any and all work required by the board of health, board of public works, or other authorities, in connection with building; but not with business of the party of the first part.

"It is further agreed and understood that the lot facing Russ St., running back to building will be included in the lease and any improvements placed thereon by said party of the first part will be removed at the termination of the lease.

"Said party of the first part is permitted to sublet any portion or all of said buildings for any purpose excepting the same shall not be leased for a junk business.

"Rent to commence fifteen (15) days after buildings are repaired and ready for occupancy. Party of the second part will notify party of the first part when buildings are ready for occupancy.

"Party of the first part agrees to pay for all water, gas or electricity used in said buildings during the term of said lease or any extension thereof.

"Party of the second part reserves right to remove wagon scales at any time during lease and party of second part agrees to keep same in good order. Party of the first part agrees to keep in order and maintain buildings and elevator in repair during entire term of lease."

In accordance with this agreement, the plaintiffs made the repairs and alterations required thereby, and the defendant Saroff took possession of the premises and paid four months' rent in advance to the plaintiffs. The other defendant is a subtenant of Saroff. The defendants continued to occupy the premises, and Saroff paid rent therefor, in advance, at the rate of \$250 a month from about January 1, 1920, until July of the same year. During this period of time, the parties had some negotiations for the execution of a more formal lease in accordance with the terms of the agreement

above quoted. The plaintiffs insisted upon defendant Saroff signing a formal lease embodying terms and conditions not contained in the more informal agreement, and which would not have been implied by law. Among such terms was one to the effect that the lessee waived his right to make repairs under the provisions of section 1942, Civil Code; that the premises should be sublet only to a responsible person; that the lessor is entitled to enter the premises personally or by representative for the purpose of viewing the same or of making alterations thereon; that the lessee will save the lessor harmless from any liability whatsoever by reason of any damage occurring to himself, his employees, servants or any person or persons in or about the said property from any cause or act whatsoever; that any increase in insurance rates upon the building due to the character of the lessee's business should be borne by the lessee. Also the lease submitted for defendant to sign did not contain a provision granting him an option to renew the lease for an additional five-year period. In compliance with this portion of the informal agreement, plaintiffs tendered to defendant a separate writing stating that such option was granted to the defendant, provided that written notice of his intention to avail himself of the option be given by registered letter duly mailed 90 days prior to the date of the expiration of said lease.

Defendant Saroff refused to sign this lease submitted to him by the plaintiffs, insisting that it did not conform to his agreement. On July 19, 1920, plaintiffs notified the said defendant that because of his refusal to execute the lease submitted to him by plaintiffs' attorney, the agreement of October 29, 1919, herein set out, was rescinded and canceled, and that his tenancy would thereafter be considered as one from month to month. On July 29, 1920, by written notice the monthly rental of said premises was raised to \$500, commencing September 1, 1920. Defendant Saroff disregarded these notices, and on September 1, 1920, offered to pay to plaintiffs the rental of \$250 reserved in his agreement. This offer was refused. On September 2, 1920, plaintiffs served notice upon defendant to pay the rent within three days or vacate the premises. Upon his failure to comply therewith, this action was brought to recover possession of the premises and to recover rental at the rate of \$500 a month from September 1, 1920. Plaintiffs recovered judgment for \$1,500, representing rental for three months at \$500 a month, and for possession of the premises.

[1-4] Plaintiffs' theory of the case is that the agreement herein set out was an agreement to make a lease in the future and not a lease. It appears to us that the agree-

ment contains all the essentials of a valid lease. To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials. *Jones on Landlord and Tenant*, p. 170, § 137a; *Cochrane v. Justice Min. Co.*, 16 Colo. 415, 26 Pac. 780; *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715. However, plaintiffs' contention is based upon testimony of an understanding between the parties that they were later to execute a more formal contract. Whether an instrument is a lease in presenti or an agreement to execute a lease in future is largely a question of the intention of the parties. *Jackson v. Kisselbrook*, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; *Pac. Imp. Co. v. Jones*, 164 Cal. 260, 128 Pac. 404. Nevertheless, where the parties have agreed upon all essential facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later. *Jones on Landlord and Tenant*, supra; *Marcus v. Collins Bldg. & Const. Co.*, 27 Misc. Rep. 784. 57 N. Y. Supp. 737. The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material. *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903; *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70, 74. The evidence discloses that this is precisely what was done in the present case. The parties acted upon the agreement of October 29, 1919; the plaintiffs surrendering possession and making the repairs called for thereby, and the defendants taking possession and paying four months' rent in advance and the subsequent rent in advance each month as provided in the agreement. Later, the plaintiffs asked the defendant to execute a formal lease. He stated that he was willing to do so if plaintiffs would repair the elevator as provided in the agreement. This was done, and the negotiations regarding the formal lease were commenced. When the plaintiffs would not furnish a lease in accordance with the written agreement, the defendant submitted to them a lease of the premises drawn by his attorney, which contained all the provisions of the informal agreement and also most of the additional provisions embodied in the lease submitted by the plaintiffs. Plaintiffs, however, rejected this lease, and the defendant then took the position that he would

stand upon the agreement in writing which he had, and that such agreement was sufficient. He continued to offer to perform what was required of him thereunder.

In the case of *Cheney v. Newberry & Co.*, 67 Cal. 125, 7 Pac. 444, it is said:

"The entry under the written contract for a lease for a stated term and at a stated rent, and the payment and receipt of the rent, constituted a valid lease between the parties for the term and at the rental specified. * * * Neither party could subsequently cancel the contract without the consent of the other."

The situation in the present case is well stated in the language of *Pacific Improvement Co. v. Jones*, 164 Cal. 260 at page 264, 128 Pac. 404 at page 406, where it is said:

"Moreover, while the testimony tends to prove that the parties contemplated substituting for this instrument a more formal lease, nevertheless the execution of the document, as shown by the uncontradicted testimony, * * * was intended to conclude the lease between the parties, so that Mr. Jones could take immediate possession of the property, the contemplated execution of the formal lease being deemed a matter of mere convenience."

[5] Respondents argue that the agreement for a lease is too vague and uncertain to be specifically performed or to constitute an agreement of the parties. This is urged because the agreement does not specify the city and state in which the property is located. This precise objection has been considered in the case of *Boston Clothing Co. v. Solberg*, supra, and at page 716 of the opinion (68 Pac.) the point is decided adversely to the contention of respondents. In the present case the agreement has been acted upon and the defendant has gone into the possession of the property and there can be no dispute about the location of the property involved.

[6] We reach the conclusion, therefore, that the defendant was not violating the written agreement between the parties when he refused to execute the lease submitted to him by the plaintiffs which contained other provisions. An agreement to execute a lease for a given period at a stated rental, payable in specific installments, is not broken by a refusal to execute a lease which imposes terms and conditions not imposed by law and of which no mention was made in the instrument. 24 Cyc. 899; *Sanders v. Pottlitzer Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757. It is clear, then, that the plaintiffs had no right to rescind and cancel the agreement under which the defendant was holding the premises; that such agreement was in full force and effect until superseded by a formal writing in accordance therewith. The notices served by plaintiffs changing the tenancy to one from month to month and increasing the rent from \$250 to \$500 a month were un-

availing and gave to plaintiffs no new rights, and the judgment in their favor for the added rental and for the possession of the premises was erroneous.

[7] One further matter requires a brief discussion. The record before us shows that the money judgment has been paid and satisfied. Respondents sought to avail themselves of this fact upon a motion to dismiss this appeal upon the ground that the judgment had been satisfied. Upon the hearing of the motion in this court a showing was made by respondents that appellants had voluntarily surrendered up possession of the premises. Whether the portion of the judgment relating to the possession of the premises was voluntarily complied with by appellants or not does not concern us here, because we are of the opinion that as to the money judgment, the payment and satisfaction thereof by the appellant Saroff was not such a one as to deprive him of his right of appeal with reference to that item, at least. *Kenney v. Parks*, 120 Cal. 24, 52 Pac. 40; *Warner Bros. v. Freud*, 131 Cal. 646, 63 Pac. 1017, 82 Am. St. Rep. 400. The showing made by appellants in resisting the motion to dismiss the appeal was to the effect that after the entry of the judgment herein, supplementary proceedings were had and an order of examination issued. Upon the hearing thereof, Saroff appeared in court. In his desire to save his property from a forced sale under execution and upon the assurance by his attorney that he could recover his money in the event of a reversal of the judgment upon appeal, Saroff then and there satisfied the money judgment. Such a payment is not a voluntary payment and will not militate against appellant's privilege to have his rights determined upon appeal (*Warner Bros. v. Freud*, supra), and this court so determined in denying the respondents' motion to dismiss the appeal.

The judgment is reversed.

We concur: **NOURSE, J.; STURTEVANT, J.**

(54 Cal. App. 401)

In re **CATE**. (Civ. 3660.)

(District Court of Appeal, Second District, Division 1. California. Sept. 29, 1921.)

Attorney and client ⚡61—Attorney disbarred for serious violation of law not reinstated after lapse of only three years.

An attorney, disbarred for serious misconduct in violation of Code Civ. Proc. § 287, subd. 5, relative to the commission of any act involving moral turpitude, dishonesty, or corruption, *held* not to be reinstated after being deprived of his license for only three years, though the application was supported

by testimonials of numerous persons to his conduct and present good character.

Original application by Clyde E. Cate, a disbarred attorney, for reinstatement. Petition denied.

Vincent B. Vaughan, of Los Angeles, for petitioner.

G. R. Crump, of Los Angeles, for Los Angeles Bar Ass'n.

PER CURIAM. Petitioner, an attorney at law, licensed to practice in the state of California, was disbarred by judgment entered in the superior court of the county of Los Angeles on the 27th day of May, 1918. The offenses of which he was found guilty were of the character described in subdivision 5 of section 287 of the Code of Civil Procedure. He now applies for reinstatement, claiming that he is now and for a long time has been repentant for the wrongs committed by him, and has lived an upright life since the time of his disbarment. The application is supported by the request of numerous persons who attest his good conduct and their confidence in his present good character. Without depreciating the value of these testimonials and without intimating that petitioner may not be reinstated at some future time, the court is satisfied that this petition should not be granted. The misconduct of the petitioner on account of which he has been disbarred was of a very serious nature. And we do not agree with the opinion of his friends that he has been sufficiently punished for his acts of wrongdoing merely by being deprived of his license for a period of only three years.

The petition is denied.

(54 Cal. App. 448)

MUNRO et al. v. WHITLOW et al.
(Civ. 3966.)

(District Court of Appeal, First District, Division 2, California. Oct. 5, 1921. Hearing Denied by Supreme Court Dec. 1, 1921.)

1. Appeal and error ⚡704(2), 758(2)—Finding deemed sufficient when not questioned in brief and evidence bearing thereon not printed.

A finding of the trial court as to the validity of a tax deed will be deemed sufficient, though attacked in the oral argument, where the point was not raised in the briefs, and none of the evidence bearing on that phase of the case had been printed or referred to by appellants.

2. Trial ⚡37—Defendants held to have waived derangement of title from paramount source.

In ejectment against defendants claiming under a tax deed, where a deed under which plaintiffs had peaceful and uninterrupted possession for over 12 years was admitted in evidence without objection after plaintiffs' coun-

sel had asked defendants' counsel if he would insist on deraignment of title, plaintiffs were entitled to assume that the point was waived.

3. Life estates — 8—Tenant holds adversely to others than remaindermen.

One claiming only a life estate and recognizing the claim of the remainderman makes such a claim of ownership as will support title by prescription as against all other parties.

4. Taxation — 796(1) — In ejectment with cross-complaint to quiet title, plaintiffs' attack on tax deed not collateral.

Where defendants, in an action of ejectment by answer and cross-complaint, set up title under a tax deed, and prayed that their title be quieted, and offered the deed in evidence, plaintiffs' attack on the validity of the deed was direct and not collateral.

5. Appeal and error — 704(2)—Record held not to show error in finding that tax deed was void.

Under Pol. Code, § 3786, providing that tax deeds are primary evidence of certain facts, and section 3787, providing that they are conclusive evidence of all other proceedings from the assessment to the execution of the deed, no error is shown in the court's finding that a tax deed was void, where it is not shown in the record on what grounds it was attacked.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action of ejectment by Barbara California Munro, a minor, by Roy J. Young, guardian of her estate, and another, against M. W. Whitlow and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Milton Shepardson, of San Francisco, and L. A. Kottlinger, of Oakland, for appellants. Elston, Clark & Nichols, of Berkeley, for respondents.

NOURSE, J. Plaintiffs sued in ejectment to recover possession of certain real property situated in the city of Berkeley, county of Alameda. The complaint was in the ordinary form, alleging that the plaintiffs were the owners by title in fee simple absolute; that, on or about July 22, 1919, the defendants wrongfully and without right entered into the possession and occupancy of said premises and excluded plaintiffs therefrom; and that the value of the use and occupation thereof was \$75 a month. Prayer followed that plaintiffs be put in possession, and that they recover the value of the use and occupation from the date of the ouster.

Defendants answered jointly, denying the allegations of the complaint, and in a separate answer alleged that defendant George Biaggi purchased the property from the state at a public tax sale held on July 10, 1919; that the sale followed the failure to pay the taxes assessed thereon for the year 1913; that on July 17, 1919, he obtained a deed thereto

from the tax collector, and ever since has been the owner in fee simple and in the possession of the premises; and that plaintiffs claim some interest or estate therein adverse to said defendant. Prayer followed for a decree adjudging said defendant to be the owner in fee of the property, adjudging that plaintiffs have no estate or interest therein, and for general relief. At the opening of the trial it was stipulated that all the allegations of the answer be deemed denied, and the trial proceeded on the issues so framed.

The pleadings present a cause in ejectment on the part of plaintiffs, a denial and a separate answer in the nature of a cross-complaint to quiet title on the part of defendants, and a trial of these mixed issues of law and equity without objection from either party. The trial court found that the tax deed upon which defendants relied was void on account of various irregularities in the tax proceedings, and gave judgment for plaintiffs, decreeing that plaintiff Maud May Munro was the owner of a life estate in the property; that plaintiff Barbara California Munro was the owner of a remainder interest subject only to said life estate; and that defendants have no right, title, or interest therein. The equities of the case were adjusted by awarding to defendant George Biaggi the sum paid into court by plaintiffs representing the amount of his outlay as a result of the tax sale.

The appeal is prosecuted under section 953a, Code of Civil Procedure. The issues are plainly stated in appellants' opening brief to be:

"First. That the respondents wholly failed to show a record title chaining back to a paramount source, and hence they failed to prove a fee-simple title. Second. That respondents wholly failed to show a prior actual possession of the premises, under a claim of ownership in fee; that any possession without such a claim is not presumptive evidence of title. Third. That if the evidence had been sufficient to show in plaintiffs either a record title, or a prior actual possession taken under a claim of ownership, such title or possession of respondents, and all outstanding title to the property was, on July 10, 1919, sold and conveyed by the state of California, through the tax collector of Alameda county, to George Biaggi, an appellant here."

[1] In the oral argument appellants assailed the finding of the trial court upon the issue of the validity of the tax deed, but, as this point was not raised in the briefs, and as none of the evidence bearing upon that phase of the case has been printed or referred to by appellants, this court is not required to consider the point further than to say that, in a record so presented, the finding of the trial court will be deemed sufficient.

[2] As to the first point urged by appel-

lants, it is sufficient to say that respondents showed a record title by deed from Mrs. M. J. Woolley, dated June 9, 1905, and recorded January 24, 1907, immediately after Mrs. Woolley's death. They then showed peaceful and uninterrupted possession of the premises for over 12 years, accompanied by the payment of all taxes assessed thereon for more than 5 years. The deed was received in evidence without objection, after counsel for respondents had asked appellants' counsel if he would insist upon his showing the deraignment of title. If appellants had objected to the admission of the deed when it was finally offered in evidence, respondents would have had ample opportunity to make this proof. As they made no objection, respondents were entitled to assume that the point was waived. Thus, if the proof had been attempted and had showed no title in the respondents as of the date of the tax levy, such proof would have defeated the claim here asserted by the appellants as well as the respondents. If the proof had been otherwise, it would have benefited the appellants as well as the respondents.

[3] As to the second point urged by appellants, the record shows that Maud May Munro was the owner of a life estate, and her coplaintiff was the owner of the remainder. Cases are cited to the effect that actual possession cannot ripen into prescriptive title unless the possession was taken under a "claim of ownership." From these it is argued that the mother could not obtain any title through possession unless possession was "taken under a claim of ownership in fee simple absolute, against all the world." Putting it in another way the contention is that as Maud May Munro claimed a life estate only and took possession under the deed, thus recognizing the remainder interest of her daughter, she did not obtain any title at all through possession. Appellants have cited no authority directly in point, and in view of what has been said regarding the proof of title by deed, the question is not of sufficient importance to require original research by the court. It is a question which would not arise frequently because the claimant of a life estate would naturally claim under some paper title—such as by will or deed—and the matter of possession would be immaterial. But in the absence of authority we would not hold that such a claimant could not obtain good title by adverse possession if some technical defect appeared in the paper title. Though, strictly speaking, the claimant of a life estate does not hold or claim the fee, he does "claim ownership" to the extent of the life interest. When possession is taken under such a claim of ownership with the recognition of the claim of the remainderman and with his consent, there does not seem to be

any sound reason why such possession may not ripen into title by prescription as against all others.

[4, 5] Appellants' argument on their third point is that respondents could not impeach the tax deed they offered in evidence—they could not collaterally assail it—that the tax deed was not void on its face, and it conveyed the absolute title to the property. The answer is that appellants themselves put this tax deed in issue by their answer and cross-complaint, and prayed judgment quieting the title based on the deed. They offered the deed in evidence as a part of the respondents' case, and the attack which respondents made was therefore direct and not collateral. The deed to Biaggi and nothing more is printed in appellants' brief. We are not even informed upon what grounds it was attacked. It is argued that it is conclusive evidence of the regularity of all proceedings from the assessment up to the execution of the deed, and section 3787, Political Code, is cited as authority. But this section refers to all "other" proceedings. *Bernhard v. Wall*, 194 Pac. 1040, 1045. If the grounds of attack related to the proceedings mentioned in section 3786, then, under that section, the deed was but prima facie evidence of the regularity of such proceedings. Upon the record as presented we find no error.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 402

HERSPRING v. UNITED CANNERIES CO. OF CALIFORNIA. (Civ. 3766.)

(District Court of Appeal, First District, Division 2, California. Sept. 30, 1921.)

1. Account stated $\S$ 6(2)—Failure to reply to letter stating amount of claim held not an admission of correctness in view of answer to prior letter.

Defendant's silence by failure to answer plaintiff's letter, stating the amount of his claim and asking for remittance, was not an admission of the correctness of the account, rendering it an account stated, where only a few days before defendant, in answering plaintiff's prior letter, asking a check for a balance claimed, had emphatically and at length refused any further remittance and claimed that it had been wronged.

2. Frauds, statute of $\S$ 44(3)—Oral contract of employment for 10 years void as not to be performed in year.

An oral contract of employment for 10 years is, under Civ. Code, $\S$ 1624, subd. 1, invalid, as an agreement that by its terms is not to be performed within a year from the making thereof.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Joseph Herspring against the United Canneries Company of California. From an adverse judgment, plaintiff appeals. Affirmed.

Peck, Bunker & Cole, of San Francisco, and Robert H. Schwab, of Sacramento, for appellant.

Roscoe D. Jones, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover moneys alleged to be due and owing to him. The defendant answered and filed a cross-complaint which the plaintiff answered, and the judgment of the trial court was rendered in favor of the defendant and against the plaintiff on the issues made by the plaintiff's complaint, and in favor of the defendant and against the plaintiff on the issues made by the cross-complaint. From that judgment the plaintiff has appealed, bringing up the judgment roll and a bill of exceptions.

On the 17th day of February, 1917, a contract in writing was made which is as follows:

"We the undersigned, hereby authorize Mr. Jos. Herspring, of San Francisco, to secure for us signed contracts for peaches and apricots from growers and at such points as we may direct, under the following conditions: All contracts to be on blanks furnished by us, a copy to be given the grower and the original to be turned over to us. Prices to be such as we authorize from time to time as market conditions warrant. Specifications as we direct. When fruit is offered for delivery under these contracts at shipping points, it shall be inspected by said Jos. Herspring, and such fruit as conforms to contract specifications shall be accepted and weigh slip issued therefor by him. He shall also supervise the loading into cars in first-class workmanlike manner. He shall also superintend the distribution of empty boxes, taking grower's receipts therefor on suitable blanks furnished by us. For faithful performance of the above obligations we agree to pay the said Jos. Herspring, at the end of the 1917 season when all deliveries have been made, the sum of one dollar and fifty cents (\$1.50) for each ton of 2,000 pounds net fruit delivered on all such contracts secured by him, in full payment and satisfaction for his services.

"United Canneries Company of California,
"By A. C. Harvey, Prest."

The parties entered upon the performance of the contract, and during the same month in which the same was made the plaintiff, being out in the field engaged in negotiating contracts, called up the defendant on the telephone and said, "Mr. Harvey, I can get a lot of peaches up here on seven and ten year contracts; you only want me to buy now for one year. I can get these contracts," and as the plaintiff testified, Mr. Harvey replied, "All right, Herspring; go ahead and

take them." Thereafter, during 1917, the plaintiff proceeded to negotiate contracts and to perform the contract of employment in other respects. At the end of the year a settlement was had, and nothing is claimed in this case as for the year 1917. During the following season certain services were rendered and an accounting was attempted, but no settlement was agreed upon. On December 6, 1918, the plaintiff wrote to the defendant asking for a check for a balance claimed. On December 11, 1918, the defendant wrote the plaintiff a long letter full of acerbity, and refused to make any further remittance, claiming that the defendant had been wronged. On December 16, 1918, the plaintiff wrote to the defendant stating the amount of his claim and again asking for a further remittance. This action was commenced January 28, 1919.

[1] On these facts the plaintiff claims, among other things, that an account was stated. However, we think that the facts show a decided disagreement as to the account instead of showing an agreement as to an account. Owing to the very heated language used in the letter of the defendant under date of December 6th, it is clear that the defendant was not called upon to answer the letter written later by the plaintiff. Such silence on his part, under such circumstances, was not an admission as to the correctness of the later letter. The trial court found against the plaintiff on this issue, and this court is not at liberty to disturb that finding.

We understand the plaintiff to claim that the oral conversation quoted above prolonged the term of the hiring of the plaintiff through the year 1918. Assuming, solely for the purpose of stating the point, that such was the fact, then it became the duty of the plaintiff during the year 1918 to perform the written contract in all its terms, for none of them had been eliminated, according to the plaintiff's own wording of the oral conversation; but the proof introduced was all to the effect that during the year 1918 the plaintiff did not inspect before shipping but a very small portion of the fruit offered for shipping. The same remark applies to the supervision of the loading into cars, and also to the superintending of the distribution of empty boxes. If, therefore, the oral conversation be treated as extending the terms of the contract, it is patent that the plaintiff may not recover because he did not perform those things provided in the contract for him to do and perform.

However, the plaintiff does not rely solely on the oral conversation above mentioned, but he relies also on another conversation. In June, 1918, Mr. Harvey, the president of the defendant corporation, went to Sacramento and had a conversation with the plaintiff. That conversation had a double aspect. In one aspect it was with regard to the interests

of the growers, and that subject-matter is not at all involved in this case. In another aspect it involved the relations of the plaintiff and the defendant. The plaintiff testified that he said to Mr. Harvey:

"I do not want to go on with you any further unless our business relations are going to be smoother. Now, I expect you to pay me for the life of my contract. * * * How about it?"

And he said:

"That is all right, Herspring; you go ahead and everything will go smooth with us this year."

The plaintiff further testified:

"He (meaning Mr. Harvey) came back and said, 'I want you to go out and see if you can buy me 400 tons of free peaches. I want some Lovells and Muirs.'"

At this point it may be stated that the peaches were purchased and paid for, and this action does not involve that element. Looking at the other portions of the oral conversation, the utmost that can be said is that it continued the employment of 1917, according to the terms of the above writing, through the year 1918, without any other alteration. So treating it, the plaintiff was not entitled to recover for the same reasons stated above with reference to the conversation which occurred in February, 1917. Furthermore, if we run together and combine the conversation of February, 1917, with the conversation of June, 1918, we reach the same conclusion.

[2] But the plaintiff's cause of action has yet another theory. He contends that the oral understanding between himself and the defendant as above recited had the legal effect to continue him in the employment of the defendant year after year—to obtain compensation for services rendered by him. In other words, the plaintiff's contention is that he was employed orally for the term extending from 1917 to a date ten years thereafter, namely, the term corresponding with the term of years existing between the producer and the canner. If such was the contract, it violated section 1624, subd. 1, of the Civil Code. Again, the language used in the oral contract will not sustain such a broad claim. And, even though the language used by the parties would sustain such a claim, still the plaintiff may not recover, for, as shown above, he has not performed the contract on his part.

Before dismissing this portion of the case, it may be said that the plaintiff contends that those portions of the contract which the plaintiff did not perform were waived by the defendant. The evidence does not sustain the plaintiff in that position. It does not appear that plaintiff's nonperformance was

known to the defendant until the action was commenced.

From what has been said above, it follows that the plaintiff was not entitled to make any charge against the defendant for fruit purchased in 1917, but received out of the crop of 1918. Passing to the fruit which was purchased in 1918 and delivered in that year, the plaintiff was entitled to receive \$1,099.53. The parties did not seriously disagree as to this item. The whole of that sum has been paid. Indeed, the defendant paid to the plaintiff \$2,000, which included \$900.47 more than the plaintiff was entitled to. For that item the trial court gave judgment in favor of the defendant and against the plaintiff, and in so doing it committed no error.

The plaintiff sought to be reimbursed for expenditures for telephone service. Such payments were not made "at the special instance and request of the defendant." If claimed as on an account stated, the same was neither pleaded nor proved.

Much of the time of the trial court was taken up with the introduction of evidence concerning the item of damage alleged to have accrued in favor of the defendant by reason of the failure of the plaintiff to properly perform his contract. That damage was estimated by the trial court in the sum of \$401.38; but no judgment was rendered against the plaintiff on that item. The defendant has not appealed. It is not necessary, therefore, for us to dwell on that subject.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

54 Cal. App. 415

In re BANGLE et al.

HUTTON et al. v. TITLE INS. & TRUST CO.

(Civ. 3483.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1921.)

1. Records $\S$ 9(10½)—Decree of registration subject to restrictions held not to preserve lien.

A provision in a deed that the sum which the grantee agreed to pay for maintenance of improvements should be a lien upon the land until paid is a lien within the definition in Civ. Code, § 2872, created by the contract of the parties within section 2881, and was not covered by a decree registering the title subject to the exceptions, reservations, and conditions contained in the deed of conveyance, but omitting reference to the liens in such deed.

2. Records $\S$ 9(10½)—Decree of registration should declare amount of lien not barred.

Where a deed made the amount the grantees were to pay for maintenance of public

improvements a lien upon the property, the failure of the grantor to enforce such payments did not waive its right thereto in the future, and a decree registering the title affected by the deed should specify that it was subject to the lien and fix the amount due thereon which was not barred by limitations.

3. Deeds ⚡166—Protection of mortgagee from forfeiture for violation of restriction is valid.

A clause in a deed containing a number of restrictive provisions the violation of which would defeat the title of the grantee, which clause exempted from the forfeiture the lien of any mortgage or deed of trust made in good faith, was valid.

4. Records ⚡9(10½)—Registration referring to restrictions in deed not in chain of title is erroneous.

A decree of registration of title which stated that the title was subject to the conditions and restrictions in a deed recorded on a specified book and page was erroneous where the deed recorded on that book and page was not in the chain of title registered.

5. Records ⚡9(12)—Findings and decree as to deed, containing restrictions cannot be changed.

On appeal from a decree registering title to real estate, findings and decree with reference to the deed containing the conditions and restrictions to which the title was subject cannot be corrected so as to make it refer to a deed which was within the chain of title.

6. Deeds ⚡150—Restrictions on sale of intoxicating liquors is valid.

A provision in a deed prohibiting the use of the premises for the sale of intoxicating liquors and providing that on breach of such condition the premises should revert to the grantor is not void.

7. Records ⚡9(12)—Where registration decree referred to wrong deed, restrictions in other deed present abstract questions.

On appeal from decree registering title which erroneously stated the title to be subject to conditions and restrictions in a deed not in the chain of title, the validity of other conditions and restrictions in a deed in the chain of title will not be determined, since questions with reference thereto are abstract and may be properly decided after remand of the case.

8. Records ⚡9(10½)—Registration should specify valid restrictions not merely refer to deeds.

Decree of registration of title should specify the conditions and restrictions subject to which the title is held where the deeds imposing such conditions and restrictions are confusing and ambiguous, and some of the restrictions are no longer in force, though a reference to the deed might otherwise be sufficient, since the object of the registration is to simplify the title.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the petition of Paul Monroe Bangle and others against the Title Insurance & Trust Company for registration of title to real property. From so much of the judgment as registered the title of Charles Newton Hutton and others, defendant appeals. Reversed.

Charles H. Brock and Edmund W. Pugh, both of Los Angeles, for appellant.

L. M. Hartwick, of Van Nuys, and John G. Mott, Albert M. Cross, Albert Lee Stephens, and I. B. Dockweiler, all of Los Angeles, for respondents.

James W. Bell, of Los Angeles, amicus curiae.

SHAW, J. This proceeding was instituted by the owners of certain lots and parcels of land to have title thereto registered in accordance with the provisions of the law known as the Torrens Land Title Act (St. 1915, p. 1932), adopted by the people of the state at the general election held on November 3, 1914.

The lots in question constituted a part of a large tract of land subdivided and conveyed by the owner, Title Insurance & Trust Company, which, as defendant, and claiming that its rights reserved in the grants so executed by it are not protected by the decree rendered, has appealed therefrom in so far as it applies to certain of the lots described in the petition, to wit:

Lot 14, block 45, of tract 1200, city of Los Angeles, as per map recorded in Book 19 of Maps, page 35, title to which was vested in Charles Newton Hutton and his wife, Grace Iliff Hutton, which is herein designated as No. 1.

Lots 8, 10, 11, and 12, block 20, of tract 1200, city of Los Angeles, as per map recorded in Book 19 of Maps, at page 35, title to which was vested in Samuel Andrus as community property, herein designated as No. 2.

Lot 9, block 20, of tract 1200, Van Nuys district, city of Los Angeles, as per map recorded in Book 19 of Maps, page 35, title to which was by the decree declared to be in Adolph John Boulanger and Lillian Maude Boulanger, as joint tenants, herein designated as No. 3.

Lot 348 of tract 1000, in the city of Los Angeles, as per map recorded in Book 19 of Maps, pages 1 to 34, herein designated as No. 4.

As to the Hutton lot, description of which we have designated as No. 1, the applicants alleged that the deed from appellant, Title Insurance & Trust Company, to the grantor of petitioners, contained certain restrictions and reservations which were not conditions of the conveyance and had been abandoned and were void, which provisions they asked to have canceled. This allegation was denied

in the answer of defendant, and the question presented on the appeal is whether the language of the decree, to wit, "exceptions, reservations, and conditions contained in deed recorded in Book 5018, page 203, of Deeds," to which as declared by the decree, the land was subject, is sufficiently broad to include all of the valid and existing covenants, exceptions, reservations, restrictions, conditions, and liens contained in the deed executed by defendant to one Agnes H. Brown, whose title and interest in the lot was by the administratrix of her estate conveyed to applicants. The "deed recorded in Book 5018, page 203, of Deeds" was dated May 22, 1912, and among other provisions contained therein was a covenant on the part of the grantee to pay the grantor \$5 per year for each lot described in the conveyance, which sum, with like payments to be contributed by other lot owners in the district, should constitute a fund devoted to the care, maintenance, and replanting of street trees, repair and upkeep of street curbs and sidewalks, and to otherwise keeping up and beautifying the district as far as possible with the fund derived from such source. It was further provided in the deed that the obligation to make such payments should terminate whenever said lot should be permanently occupied, and in any case at the expiration of ten years from January 1, 1911, or, at the option of the grantor, at any time after four years from January 1, 1911, followed by an express provision that "the above sum agreed to be paid shall be and remain a lien upon the land hereby conveyed until paid."

[1] By section 2872, Civil Code, a lien is defined as "a charge imposed in some mode other than by a transfer in trust upon specific property, by which it is made security for the performance of the act." It is created by contract of the parties, or by operation of law. Section 2881, Civ. Code. By acceptance of a deed the grantees not only promised to pay the \$5 per lot, but by contract in the language quoted created a lien upon the property as security for its payment. We may readily concede, as claimed by respondents, that the covenant cannot be construed as a restriction, condition subsequent, or exception the compliance or noncompliance with which could work a forfeiture of the estate. As in other cases of lien, the remedy of the lienor upon nonperformance of the covenant would be an action of foreclosure. Since the deed containing the covenant imposing the charge upon the lot was recorded, subsequent purchasers of the land must be held to have taken title upon constructive notice of the fact that the lien not only existed, but that, subject to permanent occupancy or bar of the statute of limitations, it would continue until the sum agreed to be paid was liquidated. *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Fresno*

Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112.

[2] While it appears that appellant has not enforced the collection of said sums, no waiver of the provision on its part is shown, nor any action had the effect of which would, as to the whole obligation, terminate or extinguish the lien; and, since by the covenant the property was made the subject of a lien to secure the payment of \$5 per year, the decree, in the absence of any showing by respondent, should in express terms, as provided in section 15 of the act, have established the amount thereof not barred by limitation and declared the same to be a lien and incumbrance upon the land, subject to which it should have been ordered registered.

What is said upon this point is likewise applicable to the lots designated herein as No. 2, title to which is vested in Samuel Andrus, and the lot designated as No. 3, title to which is vested in the Boulangers, as to each of which lots the grantees thereof covenanted to pay \$5 per annum, and wherein, as in the Hutton case, it was stipulated that until paid such sums should, subject to the conditions therein expressed, constitute a charge and lien upon the lot or lots so conveyed.

[3] In application No. 2 the deed conveying the lots to Samuel Andrus contained a number of restrictive provisions for the violation of which it was agreed the title of the grantee should cease and revert to the appellant as grantor, and subject to some of which provisions title to the lots was registered in the name of Andrus. The deed also contained a provision, designated "I," that a breach of any or either of said conditions, or any re-entry by reason of the breach thereof, should not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to said land and the improvements thereon. The purpose of this provision clearly expressed was to protect innocent parties, as holders of liens based upon mortgages or deeds of trust, from the penalties imposed upon owners of the property for breach of the conditions. That, in addition to the restrictions subject to which the lots were ordered registered, the decree should also have ordered the registration of the property subject to the covenants and provisions designated "I" in the deed, appears to admit of no question, and respondent offers no argument in justification of the action of the court in declaring the same inoperative and of no effect.

[4] It appears that title to lot 9 in block 20, herein designated as No. 3, was registered in the name of Adolph John Boulanger, to whom title was conveyed by Samuel Andrus, who acquired the property under a deed from appellant, which deed was recorded in Books of Deeds, No. 6194, at page 44. This deed contained a number of conditions, re-

strictions, and reservations, but, instead of registering the lot subject thereto, the title was by the decree ordered to be registered in the name of Boulanger, subject to "exceptions and reservations as contained in deed recorded in Book 6081, page 307, of Deeds," which deed, it is conceded by both parties, is not in the chain of title for the reason, as stated, the title of applicant was under another and different deed recorded in Book 6194, at page 44, to which reference was made by the court in properly ordering registration subject to the provisions contained therein under which it was agreed the title should, in case of the vending of intoxicating liquors upon the lot, be forfeited. In thus registering the title subject to the conditions, exceptions, and reservations contained in a deed which was no part of the chain of title and under which Boulanger made no claim to the property, and in the absence of any evidence to warrant it, the court erred.

[5] As we understand counsel for appellant, his objection to the decree, in so far as it applies to lot 348, tract 1000, which we have designated No. 4, is that, while the decree declared title to the lot was subject to "forfeiture of title if intoxicating liquors are vended thereon, as set forth in deed recorded in Book 4351, page 313, of Deeds," such deed is not in the chain of title, and there is no evidence whatever tending to show that the title was conveyed subject to the provisions contained therein. These facts are conceded by respondent, who suggests, however, that the court correct the error by inserting in lieu of the deed so referred to the words "deed recorded in Book 6081, page 307." For obvious reasons, the court has no power to make such change in the findings and decree. The deed under which the applicant for registration held title to the lot was recorded in Book 6081, at page 307, and, subject to the exceptions and reservations contained therein, title to the lot was ordered to be registered in the name of Adolph John Boulanger and Lillian Maude Boulanger, as joint tenants; it being declared, however, that conditions and restrictions numbered 2 in said deed are void.

[6] The conditions in No. 2 of said deed contained a provisions that "no part of said premises shall ever at any time be used for the purpose of buying, selling, or handling intoxicating liquors," and that for the breach of such condition the premises should revert to the grantor, its successors and assigns. We perceive no reason why the court should have declared the provision void, and respondent has offered none. He suggests, however, that the reference made in the decree to condition No. 2, which the court declared void, should in fact have referred to another and different provision which the court intended by the decree to declare void. While this deed provided that a breach of

the conditions should cause the premises to revert to the grantor, it further provided that such provision should not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to said land and the improvements thereon. What is said upon this point as to application No. 2 herein is likewise applicable to lot 348 in tract 1000.

[7] Appellant also insists that the registration of the title to lot 9, block 20, No. 3, hereinbefore referred to, should have been made subject to certain rights of way for the erection, construction, and operation of pole lines, conduits, and pipe lines for the transmission of electric energy and for telephone and telegraph lines and gas mains, of a width of four feet, and also subject to the reservation of all minerals, oils, natural gas, etc. (not for the purpose of mining the same by the grantor in the deed, but to prevent the exploration or use of said land for the discovery and production of such commodities), as well as other rights of way reserved from the operation of the deed, and all mentioned in deed recorded in Book 6081, page 307. Since, however, any action of the court in regard to title to this property was, as hereinbefore stated, based upon the erroneous reference to a deed other than that under which the applicant claimed title, we do not feel called upon to discuss or determine an abstract question not before the court and as to which upon a retrial a decision may be rendered in accordance with the law applicable thereto.

[8] Counsel for respondent very properly suggests that the deeds under consideration "are well calculated to confuse, and the brief of appellant has not served to any great extent to clarify the confusion." We fully concur in this statement, and may add that what is said concerning appellant's brief is equally applicable to that of respondent. The petition for registration contained the application of a number of owners claiming property under different deeds, which deeds, while being of great length and containing many provisions relating to reservations, liens, restrictions, and exceptions, and while in some respects containing like provisions, were nevertheless different in wording. Each of them was made the basis of a distinct application for registration of title to the lot therein referred to. The decree presented is in terms ambiguous and uncertain in meaning. No doubt some of the liens for the annual payment of \$5 against the lots are barred by the statute of limitations. Some of the restrictions have expired by limitation. Some of the provisions binding upon owners do not apply to innocent mortgagees and holders of liens under deeds of trust. Since the purpose of the proceeding is, so far as possible, to simplify the title and eliminate questions that no longer affect it, the decree should in plain,

explicit, and unmistakable terms set forth the conclusion of the court thereon. While under the act reference may be had to records of deeds, nevertheless, as to a title which, as here, under the deeds is limited and qualified by so many covenants contained therein, the purpose contemplated would be far better subserved if the decree in specific language set forth the conditions, restrictions, reservations, and liens to which the court found the title to be subject, rather than by reference. We are fully cognizant that in discussing the case, in the absence of material aid from counsel, we may have omitted questions involved in the jumbled record presented. However this may be, we are clearly of the opinion that the judgment appealed from should, for the reasons given, be reversed.

The judgments, in so far as they affect the lots in question, are reversed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 452

KELLIHER v. FITZGERALD et al.
(Civ. 2188.)

(District Court of Appeal, Third District, California. Oct. 5, 1921. Rehearing Denied Nov. 4, 1921. Hearing Denied by Supreme Court Dec. 1, 1921.)

1. Pleading ⚡19—**Complaint, alleging damage to property, held not reversible for ambiguity.**

In an action for abatement of nuisance, injunction, and damages, a complaint, alleging that as a result of washing, cutting, and silting of plaintiff's lands they have become, are, and will be more expensive to plow, harrow, sow, crop and harvest, and thereby their economical use has been diminished and damaged to plaintiff's damage in the sum of \$1,000, is not so ambiguous as to justify reversal.

2. Waters and water courses ⚡179(4)—**Evidence of sources, character, and extent of injuries of damage to land held sufficient to support a verdict.**

In an action for abatement of nuisance, injunction, and damages, testimony as to the sources, character, and extent of the injuries to land and as to amount of damages held sufficient to support a verdict for damages.

3. Trial ⚡395(5)—**Finding of court held to be on material issues.**

In an action for abatement of nuisance, injunction, and damages, where the complaint alleged the existence of certain depressions called swales, Nos. 1, 2, and 3, which was denied in the answer, the finding of the court that the evidence was sufficient to support the allegations of the complaint as to the existence of the swales is a sufficient finding on material issues.

4. Waters and water courses ⚡179(6)—**Finding that water flowed from lands to other lands held equivalent to a finding that the first lands were higher.**

A finding that surface waters under normal conditions flowed from the lands of defendant across the lands of plaintiff is a finding of ultimate fact, and is equivalent to a finding that defendants' land is higher than plaintiff's land.

5. Appeal and error ⚡1011(1)—**Finding of trial court is conclusive as to point where evidence is in conflict.**

The appellate court is bound by the finding of the trial court as to points concerning which the evidence is in conflict.

6. Judgment ⚡255—**No special evidence necessary to support judgment that defendants in action to abate nuisance shall fill in an excavation.**

In an action for abatement of nuisance, injunction, and damages, no special item of evidence is needed to support the judgment that the defendant shall fill an excavation, since when the court found that the nuisance had been created by the act of defendants, it followed as conclusion that plaintiff was entitled to have it abated.

7. Waters and water courses ⚡179(6)—**Finding that water did not affect course of drainway held not contrary to a finding that increased overflow damaged farm land.**

In an action for abatement of nuisance, injunction, and damages, where the chief injury resulted from the water overflowing over the farming land, and washing, cutting, and otherwise injuring the same, the finding that the water did not widen, deepen, or change the course of a drainway, as alleged by plaintiff, is not contrary to a finding that the increased flow caused by the nuisance damaged his farm land.

8. Waters and water courses ⚡179(6)—**Judgment, directing defendant to maintain waterway at a certain depth, held erroneous.**

In an action for abatement of nuisance, injunction, and damages, a judgment, directing the defendants to maintain a waterway across plaintiff's land, so that it would not have dimensions exceeding certain specified width and depth, since it makes defendants responsible for damage by natural causes or third person, is erroneous.

On Petition for Rehearing.

9. Appeal and error ⚡931(1)—**Findings of trial court are, if possible, to be reconciled so as to support the judgment.**

On appeal, findings of the trial court must, if possible, be reconciled so as to support the judgment.

Appeal from Superior Court, Stanislaus County; E. N. Rector, Judge.

Suit by D. E. Kelliher against Nora Fitzgerald and others. From judgment for plaintiff, defendants appeal. Modified and affirmed.

Newton Rutherford, of Stockton, and Hatton & Scott, of Modesto, for appellants.

A. H. Ashley, of Stockton, and Griffin, Carlson & Boone, of Modesto, for respondent.

PER CURIAM. The court granted a rehearing of this case mainly for the purpose of further considering the claim of the appellants that the findings are hopelessly conflicting. It is earnestly insisted that finding 5 conflicts with finding 6 and other findings. We have given the matter mature consideration, and we are satisfied as the result of such examination that there is no conflict whatever between them. It is clear to us that finding 5 relates to one matter and finding 6 to another.

To understand this point fully it must be recalled that the respondent urges two causes of action in his complaint. They are not stated in separate counts, but they are quite distinct. They are:

First. That the flood waters are so diverted by the embankments of which he complains that they are thrown in volume into a drainway upon and across the premises of the respondent, and that they have washed and deepened this drainway to such an extent that he cannot plow and harrow across it as he was accustomed to do. The following quotation from paragraph 25 of the respondent's complaint will make this plain:

"That upon plaintiff's said lands adjoining said Fitzgeralds there is no marked depression or swale and, with the exception of said above drainway, the same were, prior to said flooding thereof, practically level for approximately a mile or more west of said boundary or division line; that said unusual surface waters so in the spring of 1918 forced thereon and thereover by said acts of said Fitzgeralds flowed over said portion of said section 1 until they reached said drainway in the westerly portion of said triangle; that such waters then followed substantially the said course of said drainway, and so frequently and irregularly cut, washed, deepened, widened, or changed the same and so carried the soil therefrom throughout most of its entire length that it is and was thereafter and will hereafter be impossible or imprudent to plow or drill the said lands through which said drainway meandered, except by plowing on either side of said enlarged and deepened drainway," etc.

The issue tendered by this allegation is met and covered by finding 5. It will be noted that the court found against the respondent as to this cause of action, and in so doing it employed the language found in that finding.

The second and principal cause of action stated by respondent relates to the injury inflicted by flood waters in spreading out upon and over his farming lands and destroying the crops growing thereon.

The court determined this issue in favor of the respondent, and awarded damages

and preventive relief. It awarded, also, certain mandatory relief, which will be noticed further along.

We find no ground for reversing the judgment. On the contrary, we adhere to the views expressed in the opinion filed herein on the former hearing as prepared by Judge Prewett, presiding justice pro tem., and we hereby adopt the same as the opinion of the court. Correcting a trifling typographical mispision, said opinion is in the following words:

"Action for abatement of nuisance, injunction, and damages. It is averred that the alleged nuisance consists of embankments and excavations constructed in the years 1916 and 1917, and since maintained by the defendants, thereby causing the surface waters to flow in increased volume from lands of the defendants to the adjoining lands of the plaintiff to his damage in the sum of \$11,500. The answer traverses all the allegations of the complaint. The plaintiff had judgment abating the nuisance, prohibiting its future maintenance and relief by way of damages in the sum of \$200. The evidence in the case is unusually voluminous, and is emphatically contradictory on every contested point. The evidence, together with the briefs and other papers, fills about 1,700 pages. In addition, about 30 photographs and several maps accompany the transcript.

"The defendants appeal from the judgment and assign various alleged errors, some of which invite only a passing notice. The pleadings are unusually lengthy. In fact, they leave nothing to be desired in the way of prolixity of detail. The complaint, reduced to its lowest terms, is simply an allegation that the defendants, by the construction and maintenance of two embankments and the excavation of a ravine beyond its normal dimensions, have thereby caused the surface waters to flow across and injure the lands of the plaintiff, instead of flowing, as they would under normal conditions, across the lands belonging to themselves. The various assigned errors may be summarized as follows:

"(1) Overruling the demurrer to the complaint; (2) contradictory findings; (3) no evidence of damages to the amount of \$200; (4) error in admitting proof of damages; (5) failure to find on material issues; (6) finding No. 4 not supported by evidence; (7) a portion of the judgment unsupported by evidence.

[1] "The only point urged on demurrer is that the complaint is ambiguous and uncertain as to a certain allegation which reads as follows: 'That as a result of said washing, cutting, and silting of plaintiff's said lands, same have become, are, and will be more expensive to plow, harrow, sow, crop, and harvest, and thereby their economical use has been diminished and damaged to plaintiff's damage in the sum of \$1,000.' We think this allegation is not so obnoxious to the rule requiring certainty and freedom from ambiguity as to justify a reversal.

"The point as to contradictory findings will be passed until we shall have noticed the other ground urged by defendants.

[2] "It is insisted that there is no evidence of the injury on account of which the court allowed \$200 by way of damages, and no evi-

dence as to the amount of injury wrought. But the testimony of the plaintiff given under objection by the defendants is quite full upon this point.

"He stated the sources, character, and extent of the injuries and gave an estimate of his damages at \$1,000. The point is not well taken. The fourth ground is practically a repetition of the third, and is answered by what is said with reference to that point.

[3] "In the fifth ground, it is claimed that the court failed to find on material issues. The complaint alleged the existence of certain depressions on the ground designated as swales, Nos. 1, 2, and 3. This was denied in the answer. Assuming for the moment that this is a material issue upon which the court was required to find, it will be seen that the court did find as follows: 'That the evidence is insufficient to support the allegations of plaintiff's complaint as to the existence of swale No. 1, swale No. 2 and swale No. 3.' This is sufficient, especially as to a probative fact like this.

"In the sixth point, the court is asked to reverse the judgment on the ground that finding No. 4 is not supported by the evidence. This finding purports to give the maximum dimensions of the waterway in question, and it is claimed that there is no evidence upon this point. But in this position, counsel are in error. A vast amount of testimony throughout the trial dealt, in one way and another, with this waterway and its depth, width, meanderings, and general course. It would be unprofitable and needless to undertake to quote it in detail.

[4] "In the same connection it is claimed that the court failed to find that the lands of the appellants are higher in elevation than those of the respondent. But the court did find that the surface waters, under normal conditions, flow from the lands of the appellants upon and across the lands of the respondent, and it must be conceded that even in the locality in question water under normal conditions flows down hill. Besides, the respective elevations are probative facts. The ultimate fact is the flow of the water.

[5] "As to all these points the evidence is by no means all one way, and this court is bound by the finding of the trial court. We find no fault with his conclusions. On the contrary, they appear to be fully supported by the record.

[6] "It is urged that a portion of the judgment is not supported by the evidence. The portion thus excepted to provides that the excavation made by the defendants, be 'by said defendants, at their own cost and expense, forthwith filled in, repaired and corrected,' etc. No especial item of evidence is needed to support such a provision. When the court found upon sufficient evidence, that the nuisance had been created by the act of the defendants, it followed as a conclusion therefrom that the plaintiff was entitled to have the nuisance abated. The provision objected to is proper.

[7] "There remains for consideration only the second point. This requires a little more extended notice. It is claimed that finding numbered 5 is contradictory of other findings, and especially of finding numbered 6. Finding 5 is in the following words:

"(5) 'That the quantity of water so thrown upon and flowing over said lands of plaintiff (which quantity, but for said excavations, embankments, etc., would have flowed upon and over said 249.67 acres of defendants), did not frequently, irregularly, or at all appreciably up to the present time cut, wash, deepen, widen, or change the said course or the drainway across any of said lands of plaintiff and carry soil therefrom throughout much of its entire length of said two miles; that said channel, unless corrected, will result in the more rapid passage of said waters and in the increase of the water flowing upon and across plaintiff's lands.'

"(6) That said excavation, said construction of said embankments, etc., was done by defendants without right and without plaintiff's consent and against his will; that as a result of said washing and said cutting of plaintiff's lands in March, 1918, the same became, are, and will be more expensive to plow, harrow, sow, crop, and harvest; that thereby their economical use has been and is diminished and damaged in the sum of \$200. That the said work by the said defendants on said 249.67 acres has resulted and will result in throwing more water on plaintiff's lands than otherwise has or would naturally have flowed to or come upon the same; that said water so thrown upon plaintiff's lands has done damage to plaintiff's lands, and has damaged the economical value or use thereof.'

"It will be seen that finding 5 relates to one matter and finding 6 to quite another. The former finds that the waters unlawfully thrown upon the lands of the plaintiff 'did not * * * cut, wash, deepen, widen, or change said course or the drainway across any of said plaintiff's lands,' etc. The apparent meaning of this is that the waters did not enlarge the drainway, thereby committing little or no injury. The chief injury would have resulted, and did result, from spreading the waters out over the farming land and washing, cutting, and otherwise injuring the same. Finding 5, while infelicitous, is not contradictory of the other findings.

[8] "It is urged that a portion of the judgment is erroneous, in that it directs the defendants to 'maintain' the waterway so as not to have dimensions exceeding a certain specified width and depth. This provision should be stricken out. Elsewhere in the judgment it is provided that the defendants be 'forever enjoined and restrained from deepening or widening said waterway.' While they are properly restrained from deepening or widening the waterway, they should not be commanded to maintain it as against the operation of natural conditions for which they are not responsible. Floods, the acts of third parties, or other causes might, without the fault of the defendants, operate to widen or deepen it."

The last point discussed in the foregoing opinion demands a little further attention at our hands. In its judgment, the trial court decreed that the appellants "maintain" the excavation at its reduced dimensions. This mandate appears to extend through all future time, and it imposes a hardship upon appellants which they should not be compelled to bear. They are, of course, responsible for

their own injurious acts, and the court has properly restrained them from a repetition or continuance of them; but upon no principle of equity should they be compelled to anticipate or correct the effect of agencies or causes over which they have no control. They are restrained from widening or deepening the excavation, and thus far the judgment is proper. But natural causes, such as floods, long-continued storms, cloudbursts, and other natural agencies, may widen or deepen the excavation; or it may be done by third persons without the consent or co-operation of the appellants. The respondent asks us to refrain from excising these mandatory parts from the judgment. We cannot accede to this view. It is presumed that the respondent was awarded the proper sum as damages for all injuries actually inflicted, or which must inevitably ensue. For any other injuries that may be inflicted in the future, he must depend upon his preventive relief or upon such other action as may be available to him.

The judgment is modified by striking therefrom the following words: "And that the same be by defendants, at their own cost and expense, so maintained as not to have dimensions exceeding those above mentioned and provided for," and also the following words: "And maintain" as last used in said judgment. As thus modified, the judgment is affirmed, the respondent to recover his costs of this appeal.

On Petition for Rehearing.

PER CURIAM. In response to appellants' petition for rehearing we may state that there is an inaccuracy in the following italicized portion of our opinion:

"The second and principal cause of action stated by respondent relates to the injury inflicted by flood waters in spreading out upon and over his farming lands and *destroying the crops growing thereon.*"

The damage was not to *growing crops*, but it was caused by the additional expense that would be incurred in cultivating the land and harvesting a future crop. There was some evidence to support the finding in that respect.

[9] As to the supposed conflict between findings 5 and 6 we must remember that, if possible, findings are to be reconciled so as to support the judgment. While the expression in finding 6, "said washing and said cutting," standing alone, might be construed as referring to the "drainway" mentioned in finding 5, yet when the entire finding, No. 6, is read in connection with finding No. 7, it is not difficult to determine that it was intended to embrace the damage caused by the overflow of the flood waters.

The petition for rehearing is denied.

54 Cal. App. 193

PEOPLE v. SINDICI. (Cr. 970.)

(District Court of Appeal, First District, Division 1, California. Sept. 12, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Criminal law — 371(5), 661—Evidence of other forgeries admissible notwithstanding offer of admission by accused.

In prosecution for forgery of an indorsement, evidence of other forgeries was admissible to show criminal intent, and the prosecution was not required to accept an offer of accused to stipulate that whoever wrote the indorsement in question did so with intent to defraud.

On Hearing in Supreme Court.

2. Criminal law — 371(5), 372(12)—Evidence of other forgeries admissible to show intent or common scheme.

In a prosecution for forgery by timekeeper of name of mythical employee, court properly admitted in evidence a number of other checks payable to fictitious persons to show criminal intent, and also a common scheme or plan embracing two or more unlawful acts so related that proof of one tended to establish the other.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Annito Sindici was convicted of forgery, and appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

John J. Greeley and Theodore A. Bell, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

KERRIGAN, J. This is an appeal from the judgment and from an order denying defendant's motion for a new trial upon conviction of forgery.

The defendant was charged with having forged the name "L. Corvina" as an indorsement upon a pay check of the California Packing Corporation purporting to have been issued on the 19th day of April, 1919, to L. Corvina in the sum of \$21.55. The information also charged the defendant with having uttered and passed the alleged forged instrument, but there was no evidence to support this portion of the charge, and the court so instructed the jury. Thus the only issue finally submitted to them was as to whether or not the defendant forged the above-mentioned indorsement.

The defendant at the time of the alleged forgery was employed as a timekeeper of the North Beach plant of said California Packing Corporation. There was also employed at the same time and place Ella Calpestri as bookkeeper, and one Guiseppe Rinaudo as assistant timekeeper; and the evidence tended to show that the forgery

was the result of a conspiracy among these three persons to defraud said corporation. It appears that they placed upon the company's pay roll fictitious names, issued pay checks in the names of such fictitious persons, which they indorsed and cashed, dividing among them the money thus obtained. One of these checks was indorsed in the name of L. Corvina, a mythical employee.

During the trial, and notwithstanding that the defendant offered to stipulate that whoever wrote the said indorsement did so with intent to defraud the purported maker of the check, the court, against the objection of the defendant, admitted in evidence a number of other checks payable to fictitious persons issued about the same time as the one forming the basis of the charge, and indorsed by the defendant. The appellant contends that it was error to admit evidence of these other forgeries for the reason that under the circumstances of this case they came within none of the exceptions to the settled rule that in a prosecution for a particular offense evidence of other independent offenses is irrelevant. On the other hand, the prosecution argues that the questioned evidence falls within two of the established exceptions to the general rule stated, namely, to show intent, and also to show a common scheme or plan embracing two or more unlawful acts so related that proof of one tends to establish the other.

We think the evidence was admissible under either or both of these exceptions.

There are cases where proof of the commission of the act charged implies indubitably criminal intent. In such cases it is generally held that evidence of wrongful intent is inadmissible. 8 R. C. L. § 200, p. 206; 1 Jones on Ev. § 143. In certain other classes of offenses the criminal intent is not necessarily inferable from the mere commission of the act charged, so that the prosecution is compelled to resort to other proof to establish such intent. Frequently this proof takes the form of evidence of other similar acts, which rebuts the inference of mistake or inadvertence. In the case at bar the defense was a general denial; and one of the facts essential to be established in order to warrant a conviction was the felonious intent with which the indorsement was made. For this purpose evidence of other similar offenses committed about the same time was admissible to establish the criminal intent. *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972.

In the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court said:

"There are cases in which the intent may be inferred from the nature of the act. There are others where wilful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to

be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. [Citing cases.] So in a case where the defendant is charged with having received stolen property guilty knowledge is the gravamen of the offense, and scienter may be proven by other previous similar acts. [Citing cases.] In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time that the instrument described in the indictment was forged or uttered the defendant had passed, or had in his possession, similar forged instruments, as it tends to prove intent."

In the class of cases referred to as constituting an exception to the general rule evidence is admitted to show guilty knowledge, or intent of the defendant, and especially so where there is a question whether the act was accidental or intentional, since the fact that the act formed part of a series of similar occurrences in each of which the defendant was concerned is relevant as characterizing the act. *State v. Brady*, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560. Likewise in trials for arson or embezzlement evidence of other contemporaneous acts of a similar character were held admissible to show intent, or to rebut the defense of accident or mistake. *Knights v. State*, 58 Neb. 225, 78 N. E. 508, 76 Am. St. Rep. 78; *U. S. v. Russell* (D. C.) 19 Fed. 591. So also in forgery cases. *People v. Bird*, 124 Cal. 32, 56 Pac. 639; *People v. McGlade*, 139 Cal. 66, 72 Pac. 600; *State v. Minton*, 116 Mo. 605, 22 S. W. 808.

[1] The evidence of the other forgeries, then, was pertinent and relevant unless, as claimed by the defendant, his admission that whoever wrote the signature on the back of the pleaded check did so with felonious intent precluded the prosecution from the right to introduce such evidence. It is said to have been substantially so held in some courts. We have no doubt, however, that the evidence being admissible the prosecution could either accept the admission or introduce its proof, as it deemed advisable. The right of the prosecution to introduce evidence to show intent could not be limited by any admission of the defendant. 8 R. C. L. § 200, p. 207. With the court in *Higgins v. State*, 157 Ind. 57, 60 N. E. 685, we say:

"We do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial."

But we think that the evidence was also clearly admissible to show a common plan or system. Evidence of other similar crimes is competent which tends to show a plan or design, and that the act charged was

the result of the plan. Such evidence is competent to prove the offense charged.

"Where the very doing of the act charged is in issue and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. There is a decided difference between this use" and the one to show intent; "for there the object is merely to give a complexion to an act conceded or proved, i. e., to negative innocent intent, while here the object is to evidence a prior general plan, scheme or design, which in its turn is to evidence the doing of the act so planned." 1 Greenleaf on Ev. 72; Wigmore on Ev. § 304; People v. Ciulla, 187 Pac. 46.

Here the other forgeries were contemporaneous with the one charged in that they were committed about the same time, in the same manner, and against the same person; and the evidence of them was admissible for the purpose of showing that the offense charged was a part of a scheme to defraud the California Packing Corporation.

In State v. Marshall, 77 Vt. 262, 59 Atl. 916, evidence of fraudulently obtaining an additional sum of money from the same person subsequent to the one concerned in the charge, both acts being in pursuance of the same scheme to obtain money by falsely impersonating another, was admissible because such evidence tended to lessen the probability of defendant being innocent of the crime charged.

In Trimble v. State, 66 Tex. Cr. R. 207, 145 S. W. 929, evidence of the "salting" by defendant of another mine involved in another transaction between the same parties was admissible to assist in making out the guilt of the defendant by a chain of circumstances connected with the act charged.

On a trial for forgery evidence of other forgeries by defendant is admissible on the issue of intent or to show system. Taylor v. State, 47 Tex. Cr. R. 101, 81 S. W. 933.

The judgment and order are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] The application for a hearing in this court after decision by the district court of appeal of the first appellate district, division one, is denied for the reason that evidence objected to of the commission of similar offenses by defendant was clearly admissible on the ground stated by the district court of appeal that such evidence tended to prove such similarity of plan or system in committing the other acts as to indicate that the offense charged was likewise the act of this defendant, but we

express no opinion on the other ground for its admission stated by the district court of appeal.

SLOANE, SHURTLEFF, SHAW, and WILBUR, JJ., concur.

54 Cal. App. 428

BELLONE v. KLEINAU. (Civ. 3376.)

(District Court of Appeal, Second District, Division 2, California. Oct. 4, 1921.)

1. Landlord and tenant ⇨48(1)—Complaint by lessee to rescind surrender of lease held to state cause of action for value of fruit.

In a suit by a lessee induced to surrender the premises by a false representation that they had been sold, complaint held to state a cause of action for the value of fruit taken by the lessor on the theory that he had repudiated and rescinded the surrender of the premises.

2. Landlord and tenant ⇨48(2)—Tenant induced to surrender premises by misrepresentation entitled to recover the property and crop of fruit or its value.

Where a lessee, induced to surrender the premises by a false representation that they had been sold, repudiated and rescinded the transaction, he was entitled to recover the premises and the fruit growing thereon, and where the fruit had been sold by the lessor to an innocent purchaser to recover its value, notwithstanding the general rule that a defrauded party cannot both rescind and recover damages.

3. Appeal and error ⇨994(3)—Credibility of witnesses and truth of testimony is for trial judge, unless record demonstrates falsity.

The credibility of the witnesses and the apparent inconsistencies between their testimony and the admitted facts ordinarily fall within the exclusive province of the trial judge, and his findings may not be reversed unless the record demonstrates that in the very nature of things the testimony of a witness cannot be true.

4. Landlord and tenant ⇨48(1)—Evidence held to support findings that one inducing surrender of lease and selling crop was landlord's agent.

In an action by a lessee induced to surrender the premises by a false representation that they had been sold, evidence held to support findings that a real estate agent making such representation, and, after the surrender of the premises, selling the fruit thereon, was the landlord's agent and had authority from her.

5. Landlord and tenant ⇨48(1/2)—Representation inducing surrender of lease held false, and lessor charged with knowledge of falsity.

Where a lease provided for termination upon payment of liquidated damages in case of a sale of the premises, a representation

by the landlord's agent that the premises had been sold was false, and the landlord was charged with knowledge of its falsity where she had never accepted the prospective purchaser's terms, but had insisted upon different terms.

6. Evidence ⇨241(1)—Evidence of representations by agent admissible where there was evidence of agency and authority.

In an action by a tenant, induced to surrender the premises by the false representation of the landlord's agent that they had been sold, evidence as to statements of the agent was admissible, where his agency and authority were shown by other evidence.

7. Landlord and tenant ⇨48(1/2)—Lessee, attempting to rescind surrender of premises, held to have made sufficient offer to restore everything received.

Where a lease provided for termination in case of a sale of the premises on payment of liquidated damages, and, in such case released the lessee from liability for rent, and the lessee was induced to surrender the premises by a false representation that they had been sold, and thereafter attempted to repudiate such surrender, a letter written the lessor, expressing his willingness and ability to return the liquidated damages and the rent, to which the landlord would be entitled on repudiation of the transaction, was a sufficient offer to restore everything received under such transaction.

8. Appeal and error ⇨205—Error in exclusion of evidence as to conversation not shown when no attempt made to show nature of conversation.

Error in the exclusion of a question as to whether a witness had any other conversation with a certain person was not affirmatively made to appear, where there was no attempt to show the nature of the conversation that defendant expected to prove by the witness.

9. Appeal and error ⇨1032(1)—Judgment not reversed unless prejudicial error affirmatively shown.

A judgment will not be reversed unless prejudicial error be shown affirmatively.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Sam Bellone against Lena Kleinau. From a judgment for plaintiff, defendant appeals. Affirmed.

C. W. Pendleton, of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

FINLAYSON, P. J. Defendant, who owns a small ranch in Los Angeles county, leased the property to plaintiff for the term of nine months, commencing February 1, 1919. Plaintiff, as the lessee, immediately entered into possession, and remained on the land until May 28, 1919, when, by reason of the false representation of defendant's agent, he

was induced to surrender possession of the ranch and of the fruit crops growing thereon. The lease contains the following clauses:

"The party of the second part [the lessee, who is the plaintiff in this action] agrees to pay to the party of the first part [the lessor, who is the defendant here] the sum of \$500 [as rent] on the first day of June, 1919, provided, however, that the said party of the first part [the lessor] reserves unto herself the right to dispose of said property at any time prior to said first day of June, 1919, and in the event that the property is so sold and in the further event that the purchaser shall require possession of said property prior to the said first day of June, 1919, then, in that event, the party of the second part [the lessee] agrees to deliver possession of said premises to the said purchaser, after receiving from the said party of the first part [the lessor] the sum of \$250 as liquidation damages for his work and labor on said premises; and in said event said second party [the lessee] is hereby relieved from the payment of the \$500 hereinabove specified. Should the premises not be sold, then the crops raised on said premises shall be the sole property of said party of the second part."

Some time prior to June 1, 1919, defendant instructed one Peckham, a real estate agent, to sell the property for \$8,250, \$2,250 to be paid in cash at the date of sale, and the balance, \$6,000, within four years. Thereafter, and on or about May 16, 1919, Peckham received from one Erickson an offer to purchase the property for said sum of \$8,250: Erickson paid Peckham \$100 down, and offered to pay the balance as follows: \$650 in cash as and when the sale was consummated, \$1,500 to be allowed for the fruit on the ranch, and the balance, \$6,000, to be paid in six years. Peckham, whose authority to sell was oral, communicated to defendant the terms of Erickson's offer. She, however, refused to accept the offer, insisting that the balance of \$6,000 be paid in four, not six, years. The result is that there never was any unconditional acceptance of any unconditional offer, and therefore no consummated agreement to sell. This notwithstanding, Peckham, on or about May 28, 1919—while the negotiations with Erickson were pending and when it appeared that a sale of the property might be consummated—told plaintiff that the property had been sold, and induced him to accept the \$250 which, in her lease of the premises, defendant had agreed should be paid to plaintiff in the event that the property should be sold prior to June 1, 1919. At the same time, plaintiff signed and delivered to Peckham a written assignment of his interest in the lease. When this assignment was delivered by plaintiff to Peckham, it did not contain the name of any assignee. Subsequently Peckham filled in his own name as the assignee. At about this time Peckham obtained from defendant a similar assignment

of her interest in the lease. It is a fair inference that plaintiff and defendant each supposed that Peckham was procuring these assignments for the benefit of Erickson, who then appeared to be a prospective purchaser of the property, and that they were executed in the belief that thus delivery of possession to Erickson would be insured. Thereafter, on May 28, 1919, Peckham sold the fruit on the property to one Mastripolito for the sum of \$1,500. Later, defendant accepted a part of the proceeds of this sale, paid to her by Peckham pursuant to a previous understanding. Mastripolito appears to have been a bona fide purchaser of the fruit.

About June 4, 1919, plaintiff discovered that defendant had not accepted Erickson's offer to purchase the ranch, and that the property had not been sold. Accordingly, on July 5, 1919, he caused to be delivered to defendant a letter in which, after stating his readiness to return to defendant the \$250 that he had received from her agent, Peckham, and to pay the rent of \$500, which, under the terms of the lease, became due on June 1, 1919, he demanded repossession of the leased property, and that there be delivered to him the fruit on the ranch, or, in the event that it had been sold, the amount that defendant had received for it. Defendant disregarded this letter, and shortly thereafter this action was commenced. The lower court found the value of the fruit to be the amount for which it had been sold to Mastripolito, namely, \$1,500, and gave plaintiff judgment for \$750, being the amount of the proceeds of the sale of the fruit less the \$250 and the \$500 that respectively, became due to defendant from plaintiff upon the latter's rescission of the transaction whereby he had been induced to surrender his lease. From this judgment defendant appeals.

Appellant contends: (1) That the amended complaint—hereafter referred to simply as the complaint—does not state a cause of action; (2) that the evidence is not sufficient to sustain certain of the findings; and (3) that the court erred in the admission and likewise in the rejection of certain items of evidence.

[1] We think the complaint states a cause of action for the relief prayed—the recovery of a money judgment. After setting forth a copy of the written lease whereby defendant, as the lessor, had leased the ranch to plaintiff, as the lessee, the complaint proceeds to allege, in substance, that plaintiff, upon the execution of the lease, took possession thereunder and complied with the conditions thereof; that on May 28, 1919, defendant and her agent represented to plaintiff that the property had been sold and that the purchaser required possession prior to June 1, 1919; that thereupon defendant tendered plaintiff \$250, according to the terms of that clause in the lease which we have

quoted above; that, relying upon defendant's said representation, plaintiff accepted from the former the \$250, relinquished possession of the leased premises, and assigned his lease to defendant and her agent; that, in truth and in fact, the property had not been sold, and defendant's representation that it had been was false, as defendant well knew; that as soon as plaintiff discovered that the property had not been sold, he demanded of defendant and her agent repossession of the premises and the fruit growing thereon, and, at the same time, tendered to defendant and her agent the \$250 that had been paid to him and also the \$500 rental which the lease required to be paid on June 1, 1919, in the event that the property should not be sold prior to that date; that, though the property was not sold prior to June 1, 1919, plaintiff and her agent have taken possession thereof; that defendant refuses to deliver to plaintiff possession of the premises and the fruit; that defendant and her agent "have sold from said premises the fruit growing thereon which belonged to said plaintiff," the value whereof is \$2,500; and that by reason thereof plaintiff has been damaged in the sum of \$1,750, being the value of the fruit sold by defendant and her agent, namely, \$2,500, less the \$250 that was paid to plaintiff when he surrendered possession and the \$500 that became due from him on June 1, 1919, as the agreed rental. Wherefore plaintiff prayed judgment for \$1,750.

Appellant erroneously assumes that this action is one sounding in tort, and that respondent in suing to recover damages for the deceit practiced upon him. So assuming, she attacks the complaint upon the ground that, though a defrauded party may elect either to rescind the fraudulent transaction and recover what he may have been induced to surrender or to affirm it and claim damages, he cannot do both. Appellant's claim, to state it in her counsel's language, is that the complaint "undertakes to state a cause of action bottomed upon both rescission and damages." There is no merit in this contention. The complaint clearly proceeds upon the theory that the transaction that involved the relinquishment of possession by plaintiff and the acceptance by him of the agreed \$250 was repudiated and rescinded by him upon his discovering the falsity of the representation that the property had been sold prior to June 1, 1919. All the facts necessary to show that plaintiff had repudiated and rescinded that transaction are set forth in the complaint. And he is suing for the monetary equivalent of the fruit which defendant had put out of her power to restore. He is suing for that equivalent, not as damages, but as a substitute for the fruit itself.

Plaintiff places much reliance upon the decision of our Supreme Court in *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58

Pac. 92, 61 Pac. 667, where it is held that if the fraudulent transaction—in that case a contract of settlement or compromise—be rescinded or repudiated, an action sounding in tort to recover damages for the deceit cannot be maintained. The gist of that decision is substantially this: If the defrauded party has elected to stand upon and affirm the fraudulent transaction, then he may recover damages in an action of tort based upon the deceit, his damages being compensation for whatever loss he may have sustained by reason of having been induced to accept something of less value than that for which he had bargained. But if, instead of standing upon and affirming the transaction, the defrauded party has elected to repudiate the whole fraudulent transaction and thus entitle himself to be restored to the status quo, he can recover that which he may have transferred to the defrauding party upon making to the latter a proper offer to restore anything of value which he may have received. The defrauded party may not, however, recover the property or thing of value that he was induced to transfer to the defrauding party, and, in addition, damages occasioned by the deceit.

[2] The complaint in the instant case does not do violence to the principles announced in the *Westerfeld Case*. The facts alleged in the complaint show that plaintiff elected to repudiate and rescind, and that he has repudiated and rescinded the fraudulent transaction which resulted in his loss of possession of the leased land and the fruit growing thereon. Having thus repudiated that transaction, plaintiff became entitled to recover all the property that he had been induced to relinquish—the land and the fruit. But the complaint discloses that a valuable part of the relinquished property, the fruit, had been sold by defendant to an innocent purchaser before the action was commenced, thus revealing the fact that defendant has put it out of her power to make restitution of the fruit itself. Such being the case, plaintiff, still basing his right to relief upon his rescission and repudiation of the fraudulent transaction, is entitled to recover from defendant the money for which the fruit was sold, less the amounts due from him to defendant, namely, the \$250 that was paid to him by defendant's agent when he was induced to surrender the leased property, and the \$500 rental that would have become due from him to defendant on June 1, 1919, had he not surrendered the leased property to defendant's agent. Any money judgment that might be given upon the cause of action alleged in the complaint would be given, not in affirmance of the fraudulent transaction, but for the monetary equivalent of fruit which, as between plaintiff and defendant, belonged to the former when plaintiff rescinded the fraudulent transaction. Such monetary equivalent is recoverable, not

as damages, but as a substitute for the fruit that defendant is unable to restore. In support of our conclusion that the complaint states a cause of action and that it warrants the relief that was granted, reference may be had to the following cases—if, indeed, any authority be necessary to sustain so plain a proposition: *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, and *Valentine v. Richards*, 59 Hun, 619, 13 N. Y. Supp. 417, *Valentine v. Richardt*, affirmed in 126 N. Y. 272, 27 N. E. 255.

[3] It is earnestly urged that the evidence is insufficient to justify certain of the findings. This contention is based largely upon matters going to the credibility of the witnesses and to apparent inconsistencies between the statements of certain witnesses and the admitted facts. Such questions ordinarily fall within the exclusive province of the trial judge, and we may not reverse his findings unless the record demonstrates that in the very nature of things the testimony of a witness cannot be true. We have no such case here. It would serve no useful purpose to set forth the testimony in extenso or to consider in detail all of the matters as to which it is claimed the evidence is insufficient. It will suffice to consider those upon which appellant chiefly relies.

[4] It is urged that there is nothing in the evidence to show that defendant represented to plaintiff that the property had been sold. The claim is that the evidence does not show that defendant's agent, Peckham, was authorized to represent to plaintiff that the property had been sold, and that the purchaser required possession. Defendant testified that she "gave Peckham the ranch to sell; that he had the right to sell it." He had previously acted for defendant in other matters. The evidence as a whole warranted the inference that defendant had verbally authorized Peckham to do whatever might be necessary to sell the property, on terms satisfactory to her, and to put the purchaser in possession if he should succeed in selling the property on satisfactory terms. It also is a fair inference from the evidence, considered in its entirety, that defendant left to her son, as well as to Peckham, all matters connected with the sale of the ranch. She and her son testified that the son, prior to June 1, 1919, presumably with defendant's knowledge and consent and as her representative, told plaintiff over the telephone that the property had been sold, that the purchaser required possession, and that Peckham would pay plaintiff the \$250 which, by the terms of the lease, was to be paid to him in the event that the leased property should be sold before the 1st of June. It sufficiently appears, therefore, from defendant's own testimony, that through her authorized agents, Peckham and her son, she notified plaintiff that the property had

been sold, and that possession would be required by the purchaser.

[5] The evidence shows beyond all cavil the falsity of the representation that the property had been sold. There never was any meeting of the minds of defendant and the prospective purchaser, Erickson, respecting terms of sale. Erickson offered to pay the balance of \$6,000 in six years; defendant insisted upon that balance being paid in four years; the two never did come to an agreement; and Erickson's offer to purchase on the terms proposed by him never was unconditionally accepted. Therefore there never was a sale of the premises. Defendant is charged with knowledge that the property was not sold and that the representation that it had been was false. In the very nature of things, she must be deemed to have known whether or not she had sold her own property.

It is claimed that the evidence shows that Peckham, when he sold the fruit, was acting in his own behalf, or as Erickson's agent, and not for or on behalf of defendant. Upon this issue there was a sharp conflict in the evidence. There was, however, testimony sufficient to sustain the finding that defendant sold the fruit through Peckham as her agent. The receipt that was given by Peckham to Erickson for the \$100 deposited by the latter when he made his offer to purchase shows, as we interpret it, that one of the terms of the proposed sale was that Erickson would allow \$1,500 for the fruit. Peckham testified that Erickson's proposed terms of purchase were immediately communicated by him to defendant, who, therefore, must have known that it was proposed to sell the fruit for \$1,500. Indeed, Peckham testified that he told defendant that, in order to complete the deal, he would have to sell the fruit to make to Erickson the \$1,500 that the latter agreed to allow therefor. Asked why he had filled in his own name in the blank space that had been left for the name of the assignee in the written assignment of plaintiff's interest in the lease, Peckham replied:

"Because I was—I had—it was to give a bill of sale of that fruit. I was to handle the sale of the fruit. It was just a question. I had to sell the fruit for \$1,500 in order to put this sale through, and she [defendant] told me to go on and sell the fruit."

After Peckham sold the fruit he divided the proceeds with defendant pursuant to an agreement which, he testified, he had theretofore made with her. Appellant makes much of the fact that, after she and plaintiff had assigned to Peckham their respective interests in the lease, Peckham, according to testimony given by defendant and her witnesses, asserted the right under these written assignments to sell the fruit as his own. But Peckham testified:

"When I bought this lease, or took this lease from Mr. Bellone [meaning Bellone's assignment of his interest in the lease], I absolutely was acting merely for Mrs. Kleinau."

The learned trial judge, as was his privilege, evidently believed this testimony. It was sufficient for the purpose, and we, therefore, may not reverse the finding. Without further citation from the record, let it suffice to say that the evidence fully warranted the trial judge in his conclusions upon the facts in issue. Only the apparent earnestness of counsel has induced us to give more attention to this point than it deserves in view of the rule so thoroughly established by our decisions that a reviewing court may not set aside a finding if there is any substantial evidence to support it.

[6] Appellant was not prejudiced by the court's rulings on the admission and rejection of evidence. Plaintiff, over defendant's objection, was permitted to testify that, defendant not being present, Peckham told him on May 28, 1919, that the premises had been sold, and that the purchaser had demanded possession. As we already have shown, Peckham's agency and his authority to represent defendant in all matters pertaining to the sale of the premises, including delivery of possession to the purchaser, should the latter require it, was sufficiently shown by other evidence in the case. It was proper, therefore, to permit Peckham to testify to what he, as defendant's agent, told plaintiff respecting the sale of the ranch and the necessity for surrendering possession to the supposed purchaser.

[7] The court did not err in admitting in evidence the letter of July 5, 1919, from plaintiff's attorney to defendant—the letter demanding that defendant deliver to plaintiff the fruit, or pay to him the amount for which she had sold it. The claim seems to be that this letter was not a sufficient offer to restore to defendant everything of value that plaintiff had received from her under the transaction whereby he had been trapped into surrendering possession of the leased property on the supposition that it had been sold to Erickson prior to June 1, 1919. In the first place, we doubt if, under the circumstances of this case, it was necessary to offer to restore to defendant the two amounts which, on a rescission of the fraudulent transaction, should be credited to her, namely, the \$250 and the \$500, respectively. The \$1,500 that defendant and her agent received from the sale of the fruit—fruit to which plaintiff would have been entitled had it not been sold—exceeded the aggregate of the two sums which, on plaintiff's election to repudiate the fraudulent transaction and to affirm the lease contract, would be due from him to defendant. Defendant, therefore, would be required to account to plaintiff for a greater sum than the amount that was due from him

to her. But this notwithstanding, and assuming, for the purposes of this decision, that under the circumstances an offer to restore to defendant everything of value was necessary, it was not necessary that the language of the tender should conform to technical niceties. The letter of July 5, 1919, expressed plaintiff's willingness and ability to return the two sums—the \$250 and the \$500—to which defendant would be entitled upon plaintiff's repudiation of the transaction that resulted in the surrender by him of the leased premises. That was all that was required. *Mitchell v. Moore*, 24 Iowa, 394, 9 C. J. 1213.

[8, 9] Complaint is made that the court erred in sustaining an objection to a question propounded to defendant's daughter when called as a witness for the defendant. That witness, after having detailed a conversation that she had had with Peckham, was asked, "Was there any other conversation that you had with Mr. Peckham at his office?" The court sustained an objection to this question. Defendant made no attempt to show the nature of the conversation that she expected to prove by this witness, and we, therefore, cannot say that it has affirmatively been made to appear that the court erred. A judgment will not be reversed unless prejudicial error be shown affirmatively. There are other objections as trivial and unimportant as those to which we have adverted. No purpose would be subserved by a more extended reference thereto. Suffice it to say that we find no reversible error.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

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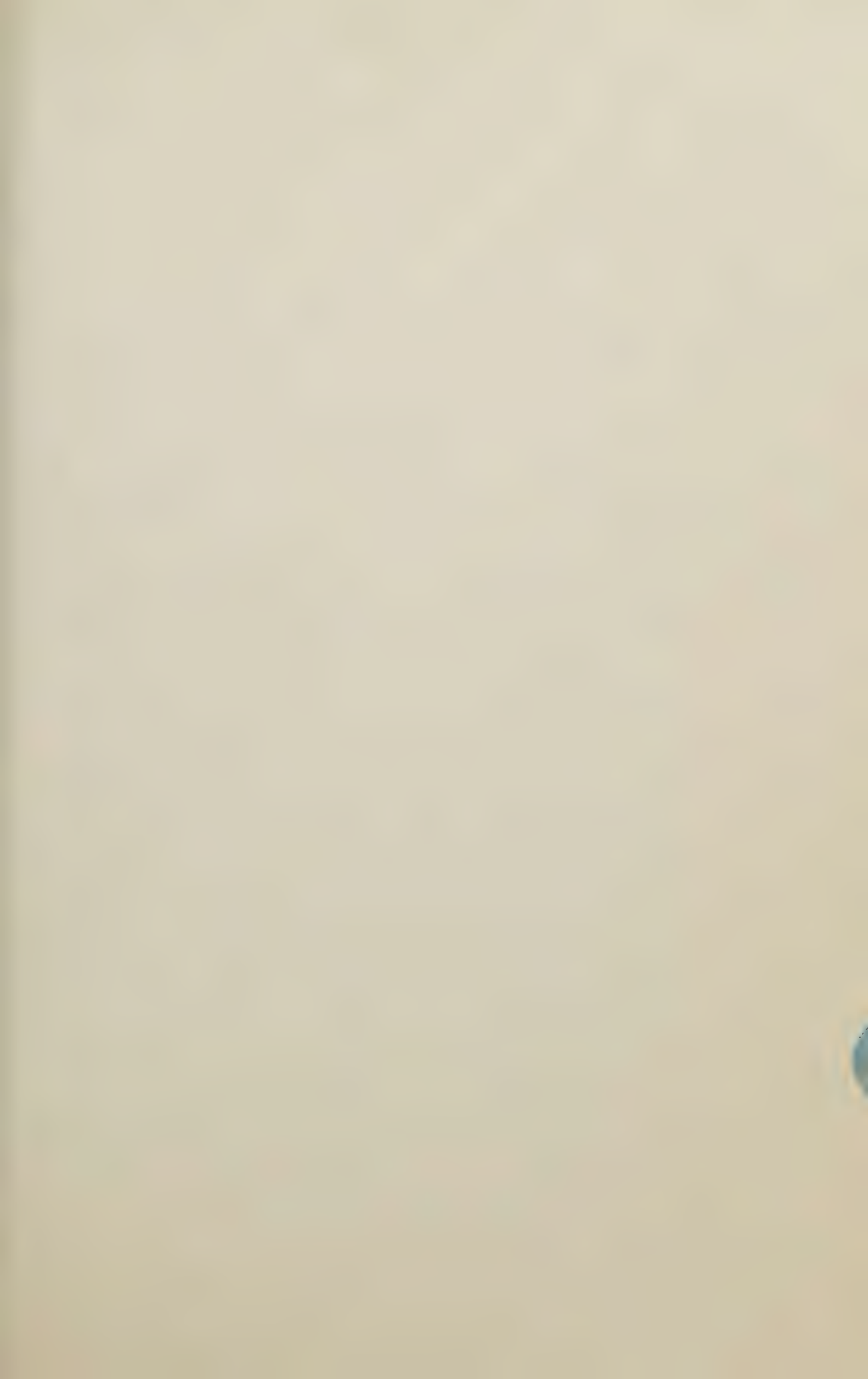
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MEMORANDUM DECISIONS

(54 Cal. App. 378)

PEOPLE v. STERLING. (Cr. 993.) (District Court of Appeal, First District, Division 1, California. Sept. 27, 1921.) Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge. Louis Sterling was convicted of murder in the first degree, and he appeals. Affirmed. Edmond H. Lomasney, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was charged with killing his wife. He was found guilty of murder in the first degree, and his punishment was fixed at imprisonment in the state's prison for life. From a judgment entered on the verdict he has appealed. The matter comes before this court on an order to show cause why the judgment should not be affirmed for lack of prosecution of the appeal. Ordinarily in such matters we would not consider the record further than to determine whether or not due diligence had been exercised in perfecting the appeal. Owing to the nature of the charge and the gravity of the sentence imposed on the defendant, however, we have gone further than is usual in such cases, and have permitted appellant on this hearing to advance reasons why the judgment against him should be modified. After consideration we find no error in the record which substantially affects the rights of the defendant. This narrows the issues presented by this appeal to the principal point urged by the defendant in support of his motion, which is that the evidence fails to show that the homicide was premeditated, and therefore is insufficient to support the verdict of murder in the first degree. There is evidence in the record, however, which, if believed by the jury, as undoubtedly it was, is sufficient to support its findings. The motion to modify the judgment is denied. The judgment and order are affirmed.



CALIFORNIA REPORTER

202 PACIFIC REPORTER

187 Cal. 323

JOHNSTONE v. PANAMA-PACIFIC INTERNATIONAL EXPOSITION CO.
(S. F. 9333.)

(Supreme Court of California. Nov. 8, 1921.)

1. Theaters and shows ☞6—Complaint against exposition company for personal injury from negligence of concessionaire held to state cause of action.

A complaint alleging that defendant exposition company invited crowds to purchase tickets and enter its fair grounds, thereby assuming the duty of providing safe thoroughfares as far as possible by ordinary care, that plaintiff purchased a ticket and entered, and that defendant had negligently granted a concession of operating motor vehicles on its thoroughfares, and that the concessionaire permitted visitors to operate electrically propelled vehicles, and defendant negligently allowed the vehicle company to conduct its concession, negligently permitting it to allow visitors unskilled in the operation of vehicles to operate them among the pedestrians without providing a suitable pathway for them, rendering the thoroughfares dangerous, and that without negligence on plaintiff's part one of the vehicles ran into her, stated a cause of action.

2. Theaters and shows ☞6—Exposition company held liable for act of concessionaire.

That injuries to a guest at a fair were inflicted by negligence of a concessionaire, and not by the proprietor, would not relieve the latter of responsibility.

3. Theaters and shows ☞6—Rule as to non-liability of bailor held not to apply to exposition company granting concessions to run vehicles.

The rule that the bailor of vehicles is not ordinarily liable for a resulting injury by the bailee to a third person, a stranger, is not applicable to an exposition company granting to a concessionaire the privilege of letting vehicles to be run along the thoroughfares of the exposition.

4. Theaters and shows ☞6—Whether vehicles of concessionaire were dangerous to pedestrians held for jury.

Whether the vehicles let to the pedestrians of an exposition company to use on the thoroughfares of the company were of a dangerous character to let to unskilled persons, was a question for the jury under allegations to that effect.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Nellie Johnstone against the Panama-Pacific International Exposition Company. From the judgment of the superior court, plaintiff appealed. On hearing in bank after judgment in the District Court of Appeal, affirming the judgment of the superior court. Judgment of superior court reversed.

Wm. M. Cannon, J. L. Taugher, and Kingsley Cannon, all of San Francisco, for appellant.

Myrick & Deering and James Walter Scott, all of San Francisco, for respondent.

LAWLOR, J. This is an appeal by the plaintiff from a judgment in favor of the defendant, sustaining a demurrer to the complaint without leave to amend, in an action to recover damages for personal injuries.

Appellant was a visitor at the Panama-Pacific International Exposition on April 17, 1915. She had purchased a ticket entitling her to admission, and was inside the grounds. Another visitor, operating an electric carriage rented from a concessionaire, ran into appellant and inflicted the injuries complained of.

The complaint contained two counts or alleged causes of action. The material allegations of the first were that respondent invited crowds to purchase tickets and enter the grounds and thoroughfares of the exposition, and thereby assumed the duty of providing safe thoroughfares as far as possible by the exercise of ordinary care; that in response to respondent's invitation, appellant purchased a ticket and entered the grounds, thereby becoming an invited guest of respondent; that within the grounds were certain thoroughfares used by visitors for travelling on foot; that these thoroughfares were generally crowded and visitors were permitted there by respondent; that prior to the date of the injury complained of, respondent had negligently granted to the Miniature Motor Vehicle Company the concession of operating its motor vehicles upon the thoroughfares mentioned; that the vehicle company permitted visitors to operate electrically propelled vehicles upon the thoroughfares; that respondent negligently allowed the vehicle company to conduct its concession, negligently permitted it to allow visitors unskilled in the operation of the vehicles to operate them among the pedestrians without providing a suitable pathway for them; that by these acts the thoroughfares were rendered highly dangerous to the pedestrians, and that respondent failed to provide safe thoroughfares for its invitees; that on April 17, 1915, without any negligence on her part, one of the Miniature motor vehicles ran into appellant while she was within the exposition grounds; that serious injuries were inflicted on her, whereby she sustained damages in the sum of \$102,714.55.

The second count or cause of action alleged similar facts concerning the relation of invitor and invitee between the parties, and the circumstances of the accident; that respondent made the Miniature Motor Vehicle company its agent for the purpose of transporting visitors by means of electrically pro-

pelled vehicles; that the vehicles were dangerous appliances when placed in the hands of persons unskilled in their management; that respondent and its agent, the vehicle company, were aware of this; that on April 17, 1915, the vehicle company negligently intrusted one of the vehicles to a visitor who was unskilled in its management, without inquiring as to his competency to operate it upon the thoroughfares mentioned; that because of the driver's ignorance of the proper operation of the vehicle and lack of skill as to its proper management, and because of the negligence of respondent in putting the driver in charge of the vehicle without instructing him concerning its operation, the driver was unable to stop the vehicle; and that because of such negligence he ran into appellant, causing the injuries.

Respondent demurred to the complaint on the ground that neither the complaint nor either count stated a cause of action, and that it was uncertain, ambiguous, and unintelligible in some nineteen particulars. Only the first of these—that it does not state a cause of action—is urged on this appeal.

Appellant asserts:

"It is well established that there are but three elements necessary to sustain an action for personal injuries: (1) The existence of a duty on the part of defendant to protect plaintiff from the injuries complained of; (2) the failure of defendant to perform that duty; and (3) an injury to the plaintiff from such breach of duty by the defendant. When these elements are brought together they unitedly constitute actionable negligence. [Citing cases.] It is respectfully submitted that the first count of plaintiff's complaint clearly and unambiguously alleged all of these requisite elements," and that "the second cause of action likewise sufficiently alleged defendant's duty, its breach thereof, and an injury to plaintiff proximately caused thereby."

Respondent's position is thus stated:

"To summarize, this defendant and respondent is charged with negligence in two particulars: First, that it failed to provide separate paths for vehicles and pedestrians; second, that its concessionaire intrusted one of its chair cars or 'electrically propelled' vehicles to a guest without inquiring into his competency, and that generally as a result of failing to provide separate passageways, and as a result of its concessionaire's failure to make proper inquiry into the qualifications of the guest, the defendant and respondent company was liable for the damages that ensued," that "nowhere in the decisions of our courts, or in the brief of our opponent, can there be found the slightest precedent that might justify a ruling that an exposition company must, as a matter of law, maintain separate paths for pedestrians and vehicles," and that "the authorities are uniform in holding that one who leases a vehicle to another is not responsible for the latter's negligent act."

In Cooley on Torts (3d Ed.) p. 1410, it is said:

"(1) The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. * * * 2. The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence."

In Thornton v. Maine State Agricultural Society, 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488, plaintiff's intestate was a visitor at a fair conducted by defendant, and was standing on a railroad platform immediately outside the inclosing fence. He was killed by a bullet from a shooting gallery operated as a concession inside the fair grounds by one White. Deceased's widow sued under a statute which allowed recovery of damages for the death of a person caused by the wrongful act, neglect, or default of another. The court held:

"It is too well settled to need the citation of authorities that, if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended.

"Therefore, having invited the public to its fair, it was the duty of the defendant to use reasonable care to keep its grounds and the usual approaches to them, so far as the approaches were under its control, in a safe condition—safe for all who were invited. It was its duty to use reasonable care that there should be no traps or pitfalls into which the invited might fall, and that there should be no dangerous plays or sports or exhibitions by which the invited might be injured. * * * The defendant would not be relieved from this duty by leasing portions of its grounds to the proprietors of shows and attractions, and becoming their landlord. As between it and the invited public, the duty still remained of using reasonable care to see that all of the exhibition grounds were safe. It was its duty so to do both in the original letting of space, and in the subsequent inspection and supervision of the show thus permitted to given its exhibition, or of the shooting gallery thus permitted to operate as a part of the fair."

In Whyte v. Idora Park Co., 29 Cal. App. 342, 155 Pac. 1018, the question was presented whether the amusement company was liable for an injury received by an invitee while patronizing a concession. The claim was made that the concessionaire was an independent contractor, and that therefore the amusement company was not liable. The court said:

"There are some cases which support this theory advanced by the appellant; but we think the weight of authority sustains the proposition that one conducting a place of amusement will not be relieved from liability for injury to a patron merely because it was caused by the negligence of a concessioner or his employee."

In the same case the court quoted the following from Stickel v. Riverview Sharp-

shooters' Park Co., 250 Ill. 452, 95 N. E. 445, 34 L. R. A. (N. S.) 659:

"While there are some decisions to the contrary, the greater weight of authority is that the owner will not be relieved from responsibility because the exhibition is provided and conducted by the concessioner, provided it is of a character that would probably cause injury unless due precautions are taken to guard against it; and this duty applies not to construction alone, but to management and operation where the device is of a character likely to produce injury unless due care is observed in its operation."

Selinas v. Vermont State Agricultural Society, 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114, was a case where a visitor at a fair was injured by being hit in the leg by a mallet used by another visitor in testing his strength on a striking machine which was operated as a concession. The court said:

"As the defendants were holding a public exhibition in this park, and inviting visitors thereto, it was their duty to render it a reasonably safe place for all persons who might lawfully be there in attendance. * * * Whether it [the machine] was dangerous or not depended upon its construction, and the manner in which it was used. These were questions of fact, or at least mixed questions of law and fact, which could not properly have been decided by the court."

In *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580, the injured party entered a saloon conducted by the defendant, and, mistaking one door for another, fell into a cellar, as a result of which he was injured. We quote:

"The appellant also contends that the court below erred in overruling his demurrer to the complaint. We think the complaint was sufficient. It alleges that the plaintiff was at the place where the accident occurred to do business with and at the invitation of the defendant. This was sufficient to show the duty on the part of the defendant, as between the parties, of keeping the premises in safe condition."

[1, 2] We are of the opinion that, in the light of these authorities, the complaint alleged facts sufficient to constitute a cause of action. Even if it be true, as respondent insists, that there was no duty, as matter of law, resting upon it to provide separate thoroughfares for vehicles and pedestrians, there was a duty imposed upon respondent to use ordinary care to keep its grounds, including the thoroughfares, in a safe condition for its invitees, and the complaint alleged that respondent was under this duty. The complaint does not limit the violation of the duty to the failure to provide separate thoroughfares for pedestrians and electric cars. The granting of the concession, the granting of permission to operate it, the granting of permission to the vehicle company to operate its cars, and the granting of permission to

it to allow persons unskilled in the operation of the cars to operate them upon the grounds among the pedestrians are all alleged to constitute negligence. As was held in *Whyte v. Idora Park Co.*, supra, and the other cases we have quoted, the fact that the injury was inflicted by a concessionaire, and not by the proprietor, would not relieve the latter of responsibility for the negligent acts which resulted in the injury, and, as was declared in *Thornton v. Maine State Agricultural Society*, supra, it was the company's duty to use reasonable care "both in the original letting of space, and in the subsequent inspection and supervision" of the concession. It requires no citation of authority to support the proposition that whether or not acts were committed which would constitute a breach of duty was a question of fact for the jury. It thus appears that facts sufficient to state a cause of action were alleged.

[3] In support of respondent's contention that it is not liable in any event for appellant's injuries, for the reason that it was a bailor of an electric car, many authorities are cited to the effect that a bailor of a machine is not liable for injuries caused through its use by a bailee. However, these authorities are not in point for the reason that they relate to the ordinary case of bailment of a machine with a resulting injury to a third person, a stranger. In this case it was alleged that the bailor was under the duty to use ordinary care to protect appellant from injury. It may well have been, and it was so alleged in the complaint, that the mere fact of giving the machine to the bailee for operation among pedestrians was an act of negligence and a breach of the duty.

[4] It was further alleged that the cars were dangerous appliances when in the hands of one unskilled in their management; that respondent and the vehicle company knew this; that respondent negligently intrusted one of them to an unskilled person; and that by reason of his ignorance the accident in question resulted. With these allegations, whether or not the car was a dangerous machine became a question for the jury to decide. *Selinas v. Vermont State Agricultural Society*, supra. If it were found to be a dangerous machine, respondent would be liable, for in *Long v. John Breuner Co.*, 36 Cal. App. 630, 634, 172 Pac. 1132, 1133, the court declared to be correct instructions by the trial court to the effect that—

"The defendant being engaged in conducting a merchandise store which it invited the public to patronize, the duty rested upon it to keep the entrances and passageways to and from the premises as so occupied and used by it in a safe condition; * * * that 'if you find that said entrance or passageway (the entrance or passageway where the plaintiff here was injured) was in an unsafe or dangerous condition, and that such condition was the proximate cause of said injuries to plaintiff, defendant is liable

therefor if its managers, officers, or agents knew of such alleged unsafe or dangerous condition, or if, as careful and prudent men, they should have known it, provided that plaintiff was in the exercise of ordinary care.'"

This conclusion also disposes of respondent's contention that, "so long as the exposition company might lawfully allow automobiles and other vehicles to enter its grounds and be driven therein, it must follow that the negligence of the driver of such vehicle cannot be imputed to it unless some relation of principal and agent be shown"; for, if it were shown that respondent knew of such alleged dangerous character of the car, he would be liable for injury resulting to appellant, an invitee, from its operation.

The complaint having alleged that a duty was owing to appellant by respondent, that there was a breach thereof, and that the injury was the result of this negligence, it was sufficient.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHAW, J.; SHURTLEFF, J.

187 Cal. 302

BALTHASAR et al. v. PACIFIC ELECTRIC RY. CO. (L. A. 6563-6565.)

(Supreme Court of California. Nov. 7, 1921.)

1. Statutes $\S$ 233—Under rule that general words will not include government, certain sections of Motor Vehicle Act held not applicable to fire or police apparatus.

Under the rule that general words of a statute will not be construed to include the government or its agencies so as to impair sovereign power, unless expressly included by name or unless that construction be clear and indisputable, the general rules of the road imposing restrictions as to speed and the turning of corners contained in Motor Vehicle Act 1917, $\S$ 20g and 22a, do not apply to fire or police apparatus.

2. Municipal corporations $\S$ 705(1)—Right of way of fire apparatus dependent on due regard to safety of public only so far as due regard affects persons required to yield.

Motor Vehicle Act 1917, $\S$ 20m, and the ordinance of Pasadena make right of way of fire apparatus over other vehicles dependent on "due regard to the safety of the public" only so far as such "due regard" affects the person required to yield the right of way; notice to such person and a reasonable opportunity to yield being necessary to charge him with the obligation.

3. Street railroads $\S$ 118(8)—Instructions on right of way of fire truck over tracks held sufficient.

Instructions in action against street railway company for injury to employees on fire

truck from collision between truck and street car held to sufficiently condition the truck's right of way on due regard of its driver to the safety of those in the car.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis M. Myers, Judge.

Consolidated action by O. B. Balthasar and another against the Pacific Electric Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for appellant.

James H. Howard and Rhodes & Howard, all of Los Angeles, and F. C. Dunham, of Pasadena, for respondents.

WILBUR, J. On the 8th day of February, 1919, a collision occurred between a motor-truck belonging to the fire department of the city of Pasadena responding to a fire alarm from North Fair Oaks avenue and an electric railway train operated by the defendant corporation. The motortruck was moving east on Bellefontaine street, which terminated in Fair Oaks avenue, and turned north on Fair Oaks avenue without passing to the south of the intersection of the medial lines of Bellefontaine and Fair Oaks avenue, colliding with a south-bound train of the defendant, before the turn was completed. Charles Carlson and O. B. Balthasar were riding on the rear running board of the motortruck. The former was killed and the latter injured as a result of the collision. The city of Pasadena, having paid an award made by the Industrial Accident Commission for the injuries of Balthasar and the death of Carlson, brought suits on behalf of Balthasar and the widow of Carlson to recover the damages sustained by them, respectively, and on its own behalf to recover damages sustained by reason of the injury to the motortruck. These three cases were consolidated for trial, and verdicts were rendered in favor of the plaintiffs in each case. The defendant railway company appeals from the judgment upon said verdicts. It is conceded by the appellant that the evidence is sufficient to sustain the jury's verdict holding the defendant company negligent in the operation of its cars at an excessive speed, but contends that the plaintiffs were guilty of contributory negligence, and that the court erroneously instructed the jury on that subject. These contentions require consideration of the meaning and effect of the ordinance of the city of Pasadena relating to the right of way for fire apparatus responding to a fire call and to the provisions of the state Motor Vehicle Act upon that subject. Appellant claims that the driver of the motor vehicle violated the law in two respects: First, in cutting a corner in violation of section 20 (g)

of the Motor Vehicle Act (Statutes 1917, p. 382); and second, in driving at a speed in excess of 15 miles per hour in approaching Fair Oaks avenue, and in approaching the railroad tracks of the defendant company, in violation, it is claimed, of section 22 (a) of the Motor Vehicle Act of 1917 (Statutes 1917, pp. 382, 404), supra. The provisions of the statute relied upon by the appellant are as follows:

"Sec. 20 (g). All vehicles approaching an intersection of a public highway, with the intention of turning thereat, * * * in turning to the left shall run beyond the center of such intersection, passing to the right thereof, before turning such vehicle toward the left. For the purposes of this subdivision the 'center of such intersection' shall be held to mean the meeting point of the medial lines of the two highways traversed by the vehicle making the turn."

"(m). Police patrol wagons, police ambulances, fire patrols, fire engines and fire apparatus in all cases while being operated as such, shall have right of way with due regard to the safety of the public; but this provision shall not protect the driver or operator of any such vehicle or his employer or principal from the consequence of the arbitrary exercise of this right or for injuries willfully inflicted."

"Sec. 22 (a). * * * Provided, further, that no person shall operate or drive a motor vehicle or other vehicle on any public highway at a greater rate of speed than fifteen miles an hour in approaching any steam, electric or other railway crossing at grade, or in approaching or traversing an intersecting highway, or crossing or intersection of highways, or in approaching or going around corners or curves in the highway, when in any of the foregoing cases the operator's or chauffeur's view of the road or railway traffic is obstructed, but anything to the contrary herein notwithstanding, no person shall operate or drive a motor vehicle or other vehicle on any public highway at a greater rate of speed than fifteen miles an hour in traversing any steam, electric or other railway crossing at grade; * * *"

The provisions of the ordinance (No. 1346) of the city of Pasadena involved in a consideration of the questions herein are as follows:

"Sec. 32. The officers and firemen of the fire department and their apparatus of all kinds, when going to or on duty at, or returning from a fire, and all ambulances, whether of public or private character, and all other vehicles, when employed in carrying sick or injured persons to hospitals or other places for relief or treatment, and the officers and policemen and vehicles of the police department shall have the right of way over all other persons and vehicles on any street, and through any procession, except over vehicles carrying the United States mail.

"Sec. 33. It shall be unlawful for the driver of any vehicle or the motorman of any street car in or upon any street in the city of Pasadena, or for any person standing or walking in any such street, to fail, refuse or neglect to allow the right of way to any officer or fireman, or apparatus of the fire department, when the same is going to or on duty at, or returning

from a fire, or to any ambulance, whether of public or private character, or to any other vehicle, when such vehicle is employed in carrying a sick or injured person to a hospital or other place for relief or treatment.

"Sec. 34. Upon the approach of any apparatus of the fire department or any police patrol wagon, or any ambulance, the driver of any vehicle or street car, in or upon any street shall immediately stop such vehicle as near as possible to the right hand curb of such street, and it shall be unlawful for any such driver to cause or permit such vehicle to be moved until such apparatus, police patrol wagon or ambulance shall have passed such vehicle."

[4] The first question for consideration is whether the general restrictions as to speed and turning of corners applicable to vehicular traffic contained in the Motor Vehicle Act apply to fire apparatus responding to a fire alarm. Such apparatus is operated by the municipality in the exercise of its governmental functions.

It must be conceded that the language of the Motor Vehicle Act in fixing speed limits, and regulating the use of public streets, is broad enough to apply to a motor fire truck responding to a fire alarm. But a familiar and fundamental rule of construction requires that this general language shall not be construed to apply to the government or its agencies unless expressly included by name. The general rule is stated by Blackstone as follows:

"I shall only further remark that the king is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, etc.) affect him not in the least, if they may tend to restrain or diminish any of his rights or interests." Blackstone's Commentaries, book 1, p. 261.

Chancellor Kent states the rule as follows:

"It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication." Kent's Commentaries, p. 460.

Associate Justice Story of the Supreme Court of the United States, sitting in the First circuit in the case of *U. S. v. Samuel Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373, stated the rule as follows:

"Now, I think, it may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the Crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him. * * * And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public

benefit, and equally applicable to all governments. * * *

"But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the Legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act. * * *

This rule has been frequently applied in this state. Most recently in the case of *Irlarry v. City of San Diego*, 189 Pac. 1041, wherein it is held that a debt due from a municipality cannot be garnisheed in a suit by a private party, even though the debt was incurred by the city acting in its proprietary capacity, and in *Engebretson v. City of San Diego*, 197 Pac. 651, following *San Francisco, etc., v. City and County of San Francisco*, 131 Cal. 356, 63 Pac. 665, holding that general provisions in regard to interest do not apply to municipalities, and in *Slayden v. O'Dea*, 182 Cal. 500, 505, 189 Pac. 1066. In *Berton v. All Persons*, 176 Cal. 610, 616, 617, 170 Pac. 151, it was held that the general language of the *McEnerney Act* does not apply to a city, although, a judgment in such a case is expressly made "binding on the whole world." The language of that case is so appropriate to the discussion that we quote the following therefrom:

"It is apparent, therefore, that the binding and conclusive force of the earlier judgment as against the city and county of San Francisco must come, if it exists at all, from the fact that a judgment under the *McEnerney Act*, valid on its face, is a judgment in rem and so 'binding on the whole world,' unless and until set aside under familiar equitable principles.

"That the judgment here offered is valid upon its face cannot be disputed. As little may it be questioned but that such a judgment is conclusive upon all private rights and so is conclusive against all the rights of private persons, individuals, associations, and corporations whether in the judgment named or unnamed. Thus beyond question this previous judgment was binding upon all the private litigants in the present action.

"It is to be considered, however, what may be its binding force and effect upon the state itself and upon the state's public agencies and mandatories such as for some purposes municipal corporations always are. In brief, our inquiry is: What was the effect of this previous

judgment upon the city and county of San Francisco present and objecting to its introduction as an estoppel against its own claim? Law is a rule of conduct dictated by the superior, the state, for the conduct and control of its people. It is only by its own grace that the state ever becomes subject to the operation of its own laws, and while in later governmental development the state frequently makes declaration that it will submit its own rights to determination in its own or other courts, yet, as such declarations are always in the nature of impairments of the sovereign power, this submission of the state is never inferred in favor of the private litigant, but must be found either actually expressed in an act or by fair intentment and interpretation to belong in the act. It is unnecessary to cite illustrations of this. They are too familiar. Suffice it to refer to the fact that title by adverse possession as against the state can only be secured under such permissive law. The *Mechanic's Lien Law* of universality in its operation does not apply to the land and buildings of the state.

"A reading of the *McEnerney Act* discloses not only a failure by the state to declare itself bound by decrees so obtained, but makes manifest that the statute was dealing only with the private rights of private persons. Giving to 'persons' its broad and indubitable meaning, the statute was dealing with the private rights of individuals, associations, copartnerships, and corporations other than public agencies acting in their public capacity. A sovereign state is not a person."

Indeed, the rule has been so frequently applied in this state that we refrain from further comment on the cases, reference to which we now make. *Whittaker v. County of Tuolumne*, 96 Cal. 100, 30 Pac. 1016; *Reclamation Dist. No. 551 v. County of Sacramento*, 134 Cal. 477, 480, 66 Pac. 668; *Ruperich v. Baehr*, 142 Cal. 190, 192, 75 Pac. 782; *People v. San Joaquin Valley, etc., Association*, 151 Cal. 797, 806, 91 Pac. 740, and cases cited therein; *People v. Cal. Fish Co.*, 166 Cal. 576, 592, 138 Pac. 79; *Westinghouse Electric Co. v. Chambers*, 169 Cal. 131, 139, 145 Pac. 1025. This rule applicable to the interpretation of statutes is broad enough to cover municipal employees. As was aptly said in *Ruperich v. Baehr*, *supra*, concerning the garnishment of salaries of employees:

"The state and its subordinate bodies perform their governmental functions through their officers and employees elected or appointed for that purpose. Therefore any process of law which would tend to embarrass such officers or employees while in office, and hinder or distract them in the discharge of official duty, would injuriously affect the capacity of the state to perform its functions as much as, if not more than, the annoyance of having its funds subjected to garnishee process."

It follows that the general rules of the road relating to speed and to the turning of corners contained in the *Motor Vehicle Act* do not apply to fire or police apparatus. We have only to consider the utter absurdity

of requiring peace officers to observe the arbitrary speed limits fixed by the Motor Vehicle Act when pursuing criminals, who may be fleeing in high-power cars at twice the legal limit, to make manifest that the Legislature did not have in view such a limitation on peace officers. And it is equally clear that they did not contemplate retarding the speed of fire apparatus in going to a fire.

The Court of Appeals of New York, in *Farley v. Mayor, etc.*, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511, held that the general language of section 1932 of the Consolidation Act (Laws 1882, c. 410, p. 470), prohibiting "any person" from driving any horse through any street "within the city of New York with greater speed than at the rate of five miles per hour" did not apply to fire apparatus going to a fire. The court merely observed that—

"It is manifest that section 1932 of the Consolidation Act can have no application to the speed at which engines or hose carts connected with the fire department shall be driven when going to a fire. * * * Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires."

See, also, *Oklahoma Ry. Co. v. Thomas*, 63 Okl. 219, 164 Pac. 120, L. R. A. 1917E, 405.

In some cases it has been held that either an implied exception must be read into local ordinances regulating speed in favor of the fire department or that the ordinance must be declared to that extent unreasonable and void. *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305; *City of Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429. For the reasons above stated it is clear that the exception is implied, and that it is unnecessary to rely upon the doctrine that unreasonable ordinances are void, and that these cases, in so far as they so hold, support our conclusion as to the proper construction of our Motor Vehicle Act.

There is nothing in the cases cited by appellant opposed to our view as to the proper construction of our statute. These cases are *People v. Little*, 86 Mich. 125, 48 N. W. 693, a case involving the right of way of a private ambulance; *Knox v. North Jersey St. Ry. Co.*, 70 N. J. Law, 347, 57 Atl. 423, 1 Ann. Cas. 164, involving the application of the common law to a collision with fire apparatus; *Woods v. Public Service Co.*, 84 N. J. Law, 171, 85 Atl. 1016, involving the effect of a statute giving a right of way to fire apparatus; *Morse v. Sweeney*, 15 Ill. App. 486, involving the construction of an ordinance expressly applying to fire apparatus; *Greenwood v. Phila., W. & Balt. R. R. Co.*, 124 Pa.

572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614, involving a collision between a railway train at a railroad crossing and a fire engine; *Garrity v. Detroit Citizens' St. Ry. Co.*, 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529, involving a consideration of the duty of a driver of a fire truck having the right of way by ordinance in approaching and crossing a street car track, and *Birmingham Ry. & Elec. Co. v. Baker*, 126 Ala. 135, 28 South. 87, to the same effect; also *Indianapolis T. & T. Co. v. Hensley (Ind.)* 105 N. E. 474, and *Coles v. N. O. Ry. & Lt. Co.*, 133 La. 915, 63 South. 401, relating to right of way at crossings of street cars and street intersections.

[2] Raving concluded that the speed limit and rules as to turning at corners do not apply to fire apparatus responding to an alarm, the next question is as to the effect of the statute and ordinance granting a right of way. It is evident that these provisions, under our view, are inserted to direct and control the operators of other vehicles upon the highway. At common law it is said no right of way was granted to fire apparatus (*Knox v. N. J. St. Ry. Co.*, 70 N. J. Law, 347, 57 Atl. 423, 1 Ann. Cas. 164); hence the necessity of statutory rules requiring the yielding of such right of way, and such provisions are to be construed in the light of this situation.

Before further considering this subject, it should be stated that the trial court instructed the jury that the driver of the fire truck was required to exercise reasonable care. The instructions on this subject are quite as favorable as the defendant was entitled to. Instructions 23, 24, 25, and 29 were given at the request of the defendant, as follows:

"(23) Due regard to the safety of the public, required of those operating a fire truck on the public streets, means the exercise of reasonable care by them for the public safety. If the truck be driven at a higher speed than is lawful, or in a manner that is unusual to vehicles, such as cutting the corner, or on the left-hand side of the street, such unusual conduct must be accompanied by a commensurate degree of care on the part of those engaged in propelling the truck so that at all times due regard may be had to the public safety. If unusual or extraordinary care is thus reasonably necessary, it must be given; and the omission thereof will constitute negligence.

"(24) The law requires that any person operating or driving a motor vehicle (and this includes a fire truck) on the public highways shall operate or drive same in a careful and prudent manner, and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and that no person shall operate or drive such motor vehicle on a public highway at such rate of speed as to endanger the life or limb of any person, or the safety of any property. A violation of this law would constitute negligence.

"(25) No right of way exists in case of fire patrols, fire engines, or fire apparatus while be-

ing operated as such, which is superior to due regard for the safety of the public; their right of way in operation on public streets must be exercised with due regard to the public safety. This means as much the safety of that portion of the public in street cars or electric cars as that portion of the public otherwise lawfully on or using the streets."

"(29) Defendant's motorman, in operating its car, was required to use only the care and caution which an ordinarily prudent and careful man would have exercised under similar circumstances, and if you find from the evidence that said motorman used such care and caution, then you cannot find defendant railway company negligent in respect to anything done by the said motorman."

These instructions certainly made the plaintiffs' right of way dependent upon a "due regard to the safety of the public."

It is evident that the right of way of fire apparatus over other vehicles is dependent upon "due regard to the safety of the public" only in so far as such "due regard" affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus. This seems to have been the view of the trial court, for it instructed the jury as follows:

"(5) If you believe from the evidence that the motorman of defendant's car failed, refused, and neglected to allow the right of way to apparatus of the fire department of the city of Pasadena, when said fire apparatus was going to a fire, *and that such motorman knew, or in the exercise of ordinary prudence should have known of the approach of such fire apparatus*, in time to have allowed said right of way, and that by reason of such failure, refusal, and neglect to allow said right of way and as a proximate result thereof one of the plaintiffs was struck, injured, or killed or suffered property damages without negligence on his or its part contributing to such injury, death, or damage, then you will find for that plaintiff." (Italics ours.)

[3] The appellant complains that its instruction No. 35, defining the ordinary care required of the occupants of the fire truck, was modified by the court by adding the portion in italics as follows:

"Under all the circumstances of the case including the circumstances above mentioned and including also the circumstance that they were entitled by law to the right of way."

Appellant's point is that the right of way is contingent upon the exercise of due care on the part of the driver of the fire truck. This instruction, as modified, taken in connection with instruction 25, above quoted, is as favorable as defendant was entitled to.

It should be stated that no question is raised in the briefs as to the relative au-

thority of the state and city over the control of fire apparatus in the public streets of a chartered city (Ex parte Daniels, 192 Pac. 442), and hence we have not discussed that question.

Appellant, in its reply brief, calls attention to the amendment of the Motor Vehicle Act by the Legislature of 1919 (Stats. 1919, p. 218), whereby the Legislature declares that the right of way therein accorded shall not be "construed as permitting the violation by the operators of any such vehicles of any of the provisions of section twenty-two of this act," etc., and suggests that this points to the proper construction of the law in force in 1917. We cannot agree with this contention.

Under this view of the law and the facts, it is unnecessary to discuss appellant's points, based upon the claim that the defense of contributory negligence is available against the city, even if not so available against the injured persons.

Judgment affirmed.

We concur: SLOANE, J.; LENNON, J.; LAWLOR, J.; SHAW, J.; SHURTLEFF, J.

(54 Cal. App. 491)

LEHNER v. McLENNAN et al. (Civ. 3396.)

(District Court of Appeal, Second District, Division 2. California. Oct. 7, 1921.)

1. Pleading $\hookrightarrow$ 35—Conclusions held surplusage to be disregarded.

Where plaintiff, seeking to recover for fumigation of defendant's orchard, pleaded under the common counts, a statement that defendant agreed to pay for the work and labor "upon a specific contract," if stating a conclusion as to the contract, was surplusage which might be disregarded.

2. Pleading $\hookrightarrow$ 205(2)—Allegations as to indebtedness on contract held not subject to general demurrer as pleading conclusions.

A complainant, seeking to recover for fumigation of defendant's orchard, which pleaded the common counts with an allegation that defendant agreed to pay for plaintiff's work and labor "upon a specific contract," was not subject to general demurrer as pleading a conclusion.

3. Appeal and error $\hookrightarrow$ 1050(1)—Error in admitting evidence held harmless, in view of similar evidence admitted without objection.

In an action for fumigating defendant's orchard in which defendant claimed damages to the orchard, any error in permitting a witness to be asked whether as far as he observed the men were using care and doing the job efficiently was not prejudicial, where the same witness had been allowed, without objection, to answer whether in his judgment the work was done in a careful and prudent manner.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Oscar Lehner against Sue A. McLennan and another. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

William H. Wylie and A. J. Morganstern, both of San Diego, for appellants.

L. N. Turrentine, of Escondido, for respondent.

WORKS, J. Plaintiff sued defendants upon a contract for the fumigation of their orchard. Defendants cross-complained for damages to their trees and fruit because of the alleged negligence of plaintiff in his performance of the agreement to fumigate. Judgment went for plaintiff upon both controversies, and defendants appeal.

Appellants' first contention is that the complaint is insufficient, as tested by the demurrer which was interposed to it and which was overruled. The text of the complaint is:

"That within the two years last past, and on or about October 7, 1918, the defendant Sue A. McLennan became indebted to plaintiff in the sum of \$316.50 for work and labor performed at her special instance and request, and materials furnished with said work and labor, and that said defendant Sue A. McLennan expressly agreed to pay said sum of \$316.50 for said work and labor upon a specific contract to do said work and labor, at said agreed price."

The demurrer to this pleading was both general and special, the specific grounds being that the complaint is uncertain and ambiguous, in that the terms of the alleged contract cannot be ascertained from it.

[1, 2] In making their point appellants direct attention to the allegation that defendant Sue A. McLennan agreed to pay for respondent's work and labor "upon a specific contract." They contend that this averment states but a conclusion of law, and that it makes the assailed pleading obnoxious to the demurrer. Up to the point where the language mentioned is used, the complaint is a fair example of pleading under the common counts, and the clause to which objection is taken may be regarded, very properly, as surplusage. Even, however, if it were not so viewed, it does not render the complaint demurrable on special grounds as stating a conclusion of law, for the common counts, as ordinarily couched, present in their entirety nothing more than a succession of conclusions. After stating the well-settled rule that a "common count" is not subject to general demurrer, the Supreme Court said, in *Pike v. Zadig*, 171 Cal. 273, 152 Pac. 923:

"There have been intimations in this court that such a pleading, although not obnoxious to general demurrer, might fall before a special demurrer on the ground of uncertainty. We think, however, that there is no force in this suggestion. If there be any objection to the

common count, it is that the pleading states conclusions of law instead of setting forth the facts upon which the plaintiff relies. The real ground of objection, therefore, is that the complaint does not state facts sufficient to constitute a cause of action. But, as we have seen, this objection is not maintainable."

See, also, *Camp v. Boyd*, 41 Cal. App. 83, 182 Pac. 60. The demurrer was correctly overruled.

Appellants' next point is that the evidence was insufficient to support the trial court's finding as to the amount due respondent; but, without reciting any considerable portion of it, we are satisfied that the evidence on the question was ample. It is enough to say that, in addition to the witnesses called for respondent, appellant Sue A. McLennan herself testified that the only reason she failed to pay respondent's claim was because of the alleged injuries to her trees. From this statement and from others made by her it is evident that there was no doubt in her mind as to the correctness of the amount of respondent's bill.

Under the claim for damages made in their cross-complaint appellants contend that respondent was in exclusive control of the orchard while the work of fumigation was going on, and that therefore the doctrine of *res ipsa loquitur* applies to the case. Respondent disputes this contention, but he insists, also, that if the controversy is to be governed by that rule he still is not liable to appellants. We find it necessary to concern ourselves only with this latter point. As defining the rule *res ipsa loquitur* appellants refer to *Duran v. Yellow Aster Min. Co.*, 40 Cal. App. 633, 181 Pac. 395, and to *Bourguignon v. Peninsular Ry. Co.*, 40 Cal. App. 689, 181 Pac. 669. In the opinion in the first of these cases it is said that—

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from a want of care."

Taking this statement as our guide, and considering, as well, what is decided in the second case cited by appellant, we have no doubt that the evidence adduced by the cross-defendant was of such a character that the trial court might very well have concluded that the damage to appellants' trees, if there was any such damage, was sufficiently explained. The men who did the work testified as to the proper technique in the performance of such services, and as to the manner in which this particular job was done by them, as did also their manager. Several experts testified, too, that damages of the nature claimed by appellants to have been caused their orchard will often occur where

a fumigating job is conducted in the best possible manner, and that there is no satisfactory way of accounting for damages resulting in such cases. We are convinced that the trial court was amply justified in finding that the damage to appellants' trees, if any, was not occasioned by the negligence of respondent.

[3] One of the expert witnesses was asked, "As far as you observed, were all these men using good care and doing the job in an efficient manner?" Upon objection the court ruled that the question was proper to be addressed to an expert, and it is contended that the ruling was erroneous. If it be admitted, which we do not decide, that the court was in error in this ruling, the action was not prejudicial. Before the question to which exception was taken was put to him, the same expert witness had been allowed, without objection, to answer this question: "In your judgment was it [the fumigation] done in a careful and prudent manner?"

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 515

MATTHIAS et al. v. RODGERS. (Civ. 3552.)

(District Court of Appeal, Second District, Division 2, California. Oct. 10, 1921.)

Appeal and error ⇨901—Appellant has burden of showing error notwithstanding inability to hire counsel.

Though appellant, claiming financial inability to employ counsel, presents her own case, the judgment must stand unless such appellant shows error.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Richard Matthias and another against Frances Rodgers. From a judgment for plaintiffs, defendant appeals. Affirmed.

Frances C. Rodgers, in pro. per.

Haas & Dunnigan, of Los Angeles, for respondents.

WORKS, J. This is an action to quiet title. Defendant appeals from a judgment for plaintiffs.

Appellant, appearing in her own behalf, presents a brief which, although most excellent in the language employed in its composition, makes no point raising even a momentary doubt whether the judgment should be affirmed. In fact, after stating that she "has not sufficient funds to bear the expense of employment of skilled counsel"—a situation which naturally enlists our great sympathy—appellant says that "this brief must therefore make its appeal more in the nature of a

human document than by an exposition of legal talent." We cannot aid appellant, sympathize with her unfortunate situation as deeply as we may. A judgment of a trial court must stand as a finality unless it be made to appear by the party prosecuting an appeal from it that some error has occurred in the proceedings leading to its rendition.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 460

PEOPLE v. GAYS. (Cr. 766.)

(District Court of Appeal, Second District, Division 2, California. Oct. 6, 1921.)

1. Homicide ⇨296—Evidence warranting refusal of instruction that officers arresting defendant had no probable cause to believe he had committed felony.

On a trial for the murder of a deputy marshal, attempting to arrest defendant when found in an unlighted automobile shortly after a burglary had been committed, evidence held to warrant the court in refusing to charge that, as matter of law, the marshal had no probable cause to believe, nor reasonable ground for suspicion, that a felony had been committed by defendant, within Pen. Code, § 836, subd. 3, relative to arrests without warrant.

2. Homicide ⇨296—Evidence of statements of deceased, received without objection, properly considered in passing on propriety of requested instruction.

On a trial for the murder of a deputy marshal attempting to arrest defendant, where the marshal's statements to his superior officer and a constable, while in the immediate discharge of his duty as an officer in the investigation of a burglary and search for an automobile which had been seen on the street without lights, were admitted without objection, the court could consider them in passing on a requested instruction that, as matter of law, the officers had no reasonable ground to believe, etc., that defendant had committed a felony.

3. Criminal law ⇨475—Opinion of surgeon as to position of deceased and defendant when shot fired properly excluded because jury could determine such question.

Where the county autopsy surgeon, besides testifying concerning the course of a bullet, in technical language, illustrated its course, and there was much other evidence from which the jury could have determined the relative positions of defendant and deceased when the shot was fired, the opinion of another surgeon as to their position in order to cause a wound of the character described by the autopsy surgeon was properly excluded.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Dominico Gays, alias Dominico Gaiys, was convicted of murder in the first degree, and

from the judgment and order denying a new trial, he appeals. Affirmed.

Ernest M. Torchia, of Los Angeles, and Charles Matthews, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

WORKS, J. Defendant appeals from a judgment of conviction of murder in the first degree, and from an order denying his motion for a new trial. The victim of appellant was a deputy marshal of Burbank. That officer informed his superior, the marshal, at about 12 o'clock at night, that he had seen a large automobile running through the streets of the little town without lights. This was at a time when the officers were on the lookout for the perpetrators of a burglary, a place of business in the town recently having been entered. The deceased, acting under instructions from his superior, enlisted the aid of a constable in his search for the car, and the two finally located it and came up to it. According to the graphic story of the constable, who was himself severely wounded in the affray which followed, some conversation took place between the officers and the occupants of the car, during which the latter were commanded to put up their hands; whereupon the deputy went toward appellant, who was seated in the rear of the car, remarking, "Here is the man I want, right here." He then stepped on the running board of the car, pulled down appellant's left hand, and handcuffed it. With his disengaged hand, and by means of a weapon taken from some hiding place in the car, appellant then shot the deputy marshal to death.

[1,2] Appellant contends that the trial court erred in refusing to instruct the jury that—

"The evidence shows as a matter of law that the officers had not probable cause to believe, nor reasonable ground for suspicion, that a felony had been committed by the defendant."

In presenting this instruction to the trial court we assume, although counsel do not quite say so in their brief, that it was the defendant's theory, having the alleged burglary in mind, that the officers had no right to arrest defendant without a warrant, unless they had reasonable cause for believing that he had committed a felony. Pen. Code, § 836, subd. 3. Following this premise counsel must also believe—their brief, however, not disclosing such a view—that the degree of appellant's crime was lessened, or that he was altogether guiltless of crime, if the officers were engaged in an attempt, at the time of the shooting, to encompass his arrest unlawfully. Passing this latter point as being unnecessary to decide we take up the question whether the facts developed at the trial were such that it became the duty of

the court to instruct the jury in accordance with defendant's request. Counsel contend that there is nothing in the record tending to show that the officers had reasonable cause to believe, nor reasonable ground for suspicion, that appellant had committed a felony, and that, perforce, the court was bound to give the requested instruction. But counsel's statement as to the condition of the record cannot be justified. The evidence shows that a burglary had been committed in Burbank shortly before the shooting of the deputy marshal, although the time elapsing between the two events does not appear; that at the time of the shooting the deputy and the constable were engaged in an endeavor to apprehend the burglars, the deputy having pursued that labor alone for some time previously; that the deputy had reported to the marshal and had told the constable that a car was being driven about the town without lights; that the car in which appellant was when the arrest was attempted had no lights when first seen by the constable, and that, in effect, that car answered the description of the car mentioned by the deputy in his report to his superior and in what he told the constable; that the deputy said to the constable that the men in the car had been following him for about three hours, and had been keeping track of him, and that he had once tried to stop the car, but that it had driven on; that, just before the car was finally overhauled and the arrest attempted, the constable saw appellant out of the car, standing at a street intersection, and that he started to run when he saw the constable approaching; that the constable then called out to the deputy, "Their watchman is on the next corner"; that before attempting to arrest appellant the deputy exclaimed, "Here is the man I want, right here;" that at the time of the attempted arrest, and probably during the entire period through which the car and its occupants were under observation by him, the deputy wore on the outside of his coat a gold-plated police badge, the identical object being exhibited to the trial court; that he carried a police billy in his hand, and that therefore the occupants of the car knew, while they were "keeping track of him," and when they refused to stop at his summons, that they were dealing with a peace officer; and that appellant's assault upon the deputy followed immediately upon the attempted arrest of the former; that it was relentless, bloodthirsty, and murderous, and of a character not likely to have been resorted to except under a fear of serious consequences to follow upon the arrest.

Under these circumstances we are convinced that the court was justified in refusing to give the requested instruction. It will be observed that, in the above statement of the evidence bearing on this question, we have referred several times to matters which

were communicated by the deputy to his superior and to the constable. The lips of the deputy were sealed in death simultaneously with his attempt to arrest appellant, and it can never be known what particular reason he had, beyond what the foregoing recital discloses, for believing that the occupants of the car, and appellant particularly, were guilty of the burglary. Up to the time when he called upon the constable to assist him, he was endeavoring alone to unravel that mystery, and what he had discovered no man may know. Notwithstanding the fact that his statements were not made under oath, they were made in and about the immediate discharge of his duty as an officer; they are in the record without objection, and the court may well have considered them in passing upon the requested instruction. If, however, this position were not warranted, there is yet enough in the record to justify the court's action. The fact that appellant ran when seen at the street intersection by the constable, the fact that he knew he was dealing with peace officers, the character of his attack upon the deputy, and the fact that the constable himself was seriously wounded either by appellant or by another member of his party, probably the latter—all these speak volumes upon the question we now consider. The court committed no error in refusing the instruction.

In passing upon this point we have not found it necessary to determine whether the officers had the right to arrest appellant, seated, as he was, in the rear seat of the car, and not driving it, for an offense committed in their presence (Pen. Code, § 836, subd. 1), because of the fact that the car occupied by the men at the time was on a public highway without lights (State Motor Vehicle Act, as amended, section 13, Stats. 1919, p. 206, Deering's 1917-1919 Supp. to Gen. Laws, p. 1493; section 32, Stats. 1919, p. 225, Deering's Supp. p. 1512). The question naturally suggests itself.

[3] While on the witness stand for the prosecution the county autopsy surgeon testified to a result of his examination of the body of the deceased deputy marshal as follows:

"One bullet entered his back three inches below the right armpit and two inches internal to the external axillary line. This bullet penetrated the right lung, glanced upward at an angle of about 15 degrees, penetrating the superior vena cava of the left lung, struck the upper part of the chest cavity, and I found the bullet lying loose in the left pleural cavity."

As a part of appellant's defense, with a surgeon on the stand, the above answer of the autopsy surgeon was read to the witness, and he was asked:

"Now, Doctor, from that description of the wound, what is your opinion as to the different

position—that is, the position of the person who was wounded and the person who fired the shot, what it must have been at the time in order to cause a wound of that character?"

The question was objected to on the ground that it was not a question for expert testimony. The objection was sustained, and the ruling is assigned as error. If the question was one proper to be addressed to an expert, a point concerning which we express no opinion, it was so merely because of the technical language of the autopsy surgeon, for, if the jury had before them a description of the course of the bullet in ordinary lay language, they could have determined from that description and from the other evidence in the case bearing on the subject—and there was much of it—what the relative positions of the two men were when the shot was fired. And they did have such a description from the autopsy surgeon himself on his cross-examination by appellant's counsel. On that examination he responded fully to this question:

"Now, Doctor, will you please illustrate by using Mr. Matthews as a subject, associated with me, * * * and illustrate just the course of those bullets; just the place where the bullets entered and where you found the bullets?"

The ruling of the court on the objection was therefore proper.

Three other points are made by appellant, but one of them is answered in what we have said concerning the question we have first considered above, and the other two do not merit a specific consideration.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 439

PEOPLE v. CASANOVA. (Cr. 801.)

(District Court of Appeal, Second District, Division 2, California. Oct. 5, 1921.)

1. Perjury $\Leftrightarrow$ 33(1)—Evidence held to sustain conviction.

In prosecution for perjury, in which it was charged that defendant committed perjury in testifying, while being prosecuted for maintaining a hotel for purposes of prostitution, that she never knew of any room in her hotel having been rented for immoral purposes, evidence held sufficient to sustain conviction.

2. Perjury $\Leftrightarrow$ 34(1)—Degree of proof required.

The evidence is sufficient, in prosecution for perjury, if there is testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend with a reasonable degree of certitude to show that the accused is guilty as charged.

3. Grand jury $\hookrightarrow$ 41—Examination of foreman of grand jury for purpose of impeaching indictment held improper.

In prosecution for perjury, in which it was charged that defendant had committed perjury during her trial for maintaining an assignation hotel, refusal to require the foreman of the grand jury by which indictment against defendant had been returned to testify as to the close political relationship between himself and the sheriff, against whom defendant had brought an action for malicious prosecution, for the purpose of showing that the prosecution was the outgrowth of a desire to aid the sheriff in his malicious prosecution action, *held* not error.

4. Indictment and information $\hookrightarrow$ 10—Indictment final when no method for review is provided by statute.

An indictment is a record of the action of a judicial body, and such action is final when no appeal therefrom, nor other method for reviewing it, is provided by the statute.

5. Grand jury $\hookrightarrow$ 41—Indictment cannot be impeached during trial by grand juror.

An indictment found to be a true bill by the grand jury and presented in open court as such cannot be impeached during the trial by a grand juror.

6. Perjury $\hookrightarrow$ 32(2)—Record in defendant's action against sheriff for malicious prosecution not admissible to show motive for prosecution for perjury.

In prosecution for perjury, the record in defendant's action against the sheriff for malicious prosecution was not admissible to show that the motive back of the prosecution for perjury was to aid the sheriff in defending the suit for malicious prosecution.

7. Witnesses $\hookrightarrow$ 363(1)—Indictment cannot be impeached by showing of improper motive for its finding and presentment.

A party may show by proper evidence the hostility, bias, or interest of any witness called to testify against him; but an indictment cannot be impeached by showing an alleged improper motive for its finding and presentment.

8. Perjury $\hookrightarrow$ 32(8)—Testimony that defendant did not know hotel was used for immoral purposes before she was charged with maintaining disorderly house inadmissible.

In prosecution for perjury, in which it was charged that defendant had committed perjury by testifying, in prosecution for maintaining a hotel for immoral purposes, that she did not know that the hotel was being so used, testimony that witness had used hotel for such purpose with witness who had testified for the state, and that such witness for state had told witness that she did not want defendant to know of her immoral conduct at the hotel, *held* inadmissible, where matters so testified to occurred more than three months prior to the time when defendant was alleged to have maintained a disorderly house.

9. Witnesses $\hookrightarrow$ 344(2)—Specific acts of immorality inadmissible to impeach witness.

Under Code Civ. Proc. § 2051, a witness can be impeached by testimony as to her immoral character, but not by specific acts.

10. Witnesses $\hookrightarrow$ 347—One cannot be impeached by failure to testify as to certain facts before grand jury, in absence of showing that he was examined with reference thereto.

A witness cannot be impeached by his failure to have testified to certain facts before the grand jury, in the absence of a showing that he was examined as to such facts, under Code Civ. Proc. § 2052.

11. Criminal law $\hookrightarrow$ 814(17)—Evidence held to warrant instruction on circumstantial evidence.

In prosecution for perjury, where it was claimed that no dependence was placed on circumstantial evidence warranting instruction thereon, evidence *held* to warrant giving of such instruction.

12. Criminal law $\hookrightarrow$ 829(1)—Refusal of instructions covered by others given not error.

Refusal to give instructions covered by the given instructions was not error.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Juanita Casanova was convicted of perjury. From a judgment of conviction, and an order denying a motion for new trial, she appeals. Affirmed.

A. J. Morganstern, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant appeals from a judgment of conviction upon an indictment charging her with perjury and from an order denying her a new trial. The perjury is alleged to have been committed by her in the course of her testimony on the trial of a criminal action wherein she was charged with maintaining a disorderly house for the purposes of assignation and prostitution.

At all the times mentioned herein defendant kept and maintained a hotel in the city of San Diego known as the New Mexico Hotel. On December 20, 1920, by a criminal complaint filed in the justice's court of the city of San Diego, it was charged that the defendant there, who is likewise the defendant and appellant here, did, on or about December 18, 1920, keep, conduct, and maintain said New Mexico Hotel for the purposes of assignation and prostitution, and did then and there rent a room therein, knowing that it was to be used for the purposes of assignation and prostitution. On the trial of that charge the defendant, after having been duly sworn as a witness, testified that she did not know of any room in her hotel ever being rented for immoral purposes or for purposes of assignation or immoral conduct. She was acquitted of the charge so referred against her in the justice's court, and shortly thereafter the grand jury for San Diego county in-

dicted her for perjury, of which she was convicted. Hence this appeal.

It is contended that the evidence is not sufficient, in that the charge of perjury is not made out by the testimony of two witnesses, or of one witness and the necessary corroboration required by the statute. Pen. Code, § 1103a. Two witnesses, Juan Garcia and Jennie Garcia, husband and wife, testified for the people. Jennie Garcia testified in substance as follows:

My husband and I occupied room 7 in the New Mexico Hotel for a week, commencing December 11, 1920. Mrs. Casanova, the defendant, was running the hotel. On the night of December 11, 1920, Mrs. Casanova told me that room 9 in the hotel was a room "just for the girls." One evening during the week that my husband and I were there, I heard Mrs. Casanova call Mrs. Lucille Roderiquez, who lived in a house near by. Mrs. Casanova told Mrs. Roderiquez to come over; that she had a man waiting there for her. Mrs. Roderiquez came over and went to room 9. A man went in the room with Mrs. Roderiquez. I did not notice how long they stayed. On another occasion during that week I saw Mrs. Roderiquez with another man in bed in room 9. On another occasion during the week between December 11th and 18th Mrs. Casanova "told me about what she had that room for, and that was that she had a room for the girls, and that she had that fixed up for the girls; if the policeman walked up, that she had the back door all ready, if the policeman was coming there to get the girls; that she had everything fixed up so the girls could go to the back way." She told me the room was "for the girls to do business in." She also said to me that the charge for the men doing business with the women there was \$2, and that she was to have 50 cents out of the \$2. Whenever the girls forgot to give her the 50 cents, she came and collected it; she would call the girls and say, "Why, listen, you owe me those 50 cents." During the time I was in the hotel, between December 11th and December 18th. I saw different men go into room 9 with Lucille Roderiquez. I don't remember how many, but different men, colored people, Mexicans, Americans, and Indians. While I was there I saw as many men visit the Rogers woman as I saw visit Mrs. Roderiquez. I saw the Rogers women with men in room 9. Mrs. Casanova told me that that room was used by these two women.

Juan Garcia, the husband of the former witness, testified in substance as follows:

While myself and wife were at the New Mexico Hotel during the week from December 11th to December 18th, men would sometimes come and ask Mrs. Casanova for girls and she sent them to room 9. The girls used to charge \$2. Sometimes the men asked Mrs. Casanova how much the girls charged, and she says \$2. After I would hear this talk between the men and Mrs. Casanova, the men went to room 9, sometimes.

This witness also testified that upon one occasion during his stay at the New Mexico

Hotel he saw a man in bed with the Roderiquez woman in room 9.

[1, 2] We think it clear that the testimony of these two witnesses was sufficient. Though Jennie Garcia and her husband were not together upon any of the occasions when either of them saw or heard the particular occurrences to which each of them testified, it was not necessary, as counsel for appellant seems to assume, that each witness should have seen precisely the same acts of immorality or have heard the same identical admissions that defendant made respecting her knowledge of the use that prostitutes made of room 9 in her hotel. On her trial in the justice's court defendant testified that she never knew of any room in her hotel ever having been rented for an immoral purpose or for the purpose of assignation or immoral conduct. She, therefore, is guilty of perjury, if a room in her hotel was rented for such immoral purposes, and if she had knowledge thereof. If there be legal evidence sufficient to establish these two facts—the renting of a room for immoral purposes and defendant's knowledge thereof—the falsity of the testimony given by defendant on her trial before the justice of the peace is made out, and she is proved guilty of perjury. That there was such legal evidence, sufficient to meet the requirements of the statute, we have no doubt. The statute respecting the quantum of evidence necessary in perjury cases will be satisfied, if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged.

"Upon a trial for perjury, direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him." *People v. Chadwick*, 4 Cal. App. 70, 87 Pac. 387.

See, also, *People v. Parent*, 139 Cal. 600, 73 Pac. 423, and *People v. Hill*, 36 Cal. App. 574, 172 Pac. 1114.

The testimony of Jennie Garcia was direct and positive that she saw the Roderiquez woman in bed with a man in room 9. She also saw different men Mexicans, Indians, and colored men go into room 9 with the Rogers woman, as well as with Lucille Roderiquez. She gave direct evidence as to what was said to her by defendant regarding these occurrences—what was said by defendant concerning the use made of room 9, the amount charged by these prostitutes, and defendant's share of the nefarious gains.

Such testimony, if true, directly established facts that are absolutely incompatible with the truth of defendant's testimony on her trial in the justice's court, to the effect that she never knew of any room in her hotel having been rented for immoral purposes. The facts testified to by Juan Garcia—that men would sometimes come and ask Mrs. Casanova for girls, that she would tell them what the girls charged, that she would send the men to room 9, that he saw men go to that room, and that once he saw a man in room 9 in bed with the Roderiquez woman—of themselves, without the aid of the inculpatory evidence given by Jennie Garcia, tended to show that a room in the hotel was rented for immoral purposes, and that defendant knew that it was so rented, thus corroborating his wife's testimony by sufficient corroborating circumstances—if, indeed, his evidence was not corroborative of his wife's by direct and positive testimony to the corpus delicti. The evidence for the prosecution was every whit as strong as that in *People v. Parent*, supra, and was clearly sufficient to justify the verdict.

[3-5] Following defendant's acquittal in the justice's court of the charge of maintaining a disorderly house, she brought an action against the sheriff for malicious prosecution. Thereafter this indictment for perjury was presented by the grand jury. On the trial of the present action counsel for defendant put the foreman of the grand jury on the witness stand and offered to prove that there was a close political relationship between the witness and the sheriff. The avowed object of this offer was to create the inference that the indictment was the outgrowth of a desire to aid the sheriff in his defense to the malicious prosecution action which defendant had brought against that official. Needless to say, this offer was promptly rejected. And though counsel was later permitted to propound to the witness one or two questions in line with his offer, the questions and answers were subsequently stricken out. In this the court did not err. An indictment is a record of the action of a judicial body, and such action is final, when no appeal therefrom, nor other method for reviewing it, is provided by statute. In *re Kennedy*, 144 Cal. 634, 78 Pac. 24, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840; *Brobeck v. Superior Court*, 152 Cal. 289, 92 Pac. 646; *People v. Panagoit*, 25 Cal. App. 158, 143 Pac. 70. We know of no provision in the law of this state that permits a grand juror, during the trial of the case on its merits, thus to impeach an indictment that has been found to be a true bill by the grand jury and presented in open court as such. See note to *United States v. Tallmadge*, 20 Ann. Cas. p. 47 et seq.

[6, 7] Defendant assigns as error the court's refusal to permit her to introduce in evidence

the record in her action against the sheriff for malicious prosecution. The avowed purpose of this offer was to show "the motive behind the prosecution." Though a party to an action may show, by proper evidence, the hostility, bias, or interest of any witness called to testify against him, it is too clear to require the citation of authority that an indictment cannot be impeached during the course of trial of the issues presented thereby by showing an alleged improper motive for its finding and presentment.

[8, 9] In the course of the cross-examination of the people's witness Jennie Garcia, she was asked by defendant's counsel if, at a place called Barrett Dam, she had not had sexual intercourse with each of four men, one of whom was J. De Torres. She answered in the negative. Later defendant put De Torres on the stand as a witness for the defense, and offered to prove by him and other witnesses that on September 4, 1920, he, in company with Jennie Garcia, drove from Barrett Dam to defendant's hotel in the city of San Diego, and that upon that occasion Jennie Garcia cautioned him not to tell defendant about her alleged conduct with men at Barrett Dam, because she lived at defendant's hotel when in the city of San Diego, and she did not want defendant to know what had been her relations with men. In its refusal to permit defendant's counsel to pursue this line of examination the court did not err. We are informed that the purpose of the offered testimony was to show the regard in which the witness Jennie Garcia held the defendant and her hotel, and that she cautioned these men not to speak to defendant about her actions with them, because she did not want defendant to know of her immoral conduct. This excuse for the offer notwithstanding, we are unable to find in the proposed testimony aught than an attempt to impeach the witness in a manner nor warranted by the rule of evidence codified in section 2051 of our Code of Civil Procedure. The Garcia woman's conduct some months prior to the week commencing December 11, 1920, when she and her husband lived at defendant's hotel, and her alleged statements respecting such prior conduct, made more than three months prior to the time when defendant is alleged to have maintained a disorderly house, can have no tendency to disprove her testimony as to what she heard and saw during the week commencing December 11, 1920, save as such prior conduct and statement may tend to impeach her by showing that she herself was a woman of loose morals. But a witness cannot be thus impeached. A witness may be expected to come to the stand prepared, if necessary, to defend his or her general reputation for truth, honesty, or integrity, or to defend against a charge that he or she has been convicted of a felony; but no witness is ex-

pected to come to the witness stand prepared to meet any of the innumerable possible charges of specific wrongdoing which, though groundless, malice or self-interest might see fit to prefer.

[10] On the cross-examination of the people's witness Juan Garcia, the court sustained an objection to the introduction by defendant of the transcript of the witness' testimony before the grand jury. The announced purpose of this offer was to show that when he gave his testimony to the grand jurors, Garcia failed to state that he had seen a man in bed in room 9 with the Roderiquez woman. Our Code prescribes as one of the methods of discrediting a witness the following:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." Code Civ. Proc. § 2052.

The witness' omission to tell the grand jurors that he had seen a man in bed with the Roderiquez woman at defendant's hotel is not a discrepancy in his testimony at the trial, unless it clearly appears that his attention was specifically called to the matter in the grand jury room, and that he was there asked to testify concerning the very facts embraced in the questions propounded at the trial. Thus, in *Commonwealth v. Hawkins*, 3 Gray (Mass.) 463, the defendant being on trial charged with murder, his counsel sought to show by the depositions of certain adverse witnesses, taken before the coroner, that they had there omitted material facts to which they had testified at the trial, and insisted that the latter testimony was so important that the witnesses could not, consistently with the operation of an active memory and the promptings of a good conscience, have omitted such facts at the inquest and remembered them at the trial. But it was held that the mere omission to state a fact, or stating it less fully, before the coroner, was not sufficient to render the depositions admissible to impeach the witnesses upon that ground, unless their attention had been particularly called to such facts at the inquest. See, also, *State v. Ogden*, 39 Or. 195, 65 Pac. 449; *State v. Gulliford*, 76 Or. 231, 148 Pac. 876, and *State v. Mosca*, 90 Conn. 381, 97 Atl. 340. If inquiries were put to Juan Garcia in the grand jury room which

had the effect of calling his attention to the question whether he had seen a man in bed with the Roderiquez woman, those inquiries, and the witness' answers thereto, should have been read to him on the witness stand. That is the only manner in which he could have been impeached, within the rule we have already stated. The fact that such questions and answers were or that they were not contained in the transcript of his testimony would not justify the offer of the entire document.

Criticism is made of an instruction admonishing the jury as to their duties. We cannot see wherein the court misdirected the jury. The charge, when considered as a whole, does not indicate any hostility on the part of the court towards the defendant. An instruction substantially identical in character is commented upon in *People v. Wolff*, 190 Pac. 22, and held not to be prejudicial.

[11] We can see no reason for concluding that the jury may have been misled by the instruction given in regard to circumstantial evidence. The point of the criticism is that a certain instruction, conceded to be a correct statement of the law as an abstract proposition, tended to mislead the jury because, in this case, so it is claimed, no dependence was placed upon circumstantial evidence. The objection is grounded upon an erroneous assumption. Much of the evidence adduced by the prosecution was circumstantial. For instance, the witness Juan Garcia testified that sometimes, after hearing a man ask defendant how much the girls charged, he would see the man go into room 9. This was circumstantial evidence of a very strong character, tending to show that, to defendant's knowledge, a room in her hotel was rented for immoral purposes.

[12] Complaint is made of the refusal of the court to give certain instructions requested by defendant. A comparison of these instructions with those given by the court discloses that the latter fully cover the substance of those requested. There was, therefore no necessity for repetition, and appellant was not prejudiced by the refusal to charge the jury in the language requested by her.

On the whole case, we see no ground for interfering with the judgment. An examination of the record shows that there was sufficient evidence to justify the verdict, and that defendant was accorded every substantial right by the learned judge of the trial court.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

54 Cal. App. 507

Ex parte CLARK. (Cr. 810.)

(District Court of Appeal, Second District, Division 1, California. Oct. 10, 1921.)

1. Perjury — 1, 9(1)—Testimony at examination under complaint alleging no offense does not constitute.

To sustain a charge of perjury, the false testimony must have been given in a judicial proceeding and have been material to a valid issue properly made therein, so that no charge of perjury can be based upon testimony given by accused at his preliminary examination where the complaint failed to charge a public offense.

2. Gaming — 88—Complaint for conducting poker game must allege playing for value.

Under Pen. Code, § 330, making it a misdemeanor to play or conduct certain enumerated games, including "stud horse poker," or any game played with cards for money or other representative of value, a complaint for playing or conducting one of the games enumerated must allege that the game was played for money or other representative of value in order to charge an offense.

Original application by George Clark for a writ of habeas corpus to be directed to the sheriff of Kings county, to secure the release of petitioner who was held in custody upon a charge of perjury. Petitioner discharged.

J. C. C. Russell, J. F. Pryor, and H. P. Brown, all of Hanford, for petitioner.

J. W. Ferguson, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Hanford, for respondent.

JAMES, J. By this proceeding petitioner seeks to be discharged from the custody of the sheriff of the county of Kings, by whom he is held under a commitment issued by a justice of the peace of said county. After proceedings had before the justice, defendant was held to answer to the superior court on a charge of perjury. Following the making of that order by the magistrate, the district attorney filed his information in the superior court. It is here claimed that the commitment was made without reasonable or probable cause. The record of the proceedings had and testimony taken before the justice of the peace on the preliminary examination of petitioner is made a part of the petition. We think that the contention of petitioner is well made and that he is entitled to be discharged from custody.

[1] It appears that the charge of perjury was based upon testimony given by petitioner in a criminal action wherein petitioner was charged with having conducted the game of "stud horse poker," which is prohibited by the terms of section 330, Penal Code. In the

complaint for perjury it was charged that petitioner, having been called as a witness in his own behalf in the criminal action mentioned, falsely testified and stated under oath that he had not conducted or played in said game. In order that a charge of perjury be made out against the petitioner, it was necessary that the alleged false testimony had been given in a judicial proceeding, and that the same was material to a valid issue properly made therein. If the complaint in the gaming case failed to charge a public offense, as is asserted, then the testimony of petitioner would not amount to perjury as that crime is defined by the statute.

[2] The complaint in the gaming case in its charging part declared as follows:

"Said defendant did then and there willfully and unlawfully open up and conduct a gambling game, to wit, stud horse poker, in the town of Armona, county of Kings, state of California, in violation of section 330 of the Penal Code of the State of California."

In section 330 of the Penal Code it is made a misdemeanor for persons to deal, play, carry on, open, or conduct certain games enumerated by name, including "stud horse poker," after which and separated by a comma is the following:

"Or any banking or percentage game played with cards, dice or any device, for money, checks, credit, or other representative of value."

In order to constitute an offense under section 330, it is essential that it be alleged and proved that the game, whether described under any of the names specifically given in the section, or under the general term of "banking or percentage game," shall have been played "for money, checks, credit, or other representative of value." The purpose of the law is to prohibit games of the kind mentioned and described at which money or property, or the representative thereof, is lost or won. It cannot be assumed that it is impossible that any of the games specifically mentioned may not be played for amusement only and without the incident of money or property being wagered or bet thereat. The tenor of all the decisions that our attention has been referred to, or that we have been able to discover, indicates that this construction should be given to the statute. *Ex parte Capanna*, 187 Pac. 1077; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Carroll*, 80 Cal. 154, 22 Pac. 129; *People v. Ah Own*, 85 Cal. 580, 24 Pac. 780. The complaint charging petitioner with the alleged crime of conducting the game of stud horse poker did not state facts sufficiently to constitute a public offense; neither did the complaint upon which the examination on the charge of perjury was had state a public offense, for the reason that it was deficient in its reference to the

former complaint in the same particular as has been pointed out.

It is ordered that petitioner be discharged from the custody of the sheriff.

We concur: CONREY, P. J.; SHAW, J.

54 Cal. App. 333

PEOPLE v. PEETE. (Cr. 782.)

(District Court of Appeal, Second District, Division 2. California. Sept. 26, 1921. As Modified Oct. 25, 1921. Hearing Denied by Supreme Court Nov. 25, 1921.)

1. Criminal law —409—Jurors under no obligation to believe particular part of accused's unsworn declaration.

Jury, in considering unsworn declarations in statement made to prosecuting attorney, were under no obligation to believe any particular part thereof, but could consider the declaration as self-incriminatory in so far as its inconsistencies and chimerical statements constituted a self-woven web.

2. Criminal law —1159(3)—Finding of jury on conflicting evidence not disturbed on appeal.

Although evidence is conflicting, where it is not clear that verdict must have been rendered under the influence of passion or prejudice, the examination of the record on appeal is only to determine whether legal evidence has been submitted sufficient to warrant a conviction; it being the peculiar and exclusive province of the jury to weigh the evidence and pass upon the credibility of the witnesses.

3. Homicide —253(2)—Circumstantial evidence may support conviction of first degree murder.

Where the evidence is entirely circumstantial and no claim of any mitigating circumstances, justification or excuse for the killing is advanced by the accused, the jury, from the nature of the wound inflicted, character of the weapon which nature of the wound indicates was used, from acts and conduct of the accused, and all the attendant and surrounding facts, may infer that deceased was unlawfully killed by the accused with malice aforethought as the result of a deliberate and premeditated purpose to kill, and, so inferring, may return a verdict of murder in the first degree.

4. Homicide —332(1)—Degree of crime exclusively for jury.

In a prosecution for murder the degree of the crime is exclusively for the jury, and their determination will not be disturbed when there is any evidence to support it.

5. Homicide —253(3)—Circumstantial evidence held to support inference that killing was unlawful, and with malice aforethought.

In a prosecution for first degree murder of one found buried in a closet in a cellar, circumstances disclosed by evidence held ample to support inference that the killing was unlaw-

ful, and that it was done with malice aforethought, and was willful, deliberate, and premeditated.

6. Homicide —236(1)—Evidence held to warrant finding that deceased was shot and not strangled.

In a prosecution for murder of man found buried in closet in cellar, evidence held to warrant finding that death was caused by a bullet from a pistol and not by strangulation.

7. Homicide —142(7)—Jurors may convict without adopting theory of state as to manner of killing.

Under an indictment for murder not stating the manner or means of death, prosecution could advance any reasonable hypothesis as to the cause of death, and the jurors were free to adopt such theory as in their judgment was most in accord with reasonable interpretation of all the incriminatory circumstances in the case, and could convict on the theory that death was caused by strangulation, and not by shooting, as contended by the state.

8. Homicide —174(5)—Guilty agency inferred from possession of articles belonging to decedent.

Possession by the accused shortly after a homicidal death of articles known to have belonged to decedent, under circumstances that would justify an inference of larceny, is sufficient to establish the guilty agency of the accused, especially when coupled with false statements as to the whereabouts of the missing person.

9. Homicide —174(1)—Concealment of body badge of guilt.

It is one of the badges of guilt to attempt concealment of the act done, and where a homicide has been committed and the body is concealed, it is a legitimate inference therefrom that the person who concealed the body is connected with the crime as author or participant.

10. Homicide —229—Body may be identified by articles of clothing and personal belongings.

Where the body has been badly burned, mutilated, or decomposed, identity need not be proved by direct and positive evidence, but may be established in a homicide case by articles of clothing and other personal belongings found on or near the body, especially where the accused has made false statements in an attempt to account for the disappearance of the person in question.

11. Homicide —268, 332(5)—Identification of body of deceased a jury question, and where evidence conflicts determination is conclusive on appeal.

Where body of deceased is identified by clothing and articles found thereon, it rests exclusively with the jury in a homicide case to determine, from all the evidence, what weight to give such identifying circumstances, and if there is a conflict in the evidence their determination is conclusive upon the appellate court.

12. Criminal law ⚡404(3)—Revolver found in house where discovered held admissible in evidence.

In a prosecution for murder of a man found buried in closet in the basement of his house, where there was evidence that there was a hole in his neck which may have been made by a 32 or 38 caliber bullet, court properly admitted in evidence a holster and 32-caliber pistol containing one discharged cartridge shell, which was found in a closet in a room upstairs.

13. Criminal law ⚡404(3)—Remoteness of discovery of pistol near scene of killing from date of crime does not affect its admissibility.

Remoteness of time of discovery at scene of killing of pistol from date of homicide, committed in house which defendant had leased, and the fact that defendant was not in actual occupancy of the premises at the time of the discovery, or that there was a possibility that unknown persons may have visited the house in the meantime, goes to the probative force of the evidence, and does not affect the admissibility of the pistol in evidence.

14. Criminal law ⚡409—Witness properly permitted to read transcript of defendant's statements.

In a homicide case court did not err in permitting to be read to the jury a phonographic reporter's transcription of statements made by accused in the presence of district attorney and others, where the reporter testified that he took accurate shorthand notes of all that was said, and that his transcription thereof was correct.

15. Criminal law ⚡406(5)—Declarations of accused held admissible.

In a prosecution for homicide, statements made by accused in the presence of a deputy district attorney of suspicious circumstances which, if not explained satisfactorily, would naturally tend to point more or less conclusively to herself as the guilty agent, and which, when compared one with another and in connection with facts established by sworn witnesses, appeared to have been disingenuous fabrications made for the purpose of misleading or warding off suspicion, were admissible in evidence.

16. Criminal law ⚡406(5), 516—"Confession" and "admission" distinguished.

In a homicide case declarations of accused in presence of district attorney, reciting what accused claimed to be her own conduct after she met deceased, or facts surrounding his disappearance, containing no statement that she had done any wrongful or unlawful act, were only admissions and not a confession, a statement not constituting a confession where it only admits particular acts or circumstances which may or may not involve guilt, being dependent for such result upon other facts or circumstances.

[Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Admission; Confession.]

17. Criminal law ⚡409—Statement of accused held admissible as part of admission.

Statement by accused as to her relation with deceased, who was found buried in a closet in a cellar, was admissible in evidence, though the precise date of death was not shown, and some of the facts as detailed in the statement may have occurred before the homicide, the facts set forth in the statement being so interrelated that the statement was an entire and connected one, bearing upon the same subject-matter, or revolving around the tragedy as the central theme.

18. Criminal law ⚡409—Accusatory questions held admissible along with answers.

Accusatory questions, propounded to accused by district attorney in an examination while investigating a killing, held admissible in evidence along with declarations and answers made by the accused, the questions and answers constituting one entire connecting statement, being admissible for the purpose of showing the accused's reaction to the questions, or to show that the answers were not those of an innocent person.

19. Criminal law ⚡1169(12)—Admission in evidence of conversation with defendant held harmless.

Overruling of objection to relation by district attorney of conversation with accused, wherein such attorney expressed to defendant his sympathy over her predicament by stating that it was unfortunate that every one seemed to be against her, was harmless error.

20. Homicide ⚡305—Instruction on law of accomplice held warranted by evidence.

Where there was evidence to justify a finding that deceased had been murdered and to connect defendant as a guilty agent, court properly instructed upon the law of the accomplice as provided by Pen. Code, § 31, although there was no direct verdict as to the manner or the circumstances of the killing, in view of section 1127.

21. Criminal law ⚡814(2)—Positive testimony not required to justify instruction.

To justify an instruction on an issue raised by the evidence, positive testimony is not required; it being sufficient if the fact may reasonably be inferred from circumstances proved.

22. Criminal law ⚡829(21)—No error in refusing requested instruction that it was jury's duty to determine degree of crime in view of charge given.

Where the court in its general instruction clearly defined the two degrees of murder and told the jurors that it was left to them to determine the degree of the crime, except in those special cases which the Legislature has said shall be murder in the first degree, it was not error to refuse a requested charge, stating specifically that it was the duty of the jury to determine the degree if it found defendant guilty of murder, under Pen. Code, § 1157.

23. Criminal law ⚡144(14)—Assumed that jurors are fair and intelligent men requiring no instruction on obvious matters.

It must be assumed on appeal that jurors were fair and intelligent men and women, and that they required no admonition or instruction as to obvious matters and rudimentary principles of just and intelligent conduct on their part.

24. Criminal law ⚡829(1)—Requested instruction properly refused where covered by charge given.

It is not error to refuse to give a special instruction, in itself unobjectionable, if it already has been covered properly and sufficiently by other instructions comprehensive enough to embrace the whole law applicable to that branch of the case.

25. Criminal law ⚡564(3)—Venue may be established by circumstantial evidence.

The venue, like any other fact in a criminal case, may be established by circumstantial evidence.

26. Criminal law ⚡564(3)—Evidence held sufficient to establish venue in murder case.

Evidence that deceased was found buried in a closet, unexplained, was sufficient to justify the jury in concluding that the homicide was committed in the county where such house was situated.

27. Jury ⚡32(1)—Statute providing for alternate juror valid.

Pen. Code, § 1089, providing that alternate jurors may be drawn and sworn and be substituted for any regular juror dying or becoming sick during the trial, does not violate Bill of Rights, § 7, guaranteeing right of trial by jury as known to the common law.

28. Jury ⚡4—Must be composed of 12 persons at common law.

One of the essentials of the jury at common law is that it be composed of 12 persons, and that 12 persons, not more nor fewer, shall pass upon and determine the issues of fact.

29. Jury ⚡149—Discharged at common law where one juror becomes incapacitated.

At common law, where a juror became incapacitated by illness or death after the jury was impaneled and sworn in chief, the proper procedure was to discharge the entire panel and begin de novo by forming a new jury.

30. Jury ⚡10—Legislature has right to make reasonable regulation respecting trial by jury; "inviolable."

The word "inviolable," as used in the Bill of Rights, § 7, providing that the right of trial by jury shall remain inviolate, connotes no more than freedom from substantial impairment, and the Legislature has a right to make any reasonable regulation or condition respecting the enjoyment of trial by jury, provided only that the essentials of a jury trial, as known to the common law, remain unchanged, and the essentials are number, impartiality, and unanimity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inviolable.]

31. Statutes ⚡124(3)—Substance of alternate jury statute held expressed in title.

The substance of Pen. Code, § 1089, providing for an alternate juror to be substituted for juror becoming sick or dying, held sufficiently expressed in the title "an act relating * * * to alternate jurors" as against a contention that the words "alternate jurors" are unknown to the law, under Const. art. 4, § 24.

32. Statutes ⚡105(1)—Constitutional provision as to title liberally construed.

Const. art. 4, § 24, requiring the subject of an act to be expressed in the title, is liberally construed.

33. Statutes ⚡141(2)—Act not amended or repealed by act adding section within constitutional provision as to re-enacting and publishing the same at length; "amendment."

An act is not revised nor a section amended within the purview of Const. art. 4, § 24, by an act which adds a new Code section and does not purport to repeal or amend any of the sections of the Code to which it is added, an amendment by implication not being "amendment" within the meaning of such constitutional provision, and Pen. Code, § 1089, providing for an alternate juror for one sick or dying, is not unconstitutional as repealing section 1123 by implication.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amend—Amendment.]

34. Statutes ⚡285—Not impeached by resort to journals of Legislature or extrinsic evidence.

The validity of a statute that has been duly verified, enrolled, approved, and deposited in the office of the Secretary of State cannot be impeached by a resort to the journals of the Legislature, or by extrinsic evidence of any character whatever, and it cannot be shown by such evidence that bill was not read three several days in each house, as provided by Const. art. 4, § 15.

35. Criminal law ⚡730(3)—No reversal by reason of improper questions by district attorney.

A conviction will not be reversed because district attorney asked improper questions, where it does not appear that he acted in bad faith, or for the purpose of raising a prejudice against the accused, and the court properly directed the jury to disregard the questions and their implications, and it not appearing that there was a miscarriage of justice.

36. Criminal law ⚡722(2)—District attorney cannot comment upon appearance of accused not testifying.

It was reprehensible and inexcusable for district attorney to comment upon the appearance of the accused while sitting as a prisoner before the bar and not tendering herself as a witness, saying, among other things, that an innocent woman facing such an ordeal could not sit in the courtroom without a tear.

37. Criminal law ☞1037(2)—Accused must object to improper remarks, and request instruction thereon.

Unless the accused objects to improper remarks of attorney and requests an instruction that the jury disregard them, the objectionable statements will not justify a reversal, unless the district attorney's conduct is so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court can destroy its influence.

38. Criminal law ☞730(12)—Remarks of district attorney held not prejudicial in view of rebuke and retraction.

Comment by district attorney upon appearance of accused while sitting as a prisoner before the bar, not having tendered herself as a witness, saying, among other things that an innocent woman facing such an ordeal could not sit in the courtroom without a tear, was not so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court could destroy its influence.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Louise L. Peete was convicted of murder in the first degree and appeals. Affirmed.

Ford & Bodkin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was charged with the murder of Jacob Charles Denton, alleged to have occurred on or about June 2, 1920, in Los Angeles county, was convicted of murder in the first degree and sentenced to life imprisonment. She appeals from the judgment and from an order denying her a new trial.

Defendant did not take the witness stand in her own behalf. No eyewitness to the tragedy was produced. There was no direct evidence of the killing of Denton. Nor was there any direct evidence connecting the defendant with the homicide. The evidence tending to show that Denton had been murdered and defendant's connection therewith was wholly circumstantial. The record here is very voluminous, covering more than 2,000 pages. The following is a bare outline of a few of the outstanding features of the case, sufficient, however, for an understanding of the points presented for our consideration.

Denton, a man of considerable means, owned a somewhat pretentious residence in the city of Los Angeles, of which he seems to have been the sole occupant immediately preceding its lease to defendant, who, in the latter part of May, 1920, in response to an advertisement by Denton offering the home for rent, leased the premises of him and thereupon assumed possession. According

to witnesses for the prosecution, Denton was last seen alive on June 1, 1920, from which date until August 25, 1920, when she left for Denver, Colo., after having rented the premises to a third party, defendant occupied the Denton home.

Hearing nothing of her uncle for some time following his disappearance about June 1, 1920, and being anxious about him, Mrs. Paul Aument, Denton's niece, on several occasions during the period that defendant was the occupant of the Denton home, made inquiries of the latter, asking her if she had heard from the uncle or knew aught of his whereabouts. Similar inquiries were also made by Mr. Aument, the niece's husband. In response to these inquiries defendant vouchsafed a number of plausible explanations to account for Denton's disappearance, all of a character calculated to quiet the anxieties of Denton's relatives.

On September 23, 1920, a Los Angeles attorney, employed by Denton's daughter, who then was residing in Phoenix, Ariz., began an investigation of Denton's disappearance. This attorney and a private detective whom he had employed to assist him made an examination of Denton's house in Los Angeles—the house that had been leased to defendant in the latter part of May. Upon examining the premises their attention was attracted to the door of a closet or crypt under the staircase in the basement. Two boards had been nailed across the face of the door and the nails driven in as though done by hammering in a clumsy manner. At the foot of the stairway was a pile of dirt. In front of the door stood a phonograph box containing bottles. Upon prying off the door they found in the closet a mound of earth about two feet high. On this mound were several pieces of stovepipe and pieces of board. Their removal disclosed a white canvas. This they proceeded to pull off. The canvas was stuffed around the mound in such a manner as to cover it completely. Underneath the canvas was a pile of dirt in the shape of a grave, about two feet in height, almost completely covering the floor of the small closet. Obtaining a shovel, the detective dug into the mound and uncovered a foot—a shoe. At this point it was decided to call in the police. In answer to the call two members of the Los Angeles police force appeared. They shoveled away the dirt, disclosing the body of a man wrapped in a quilt and tied about with rope. The rope was wrapped a number of times around the body and knotted, thus fastening the arms to the side. The body was clad in a shirt, a pair of trousers, and a pair of white shoes. At this point Paul Aument, the husband of Denton's niece, arrived on the scene, and identified a belt buckle connected with the belt around the

body as one that had been worn by Denton. It bore the latter's initial, "D." He also identified as Denton's property a ring upon the dead man's hand, as well as a pair of cuff buttons found in the shirt. The remains were in an advanced stage of decomposition, and the features were unrecognizable. The body was that of a man weighing about 200 pounds. It was taken to an undertaking establishment, where an autopsy was held by Dr. Webb, who was then acting as deputy autopsy surgeon in the absence of Dr. Wagner, the autopsy surgeon of Los Angeles county.

Upon the return of Dr. Wagner, he and Dr. Webb held another autopsy at which X-ray photographs were taken. These disclosed some dark bodies in the region of the neck, indicating the presence of metallic substances. A dissection of the neck showed that one of the vertebrae had been broken, and that the broken particles of bone were lodged in the tissue. A small opening at the base of the skull was also found. The tissues were swollen. There was evidence that the vertebral artery had been ruptured and the spinal cord severed. This, according to the evidence given by witnesses for the prosecution—medical experts and others—was due to a bullet which had hit on the side of the vertebra and evidently had passed through. Such a gunshot wound, these medical witnesses testified, would cause instant death. Dr. Wagner testified that the aperture in the neck was about the size made by a 32 or 38 caliber bullet, and stated that in his opinion the cause of death was a gunshot wound through the neck. He further testified that it was impossible to tell how long the corpse had been in the grave where it was found in the basement of the Denton home. He said that there was a constriction around the body, apparently due to a belt, and another around the neck, which might have been caused by a rope. He admitted that there were certain conditions about the body that frequently are found in strangulation, and testified that at the coroner's inquest he had stated that strangulation was a possible cause of the death.

Following its removal to the undertaking establishment, the body and the clothing in which it was found were examined by Denton's relatives and others who had known him in his lifetime. On the body was a shirt on which was a private monogram consisting of the letters "J. C. D." Paul Aument identified the shirt as one that belonged to Denton, stating that the initials "J. C. D." had been made by a rubber stamp that had been in Denton's possession. The belt buckle found on the body and bearing the initial "D," the witness had seen many times on the person of Denton, to whom it had been given by his niece, Mrs. Aument. Paul Aument also identified the trousers

worn by the deceased by a pin stripe running through the cloth. He also testified that he had many times seen on Denton's right hand the ring that was found on the body. This ring, he testified, had been enlarged and reconstructed partly with gold from the wedding ring of Denton's wife, and from Denton's mother's ring. The witness also identified the body by a gold tooth. A laundryman, who had taken the laundry from Denton's home, testified that the mark "H. J. H." on the shirt that was found on the body was the laundry mark that had been placed on the shirt for the purpose of identifying Denton's laundry. Other witnesses who had known Denton in his lifetime identified the body as that of their old-time friend.

Upon several occasions prior to the return of the indictment against her and prior to her formal arrest on the charge of murder, defendant made statements to the authorities respecting certain phases of the baffling mystery arising out of Denton's unaccountable disappearance. On one of these occasions, at a ranch in an adjoining county, on October 4, 1920, a deputy district attorney, in the presence of a shorthand reporter and others, propounded a number of questions to defendant respecting certain aspects of the case. These questions were freely answered by her. The questions and answers were taken down in shorthand by the phonographic reporter, who subsequently transcribed his notes, and his transcription was read to the jury. In her answers to these questions defendant stated facts which, when considered in connection with other evidence in the case, are of a gravely incriminating nature. Defendant objected to the introduction of the statement so made by her on October 4, 1920; and its receipt in evidence is now assigned as error. The statements or declarations made by defendant on these several occasions are replete with contradictions and fanciful excusatory explanations, evidently made in an attempt to establish her own innocence by diverting from herself the accusatory circumstances that pointed to her as the murderer of Denton.

[1] Appellant contends that because she stated in one of these declarations that she had seen Denton alive as late as July 24th, and because this statement as to the date when she last saw Denton was not directly contradicted, the jury was not warranted in finding that Denton died at an earlier date—at a date more in keeping with the prosecution's theory of the case. The jurors were under no obligation to believe any particular part of defendant's unsworn declaration. In so far as its inconsistencies and chimerical statements constituted a self-woven web in whose meshes she had inextricably entangled herself, the jury might consider her

declaration as self-incriminatory; but they were under no obligation to accept any part of it as true.

[2] The evidence as to the date of the demise is conflicting. The evidence was, as we have stated, wholly circumstantial, and the date as fixed in the indictment, June 2, 1920, seems to accord more persuasively with the prosecution's theory of the case than would a later date. There are several circumstances in the case, not necessary to be enumerated, that point to June 2d as the date when the man whose body was found in the crypt in the basement of the Denton home met his death. If we find any evidence in the record from which a rational inference might be drawn that the decedent met his death at the time which accords with the prosecution's theory of the case, our inquiry as to that feature of the case can go no further. If the evidence which bears against the defendant, considered by itself and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law, and becomes one of fact upon which the decision of the jury is final and conclusive. We sit here in criminal cases solely for the correction of errors of law; and if there is any substantial evidence upon which the verdict may find meritorious support this court cannot, and will not, disturb the jury's determination, even under a claim that there is conflicting evidence which might have raised a reasonable doubt of defendant's guilt. It is the peculiar and exclusive province of the jury to weigh the evidence and pass upon the credibility of the witnesses; and we cannot disturb their verdict on the ground of insufficiency of the evidence unless there is a total deficiency in the evidence or unless it preponderates so clearly against the verdict as to render it clear that the jury must have been under the influence of passion or prejudice. Where it is not clear that the verdict must have been rendered under the influence of passion or prejudice, our examination of the record is only to determine whether legal evidence has been submitted sufficient to warrant a conviction; for the verdict of the jury is their declaration that it is this evidence which has been accepted. *People v. Durrant*, 116 Cal. 200, 201, 48 Pac. 75.

[3-5] One of the points made on this appeal is the broad, general contention that the evidence did not warrant the jury in returning a verdict of murder in the first degree. It is the general, if not universal, rule that where, as here, the evidence is entirely circumstantial, and no claim of any mitigating circumstances, justification, or excuse for the killing is advanced by the accused, the jury, from the nature of the wound inflicted, from the character of the weapon which the nature of the wound indicates

was used, from the acts and conduct of the accused, and all the attendant and surrounding facts, may infer that the deceased was unlawfully killed by the accused, with malice aforethought, as the result of a deliberate and premeditated purpose to kill, and, so inferring, the jury, under such circumstances, may be warranted in returning a verdict of murder in the first degree. If a different rule prevailed, then, as was said in *People v. Mahatch*, 148 Cal. 203, 82 Pac. 779, "secret murders could rarely be punished by the infliction of the highest penalty." As is well said by an eminent author:

"Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd."

See *State v. Dickson*, 78 Mo. 447. The question of the degree of the crime is exclusively for the jury, and their determination will not be disturbed when there is any evidence to support it. *People v. Machuca*, 158 Cal. 64, 109 Pac. 886. We think that the circumstances disclosed by the evidence are ample to support the inference that the killing was unlawful, was done with malice aforethought, and was willful, deliberate, and premeditated.

Appellant urges two specific objections against the sufficiency of the evidence to justify the verdict. These are: (1) That the evidence is insufficient to establish that the death of the person whose body was found in the basement of the Denton home was caused by a gunshot wound; and (2) that the evidence is insufficient to show that the body was that of Jacob Charles Denton.

[6] In support of the first of these two points respecting the sufficiency of the evidence it is claimed that the evidence supports the theory that death was caused by strangulation, and not the theory that a bullet from a pistol was the cause of death. From these premises it is argued that the evidence demonstrates that a woman of defendant's apparent weight and strength could not strangle to death a man weighing 200 pounds, and, unaided and before rigor mortis had set in, drag the body from one of the floors of the Denton home to the basement, where it was found. Physicians called on behalf of defendant testified that, from conditions of the body as described by the prosecution's witnesses, it was their opinion that strangulation was the probable cause of death. Countervailing this testimony is the evidence given

by the people's witness, Dr. Wagner, who gave it as his opinion, based on his personal observations of the body and X-ray photographs of the wound in the neck, that death was caused by a gunshot wound through the neck, from which death ensued practically instantaneously. A substantially similar opinion was given by Dr. Webb. It is true that when Dr. Webb held his first post-mortem examination he found conditions in the body which he then stated indicated that strangulation might have been the possible cause of death. This was before the second autopsy, that of October 20th, revealed a wound in the neck and the presence therein of metallic substances tending to show that a bullet had passed through the vertebral artery and severed the spinal cord. It is also true that Dr. Wagner, on his cross-examination, testified that he could not tell, from his inspection of the body, how long the deceased had been dead, nor whether the shot was fired before or after death. At most, these facts merely indicate that, following the discovery of what appeared to be a bullet wound, Dr. Webb abandoned any theory of strangulation, as the probable cause of death, in favor of what to him was the more reasonable theory of death by gunshot wound. And though Dr. Wagner admitted that he could not tell whether the shot was fired before or after death, he still was of the opinion, based on his own observations of the body and the X-ray photographs, that a gunshot wound was the cause of death. The jurors, who had all the facts and circumstances before them, were in a position to judge between the opposing theories advanced by the medical witnesses and to determine which was the more probable in view of all the conditions as explained to them by the witnesses in the case. So all we have is a conflict in the theories offered by the medical experts. Such being the case, we cannot sustain appellant's contention that the evidence was wholly insufficient in law to sustain the verdict.

[7-9] Moreover, even if strangulation were the cause of death, it would not necessarily follow that the evidence was not sufficient to justify the verdict of murder in the first degree. The indictment, following the form long approved in this state, does not state the manner or means of death. The prosecution, therefore, could advance any reasonable hypothesis as to the cause of death, and the jurors were free to adopt such theory as in their judgment was most in accord with a reasonable interpretation of all the incriminatory circumstances in the case. That the person whose body was found in the basement of the Denton home was Denton himself was, as we shall presently show, sufficiently established by the circumstantial evidence brought before the jury for their con-

sideration. That the deceased was murdered by some one under circumstances warranting an inference of malice, premeditation, and deliberation is, as we have said, an inference that is reasonably deducible from all the circumstances of the case. If strangulation was the means used to kill the deceased, it undoubtedly took some appreciable time to complete the atrocious deed after the victim had become helpless. If strangulation was the cause of death, the pressure, without doubt, was steady and continuous, and was applied with wicked and cool depravity. This fact, coupled with the inherent cruelty and barbarity of such means of causing another's death, would justify the jury in finding that the murderer, whoever he or she might be, had killed the deceased unlawfully and deliberately, with malice aforethought and premeditation. Wharton on Homicide, pp. 225-227. But it is claimed that, irrespective of any question as to the degree of the crime, if Denton, a large and powerful man, weighing about 200 pounds, was strangled to death, a woman of defendant's build and strength could not have been the perpetrator of the deed. This hypothesis is not so demonstrable as to preclude the jury from reaching a different conclusion. The fact that Denton was foully murdered by someone, with a willful, deliberate and premeditated purpose to kill, was sufficiently established. The fact of defendant's guilty connection with that murder, no matter how it was accomplished, might well be inferred from all the circumstances of the case, particularly from the many inconsistencies and obvious fabrications found in the specious and fanciful extrajudicial explanations vouchsafed by her to explain certain peculiar phases of the case. That theft was her motive might well be inferred from many facts to which, so far, we have not deemed it necessary to allude. For example, there is the fact that, subsequent to Denton's disappearance, defendant took possession of his jewelry, some of which was disposed of by her. It has been held that possession by the accused, shortly after the homicidal death, of articles known to have belonged to the decedent, under circumstances that would justify the inference of larceny, is sufficient to establish the guilty agency of the accused, especially when coupled with his false statements as to the whereabouts of the missing person. *State v. Barnes*, 47 Or. 592, 85 Pac. 998, 7 L. R. A. (N. S.) 181. As was said in *Williams v. Commonwealth*, 29 Pa. 102:

"If criminal offenses are to be punished, circumstances like these must be laid hold of to prove them."

Moreover, there was an abundance of circumstantial evidence sufficient to have warranted the jury in inferring that defendant,

either alone or with the aid of some unidentified confederate or confederates, had concealed the body where it was found in the crypt under the cellar staircase. It is one of the badges of guilt to attempt concealment of the act done; and, where a homicide has been committed and the body is concealed, it is a legitimate inference therefrom that the person who concealed the body is connected with the crime as author or participator. *State v. Dickson*, supra. For these reasons it was not necessary that the jury should have adopted any particular theory as to how the deed was accomplished. To warrant the verdict it was not necessary that the prosecution should have proved, or that the jury should have believed, that a gunshot wound, and not strangulation, was the cause of death.

[10, 11] Just as little merit is there in the claim that the dead body was not identified as that of Denton. It is true that, when the corpse was found, the features were unrecognizable. But relatives and former acquaintances of Denton were able to, and did, identify the remains as those of Denton by the clothing found thereon, by a belt buckle, a ring, and cuff buttons, a gold-crowned tooth, by an old fracture of the upper third of the right arm, as well as by a general resemblance in the outlines of the face, disfigured though it was by putrefaction, and in the contour and weight of the body. This was sufficient to meet the most exacting requirements of the law, which does not demand direct or positive proof as to the identity of the body of a murdered man. Identity may be shown as effectively by inferences from facts and circumstances as from the positive testimony of witnesses. Where the body has been badly burned, mutilated, or decomposed, identity may be established, as it was here, by articles of clothing and other personal belongings found on or near the body, especially where, as in the instant case, the accused has made false statements in an attempt to account for the disappearance of the person in question. *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423; *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721; *Hawkins v. State*, 60 Neb. 380, 83 N. W. 198; *State v. Dickson*, supra; *State v. Barnes*, supra, and notes on page 181 et seq., 7 L. R. A. (N. S.); 21 Cyc. 887; *Wharton on Homicide*, p. 910. In *People v. Palmer*, supra, such evidence was held to be sufficient notwithstanding the testimony of witnesses that they had seen the person alleged to have been murdered after the date of the alleged murder, the court saying that such witnesses were "probably honest, but quite mistaken." So, also, in the *Webster Case*, 5 Cush. (Mass.)

295, there were five persons who honestly believed that they saw the deceased alive after he, in fact, had been killed. Where the body is identified by the clothing and articles found thereon, it rests exclusively with the jury to determine, from all the evidence, what weight to give such identifying circumstances; and if there is a conflict in the evidence, their determination is conclusive upon this court.

On September 24, 1920, on the top shelf of a closet in a room on the second floor of the Denton home, one of the detectives working on the case found a 32-caliber revolver in its holster. It will be recalled that, though Dr. Wagner was unable to state accurately the caliber of the bullet that caused the aperture in the neck of the deceased—probably on account of the decomposed condition of the body—he did testify that the wound was about the size made by a 32 or 38 caliber bullet. In the revolver found in the closet were five loaded cartridges and one empty shell. The closet in which the pistol was found was locked, being entered by the detective with a pass-key. Several dresses, hanging on hangers, were in the closet at the time. The pistol was identified by two witnesses, who said that it was Denton's revolver. The room in which it was found had been occupied by Denton prior to the lease of the premises to defendant. Following this lease, and until about the time when she left for Denver on the 25th of August, after having leased the premises to a third party, defendant occupied this room. On several occasions, in her statements to others, defendant claimed that on the night of June 2d or the morning of June 3d Denton had had a quarrel with a Spanish woman, who, the evidence tends to show, was a mythical personage invented by defendant to account for Denton's disappearance. In these statements defendant, it is evident, tried to create the impression that, in his quarrel with this supposititious individual, Denton had slightly wounded the "Spanish woman." On October 15th, in a conversation that defendant had with an investigator for the district attorney's office, she was asked with what weapon Denton had shot the "Spanish woman." Her reply was: "Well, you have got the gun, the gun that was taken out of the locker upstairs—or rather, the closet." She then went on to state that the bullet that had wounded the Spanish woman—a bullet from this pistol, according to her statement—subsequently was found by her in the sink of the bathtub upstairs. These replies have a tendency to show that defendant had knowledge of the presence of the revolver in the closet, and that one of the cartridges had been discharged.

[12] The revolver, its holster and the cartridges were admitted in evidence, over defendant's objection. This was not error. It

was necessary for the prosecution to show, as accurately as the circumstances would permit, the means by which and the manner in which Jacob Charles Denton had come to his death.

"The relevancy of proffered proof in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of the guilt of the defendant, and, generally speaking, an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue certain. It is not necessary that such incidental fact should bear directly upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, however small, in the chain of evidence, and tends thereby to establish the existence of the main fact in issue. [Citing authority.] Hence any fact is relevant evidence which naturally tends to show the means and method employed in the commission of a crime, and therefore it was proper in the present case to admit evidence of the identification of the cartridges picked up near the scene of, and shortly after, the explosion, and, having been so identified, they were rightfully admitted in evidence." *People v. Billings*, 34 Cal. App. 552, 553, 168 Pac. 396, 398.

Dr. Wagner, who gave it as his opinion that a gunshot wound was the cause of death, described to the jury the character and size of the aperture in the neck, saying that "it was about the size that is generally made by a 32 or 38 caliber bullet." The body was not before the jury. So the doctor, in the testimony just quoted, is describing the condition of the body at the time when he held the autopsy; he is describing, as accurately as his recollection will permit, the nature of the wound and the size and character of the aperture in the neck, and he says that the aperture was "about" the size that is generally made by a 32 or 38 caliber bullet. From all the facts as detailed to them by the physicians and by the lay witnesses respecting the nature of the wound that was found in the neck of the body, the jurors might well have drawn the inference that a bullet through the neck from a 32-caliber revolver was the cause of death. The nature of the wound in the neck, the particles of metal found therein, the presence of the 32-caliber revolver in the locked closet of the room that was occupied by the defendant at the time when it is probable that the murder was perpetrated, the fact that one cartridge in the revolver had been discharged, considered together and with the other circumstances in the case, had a direct tendency to show that the wound found in the neck of the body had been made by a bullet from this revolver that was found in the closet, thus tending to connect defendant with the perpetration of

the homicide. In *People v. Sampo*, 17 Cal. App. 149, 118 Pac. 963, referring to the admission in evidence of a rock found at the place where the defendant had beaten the deceased, the court held that such evidence was properly admitted, not only because there was testimony that the defendant had used a rock in attacking the deceased, but also because this rock was admissible in evidence for the following reasons:

"Moreover, the doctors testified that the wound inflicted upon Pistone's head appeared to have been produced by some blunt instrument, and that it could have been caused by the use of the rock in question. Having been found at the very place where the beating occurred, with fresh blood stains thereon, and in view of the testimony of the physicians that the wound could have been made by means thereof, the rock itself constituted a pertinent circumstance, to be considered with the other evidence, in determining the question of the guilt of the accused."

See, also, *People v. McDowell*, 64 Cal. 467, 3 Pac. 124, where it was said that testimony that a slungshot was found in the possession of the defendant was admissible because it was evidence tending to show "that the wounds inflicted upon the person of deceased might have been caused by such an instrument." To the same effect are *People v. Nakis*, 193 Pac. 92, *People v. Wilson*, 23 Cal. App. 519, 138 Pac. 971; *People v. Gilman*, 185 Pac. 310, and *People v. Carson*, 192 Pac. 318.

[13] The inability of Dr. Wagner to say definitely whether the aperture in the neck was of the size made by a 32 or by a 38 caliber bullet, or whether the bullet was fired before or after death, is not a ground for the exclusion of the revolver. It was the province of the jury to determine from a due consideration of all the circumstances in the case (including the fact that a 32-caliber revolver with one cartridge discharged was found in Mrs. Peete's closet) whether the deceased came to his death from a revolver of that caliber fired by the defendant. Answering a somewhat similar objection urged by the defendant in *People v. Sullivan*, 129 Cal. 560, 62 Pac. 103, the court said:

"Notwithstanding the slight difference in weight in the bullet, under the circumstances it cannot be said that the jury were not justified in finding that it was the one shot from the gun borrowed by defendant, nor can it be said that the chain of circumstantial evidence was not sufficient to support the verdict of the jury. 'It is the peculiar province of the jury to weigh the evidence and decide upon the credibility of the witnesses; and it is not our practice to disturb verdicts on this ground unless there is either a total deficiency in the evidence or it preponderates so greatly against the verdict as to render it clear that the jury must have been under the influence of passion or prejudice.'"

Any objection that the time of the discovery of the pistol was too remote from the date of the crime, or that defendant was not in the actual occupancy of the premises at the time of the discovery, or that there was a possibility that unknown persons may have visited the house in the meantime, goes to the probative force of the evidence, but does not affect its admissibility. See *People v. Nakis*, supra, and *People v. Carson*, supra. The case of *People v. Hill*, 123 Cal. 571, 56 Pac. 443, relied upon by appellant's counsel, is altogether different from this. In that case a large club was admitted in evidence, and the Supreme Court in its opinion said:

"There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it."

In the instant case it was shown that the wound in the neck might be produced by a bullet from just such a revolver as that which, with one cartridge discharged, was found secreted in the closet of a room that defendant had occupied at the time when the murder presumably was committed. And defendant's statement to the investigator for the district attorney's office tends to show that she knew all about the pistol, where it had been secreted, and that one shot had been fired from it. The court properly overruled the objection to the introduction of this evidence.

[14] It was not error to permit to be read to the jury the phonographic reporter's transcription of the statements that defendant had made at the Glenn ranch on October 4, 1920, in the presence of the deputy district attorney and others. The reporter testified that he took accurate shorthand notes of all that was said, and that his transcription thereof was correct. The document shows that defendant, upon this occasion, made declarations respecting her movements from the time she first met Denton in the latter part of May, 1920, up to the time when the statement was made on October 4, 1920. The statement covers 102 pages of the record on this appeal. It is obvious, therefore, that no one could accurately remember all that was said by the defendant and her interrogator without having his recollection refreshed either by the shorthand notes of the questions and answers or by the transcription thereof. If, therefore, the statement made by the defendant upon this occasion is not so far within the scope of a "confession" as to be inadmissible until a proper foundation is laid by showing its voluntary character, it was not error to permit the witness to read the transcription of the shorthand notes. See *People v. Ammerman*, 118 Cal. 32, 50 Pac. 18, where the court says:

"That the witness, Hall, was permitted to read his transcription of the statement, taken down by him in shorthand, was not error. He had a right to refer to this to refresh his memory."

See, also, *Estate of Moore*, 180 Cal. 585, 182 Pac. 291, where it is said that, though there is some difference in the practice in the several jurisdictions of the country, the tendency of the courts "is toward liberality rather than strict technicality in the application of the rules with respect to the admission of this sort of evidence."

[15] Many of defendant's declarations, as set forth in the statement, are her explanations of suspicious circumstances which, if not explained satisfactorily, would naturally tend to point more or less conclusively to herself as the guilty agent, or one of the guilty agents, in the commission of the crime. Her declarations, when compared one with another, and particularly when considered in connection with the facts established by the sworn witnesses in the case, appear to have been disingenuous fabrications concocted to serve the purpose of a red herring drawn across defendant's trail to throw the authorities off the scent. At any rate, they are of such a character that the jury would be justified in drawing the inference that such was their purpose. We would not have it understood that the interpretations which we have put upon the several statements made by defendant from time to time are the only legitimate constructions of which they are susceptible. It is possible that they could be viewed in a more charitable light and characterized less harshly. But, when analyzed and compared with all the facts in the case, they are reasonably subject to the inference that they are but false fabrications made with the preconceived design to thwart the efforts of the officers to solve the mystery of Denton's disappearance. And since, to support the verdict, it is our duty to assume that the jury indulged every reasonable hypothesis and inference which may be deduced from the evidence, we are justified in characterizing defendant's several declarations and admissions in the manner that we have—that is, as false statements made for the purpose of misleading those who were endeavoring to solve the many puzzling problems attending the disappearance of Jacob Charles Denton. This being so, defendant's statements are brought within the rule that false declarations, made for the purpose of misleading or warding off suspicion, though not conclusive of guilt, may nevertheless strengthen the inference arising from other facts. Such false and fabricated statements are admissible on the same theory that evidence of flight and concealment is admissible to show a consciousness of guilt. *People v. Cole*, 141 Cal. 90, 74 Pac. 547.

[16] The prosecution made no attempt to lay any foundation for a "confession" before offering defendant's statement in evidence; it being the theory of the district attorney that the statement was not a "confession," but an "admission," and as such receivable without any prior evidence of its voluntary character. We think this theory is fully justified by the nature of the statement. In no part of defendant's recital of what she claimed to be her own conduct after she met Denton, or of what she claimed to be the facts surrounding the mystery of his disappearance, did she state or admit that she had done any wrongful or unlawful act in connection with the murder for which she subsequently was indicted. None of the facts admitted by her imported guilt or involved a crime—at least not any such crime as homicide. Her statement, which is a mass of evasions, equivocations, and attempted explanations to account for Denton's disappearance and to establish her own innocence, was intended to negative the idea that she participated in any manner in the disappearance or the killing of Denton. True, it contains admissions of facts which, when taken in connection with other proved facts in the case, are circumstances of a highly incriminating nature; but it is by no means a confession of guilt. There is a clear distinction between a "confession" and an "admission" or "declaration." And though an admission by a person charged with crime, stating or suggesting the inference that he committed the crime, is so far within the scope and purpose of a "confession" that it is not admissible until a foundation has been laid by showing that it was made voluntarily (*State v. Novak*, 109 Iowa, 717, 79 N. W. 465; *State v. Nagle*, 25 R. I. 105, 54 Atl. 1063, 105 Am. St. Rep. 864), still, to constitute an admission or declaration a "confession," it must in some way be an acknowledgment of guilt and be so intended. *State v. Novak*, supra. A mere admission or declaration by a defendant against his interest is not necessarily a confession; and this is true even though the admission is criminative. *State v. Novak*, supra. The Oregon Supreme Court has stated the distinction as follows:

"* * * The admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established." *State v. Porter*, 32 Or. 135, 49 Pac. 964.

The distinction between a confession of guilt and a mere admission of a fact or facts not constituting guilt of the offense in question is clearly pointed out in *People v. Clifton*, 198 Pac. 1065, and is fully and learnedly considered in *People v. Fowler*, 178 Cal.

657, 664, 174 Pac. 892, and need not be further discussed here. Suffice it to say that, tested by the distinctions set forth in the above-cited authorities, defendant's statement of October 4, 1920, was an "admission" and not a "confession," and therefore was admissible without preliminary proof that it was made voluntarily. For it is the established rule that the admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence without preliminary proof that it was made voluntarily merely because, when connected with other facts, it may tend to establish guilt. *People v. Ammerman*, supra; *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141; *People v. Jan John*, 144 Cal. 286, 77 Pac. 950; *People v. Weber*, 149 Cal. 339, 86 Pac. 671; *People v. Wilkins*, 158 Cal. 534, 111 Pac. 612.

[17] It is of no consequence that the precise date of the death was not shown before the statement was received in evidence, and that, therefore, some of the facts as detailed by defendant may have occurred before the homicide. She was interrogated about matters relating to Denton's disappearance and his supposed murder. The facts set forth in her answers all revolve around the tragedy as the central theme. They are the separate links in one claim. The unlawful killing of Denton by some one with malice aforethought was established by circumstantial evidence sufficient for that purpose. And it matters not that some of the facts detailed in defendant's statement may have occurred before the homicide. Not only are all the facts narrated by her parts of the one statement, but they are all so interrelated that the statement is an entire and connected one, bearing upon the same subject-matter, and therefore admissible. *People v. Cahill*, 193 N. Y. 232, 86 N. E. 39, 20 L. R. A. (N. S.) 1084. Taken together, defendant's declarations, as set forth in this statement, when considered in the light of the other proved facts in the case, have a tendency to connect her with the crime as the guilty agent, or as one of the guilty agents, if, indeed, she was aided and abetted by a confederate or confederates.

[18] There is no merit in the objection that the statement did not consist alone of declarations made by defendant, but was in part made up of accusatory questions propounded to her by the deputy district attorney. Not only do the questions and answers constitute one entire and connected statement relating to the same subject-matter, and for that reason, if for none other, receivable in evidence, but the questions were admissible for the further reason that they come within the universally recognized rule that any incriminatory statements made to an accused person, and his replies thereto, may be admitted in evidence, unless his replies are denials free from equivocation and deceit. The accusatory statements are not direct evi-

dence, but are admissible in connection with the replies for the purpose of showing the accused's reaction to the questions, or that his answers were not those of an innocent man, or were such as to implicate him in the commission of the crime with which he is charged. *People v. Bradley*, 23 Cal. App. 44, 136 Pac. 955; *Commonwealth v. Spiropoulos*, 208 Mass. 71, 94 N. E. 451; 16 C. J., p. 634. See, also, *People v. Ammerman*, supra.

[19] What we have said respecting the admissibility of the long statement made by defendant at the Glenn ranch on October 4, 1920, is equally applicable to the admissibility of the conversation between defendant and Mr. Doran, the chief deputy district attorney, held at the latter's office on October 12, 1920. Moreover, there does not seem to have been any objection or motion to strike out the material and really damaging parts of this conversation. In the early part of Mr. Doran's testimony, defendant's counsel did, it is true, move to strike out that part of the conversation which was then being narrated by the witness, upon the ground that it is "incompetent" and does not "throw any light on the transaction which the jury is trying to determine." At the time this motion to strike was made, Mr. Doran was relating that part of the conversation in which he expressed to defendant his sympathy over her predicament, and in which he said that it was unfortunate that every one seemed to be against her. There does not appear to have been any ruling upon the motion to strike out this part of the witness's testimony. But even if a failure to grant this motion to strike out the particular part of the conversation to which the motion was directed were error, it was harmless error, since the part complained of was not of a damaging character. Beyond this motion to strike, the failure to rule upon which was at most but harmless error, we have, as already stated, been unable to find any objection to or motion to strike out Mr. Doran's testimony respecting his conversation with defendant on October 12, 1920.

[20, 21] Appellant complains that there is no evidence in the case authorizing the charge of the court upon the law applicable to an accomplice; that it was calculated to confuse and mislead the jury, and was therefore harmful and prejudicial. The instruction complained of is as follows:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed. * * * For one person to abet another person in the commission of a criminal offense simply means to knowingly and with criminal intent aid, promote, encourage, or instigate, by act or counsel,

or by both act and counsel, the commission of such criminal offense."

Conceding the correctness of the instruction as an abstract proposition of law, appellant insists that it is not applicable to the facts of the case or to any legitimate theory reasonably deducible from the established facts. It is claimed that the effect of the instruction was to advise the jury that, even though they believe that Denton met his death by strangulation, and that defendant, unaided, was not able to strangle a man of Denton's physique, still they could convict upon the theory that defendant had aided and abetted some person or persons who may have been the actual stranglers. The core of the objection lies in the assumption that there was no evidence to justify the inference that defendant aided or abetted any person or persons in the killing of Denton. We can see no force in the objection. There was no direct evidence as to the manner or circumstances of the killing. The evidence of the murder and of defendant's guilty agency rested entirely on circumstantial evidence. As we already have taken occasion to say, the prosecution was not bound to offer or support any particular theory as to the manner of the crime, but might properly contend that it was committed in any manner which the evidence showed reasonably possible. *People v. Weber*, supra. We already have shown that there was sufficient evidence to warrant the inference that the deceased was killed unlawfully, with malice aforethought, by a gunshot wound inflicted by the bullet from a pistol fired willfully and with a deliberate and premeditated purpose to kill. But the inference that the murder was so accomplished was not the only legitimate inference. Physicians who gave evidence on behalf of the defense, basing their opinion upon the facts disclosed by the first autopsy conducted by Dr. Webb, testified that, in their opinion, death was caused, probably, though not necessarily, by strangulation. Here, therefore, were the bases for at least two legitimate theories as to the probable cause of death—the theory that death was caused by a gunshot wound and the theory that strangulation was the cause. That the body was Denton's was shown by circumstantial evidence of a convincing character. That Denton's death was not accidental nor self-inflicted with suicidal intent, but that he was killed unlawfully, with malice aforethought, willfully, and with a deliberate and premeditated purpose to kill, is amply disclosed by all the attendant circumstances—circumstances showing that whoever committed the deed did it with an abandoned and malignant heart. That this defendant was concerned in the commission of the crime as a guilty agent is also a legitimate inference supported by an accumulation of

incriminating circumstances. Among the circumstances pointing to defendant as a guilty agent in the commission of the crime are the following: Her unlawful possession of some of Denton's personal property subsequent to his disappearance; her false claim that Denton had given her a bill of sale to his automobile; and the cashing by her of checks drawn in the name of Denton as the apparent drawer, but which, unless the jury chose to accept her specious explanation of the circumstances under which they were signed, were palpable forgeries. This, and much other similar evidence, pointed to theft as the probable motive. In addition to this evidence of motive, we have defendant's indubitable fabrications, made with the apparent purpose of explaining suspicious circumstances that pointed to her as the guilty person. There are also her many contradictory statements; her intimate knowledge of facts that only a person connected with the commission of the crime would be likely to know; her causing earth to be taken from the garden a short time after Denton's disappearance and placed in the cellar near where Denton's body was subsequently found under a shallow mound of earth. All these and many other facts too numerous to relate point circumstantially to defendant as a guilty agent in the commission of the crime. Whether she was the sole perpetrator of the deed or whether she had accomplices whom she aided and abetted was not disclosed by the evidence. But that she was a guilty agent, and therefore either the sole perpetrator of the crime or an aider and abettor of accomplices, was an inference legitimately deducible from all the incriminating circumstances, a few of which we have taken occasion to enumerate. This being so, it was proper to charge the jury, in the language of the Code (Pen. Code, § 31), that—

"All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised, and encouraged its commission, * * * are principals in any crime so committed."

By the provisions of section 1127 of the Penal Code it is made the duty of the court to charge the jury as to all matters of law necessary for their information. And since there was no direct evidence as to the manner or the circumstances of the killing, and since the evidence supports two theories as to the manner of the killing, either of which, if found correct, would justify a finding that Denton had been murdered, and since the evidence is sufficient to connect the defendant as a guilty agent in the commission of the crime irrespective of which of the two possible theories as to the manner of the killing be correct, it was proper to give an in-

struction based upon the theory that she aided and abetted in the commission of the murder. If strangulation was the manner whereby Denton was put to death, and if, as her counsel claim, defendant alone could not have strangled a man of Denton's size and weight, and if, nevertheless, she was, as the evidence tended to show, in some manner concerned with the commission of the crime as a guilty agent, it is a legitimate inference that she had accomplices whom she aided and abetted, though there be no direct evidence of that fact; and therefore it was proper to give the instruction. See *People v. Wong Hing*, 176 Cal. 699, 705, 169 Pac. 357; *People v. Billings*, supra, 34 Cal. App. 556, 557, 168 Pac. 396. To justify an instruction on an issue raised by the evidence positive testimony is not required. It is sufficient if the fact may reasonably be inferred from circumstances proved. See *Turner v. State*, 133 Ga. 808, 76 S. E. 349; *Thompson v. State*, 147 Ga. 745, 95 S. E. 292.

[22-24] The defense requested, and the court refused, an instruction as follows: "If you find the defendant guilty of murder, it will be your duty to determine the degree." The refusal to give this instruction is now assigned as error. By a general instruction on the subject of homicide, the court correctly defined and distinguished the two degrees of murder and manslaughter. This it did so clearly and completely that the jury must have understood what state of facts would constitute each of those offenses. In so charging the jury the court told them that there are two classes which the Legislature has taken upon itself the responsibility of saying shall be murder in the first degree—namely, where the killing is perpetrated by means of poison, etc., or is done in the perpetration or attempt to perpetrate some one of the felonies mentioned in the Code; and after so instructing the jury, the court then told them that there is another and much larger class of cases included in the definition of murder in the first degree—viz. those cases where there is a willful, deliberate, and premeditated intent to kill, and that as to this class the Legislature leaves it to the jury to determine the degree of crime. This part of the instruction was couched in the following language:

"In this class [that is, where, not being perpetrated by means of poison, etc., or in the perpetration or attempt to perpetrate any of the felonies mentioned in the Code, the killing is, nevertheless, willful, deliberate, and premeditated] the Legislature leaves the jury to determine, from all the evidence before them the degree of the crime, but prescribes for the government of their deliberations the same test which has been used by itself in determining the degree of the other two classes, to wit, the deliberate and preconceived intent to kill."

It is provided by section 1157 of the Penal Code that—

"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

Because of this Code provision, it is claimed that the court, in compliance with defendant's special request, should have specifically instructed the jury that it is their "duty" to determine the degree if they find the defendant guilty of murder. Without doubt, the requested instruction was unobjectionable, and, perhaps, should not have been refused. But even so, we cannot see how defendant was injured by the refusal. As we have said, the court, in its general instruction upon the subject of homicide, clearly defined and distinguished the two degrees of murder, and told the jurors that it is left to them to determine, from all the evidence before them, the degree of the crime, save in those special cases which the Legislature has taken upon itself the responsibility of saying shall conclusively be deemed to be murder in the first degree. This being so, it was not necessary to specifically charge the jurors that, if they found the defendant guilty of murder, it would be their "duty" to determine the degree. It must be assumed that the jurors are fair and intelligent men and women, and that they require no special admonition or instruction as to obvious matters and rudimentary principles of just and intelligent conduct on their part. If, from the care and completeness with which the court, for the guidance of the jurors, defined and distinguished the degrees of murder, the jury did not understand that it was their "duty" to determine the degree of murder of which the defendant was guilty, in the event that they found her guilty of murder at all, then as was said in *People v. Scott*, 24 Cal. App. 449, 141 Pac. 949, "they were certainly lacking in an essential qualification for jury duty, that is, the possession 'of ordinary intelligence.'" The case falls within the well-established rule that it is not error to refuse to give a special instruction, in itself unobjectionable, if it already has been covered properly and sufficiently by other instructions comprehensive enough to embrace the whole law applicable to that branch of the case.

[25, 26] It is claimed that there was no proof of venue. It is argued that because the venue depends, not upon where the dead body may be found, but upon the place where the mortal wound was inflicted, it may not be inferred that the deceased was killed in Los Angeles county. The objection lacks merit. The venue, like any other fact in a criminal case, may be established by circumstantial evidence. And though no witness testified that Denton was murdered in Los Angeles county, the conviction being based entirely on circumstantial evidence,

it is uncontradicted that the body was found in the city of Los Angeles, in the basement of the house that Denton had leased to defendant, many miles from the county line, covered with a mound of dirt, canvas and other articles, showing that the body had been placed there by some one. This evidence, unexplained, was sufficient to justify the jury in concluding that the homicide was committed in Los Angeles county. In *Hawkins v. State*, 60 Neb. 380, 83 N. W. 198, it was held that—

"Evidence of the finding of the body of the person alleged to have been murdered, in an old well which had been subsequently filled, situate in Frontier county, is sufficient, in the absence of other proof, to warrant the jury in concluding that the homicide was committed in that county."

To the same effect is *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090. See, also, *Whar-ton on Homicide*, pp. 901, 902.

[27] It appearing to the trial court, after 12 jurors had been impaneled and sworn, that the trial was likely to be a protracted one, and that therefore the case is one calling for an "alternate jury," as provided by section 1089 of the Penal Code, the clerk was ordered to draw from the term trial jury box the name of an additional juror. Accordingly the name of one O'Dell was drawn. After being sworn on his *voir dire* to make true answers to questions respecting his qualifications, O'Dell was examined, passed for cause, accepted as the "alternate juror," and as such was duly sworn well and truly to try the matter in issue and a true verdict render according to the evidence. We are justified in assuming that this was, in substance, at least, the oath that was administered to O'Dell; for it is the form of oath prescribed by statute for the regular jurors (Code Civ. Proc. § 604), and section 1089 of the Penal Code provides that alternate jurors shall take the same oath as the jurors already selected. Having thus taken the same oath that had been taken by the 12 regular jurors, O'Dell, as such "alternate juror," attended at all times upon the trial of the cause in company with the other jurors, and was seated near, with equal power and facilities for seeing and hearing all the proceedings. Before the submission of the case, and about two weeks after O'Dell had thus been called and sworn as an "alternate juror," and after much evidence had been introduced, one of the regular jurors originally impaneled and sworn to try the matter in issue, Juror Rudd, became so ill that he was unable to continue the performance of his duties as a juror. Whereupon the court ordered that he be excused from further service, and that O'Dell, the "alternate juror," take Rudd's place in the jury box. Everything that was done in this connection is shown by the minutes, and

seems to have been in strict accord with the provisions of section 1089. It is now claimed that that section is unconstitutional, in that it deprives a defendant of his right to a trial by jury as known to the common law. We do not think the contention is tenable.

Section 1089, added to the Penal Code by the act of March 28, 1895 (Stats. 1895, p. 279), provides that whenever, in the opinion of the judge of the trial court, the trial is likely to be a protracted one, the court, immediately after the jury is impaneled and sworn, may direct the calling of one or two additional jurors, to be known as "alternate jurors," who shall have the same qualifications as the regular jurors, be subject to the same examination and challenges, and who, after having taken the same oath as the other jurors, shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall attend at all times upon the trial in company with the other jurors. It is further provided by the section that if, before the final submission of the case, a juror shall die, or shall become so ill as to be unable to perform his duties, the court may order his discharge and draw the name of an "alternate," who shall then take his place in the jury box and be subject to the same regulations as though he had been selected as one of the original jurors.

Section 7 of article I of the Bill of Rights, contained in the Constitution of this state, provides:

"The right of trial by jury shall be secured to all, and remain inviolate."

The right of trial by jury, secured in England by Magna Charta and in this country by the Constitutions of the United States and of the several states, a right which may not be waived in criminal cases amounting to felony, has always been regarded as sacred, and has ever been jealously guarded by the courts. The provision of our Bill of Rights that the right of trial by jury is to remain inviolate means that all the substantial incidents and consequences which pertain to the right of trial by jury at common law are beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as they existed at common law. The cardinal principle is that the essential features of trial by jury as known to the common law must be preserved and its benefits secured to all entitled to the right. *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; 16 R. C. L. 196. The word "inviolable," as used in the Bill of Rights, connotes no more than freedom from substantial impairment, and therefore the Legislature may make any reasonable regulation or condition respecting the mode of enjoy-

ing the right. *Humphrey v. Eakeley*, 72 N. J. Law, 424, 60 Atl. 1097, 5 Ann. Cas. 929; *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785; *People v. Nakis*, supra; *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95; *Lommen v. Minneapolis, etc., Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450. We are thus brought to consider whether our Code provision for calling "alternate jurors" impinges upon any of the substantial incidents and consequences pertaining to the common-law right of trial by jury.

[28] Without doubt, one of the essentials of a jury at common law is that it be composed of 12 persons, and that 12 persons, not more nor fewer, shall pass upon and determine the issues of fact. *Jennings v. State*, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862, and note; 16 R. C. L., p. 221; L. R. A. 1917a, p. 91 et seq., note to *Minneapolis, etc., Co. v. Bombolis*. Where the procedure provided by section 1089 is followed, the jury before whom the case is actually tried does not at any time consist of more or fewer than 12 persons. Prior to the substitution of the "alternate juror," the case is being tried before the original 12 jurors. Upon the death or discharge of the incapacitated juror and the subsequent substitution of the "alternate," who previously has been examined as to his qualifications, accepted and sworn well and truly to try the matter in issue, the case continues to be tried before 12 persons. Prior to the time when the "alternate juror" is substituted for the dead or incapacitated juror, the "alternate" though he has been chosen and qualified for the possible emergency, sits and listens to the evidence, but he does not during that period of his service sit as a "juror," within the strict literal meaning of the word. He does, however, from the very inception of the proceedings that begin with the introduction of the evidence, sit as one who has all the opportunities that are possessed by the regular jurors to see and hear the witnesses, and as one who is bound by the same oath that was taken by the others to "well and truly try the matter in issue, and a true verdict render according to the evidence."

[29] At common law, according to the established precedents, where a juror has become incapacitated by illness or death after the jury is impaneled and sworn in chief, the proper procedure appears to have been to discharge the entire panel and begin de novo by forming a new jury. *Dennis v. State*, 96 Miss. 96, 50 South. 499, 25 L. R. A. (N. S.) 36, and note; *West v. State* 42 Fla. 244, 28 South. 430; *State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. But though this seems to have been the established common-law procedure, the common-law right of trial by jury, as guaranteed by our Bill of Rights, is not im-

paired by legislation that provides for the discharge of the incapacitated juror only and the calling of a new juror to be sworn and impaneled in his place, the introduction of evidence then to be begun *de novo* without reswearing any of the remaining 11 jurors or providing for any challenge to them. *State v. Davis*, 31 W. Va. 390, 7 S. E. 24; *West v. State*, *supra*; *State v. Hazledahl*, *supra*. Such legislation, says the West Virginia Supreme Court of Appeals in *State v. Davis*, *supra*, "does not abridge the right of the citizen secured to him by the Constitution." The question, therefore, narrows down to this: If an incapacitated juror be discharged during the course of the trial, and an "alternate" impaneled in his place, is it an essential of the right of trial by jury, as guaranteed by our Bill of Rights, that the witnesses be resworn and give their testimony anew? That is, notwithstanding the "alternate" has seen and heard all the witnesses, is it, nevertheless, essential that, so far as the introduction of the evidence is concerned, the trial should be begun *de novo*?

[30] The Legislature, as we have seen, has the right to make any reasonable regulation or condition respecting the enjoyment of trial by jury, provided only that the essentials of a jury trial as known to the common law remain unchanged. "The essential and substantive attributes or elements of jury trial," says the Minnesota Supreme Court in *Lommen v. Minneapolis, etc., Co.*, *supra*, "are and always have been number, impartiality, and unanimity." If these three essentials be preserved in all their ancient force and vigor, no reasonable procedural innovation that the Legislature may see fit to adopt will, generally speaking, affect the right guaranteed by the Constitution. These three essentials being completely secured and adequately guarded by suitable legislation, the right of trial by jury will remain "inviolable." Does our Code provision for "alternate jurors" affect any of these three essential attributes of trial by jury? If it does not, then we may confidently affirm that the section does not affect the inviolability of the right of trial by jury.

Clearly, the section does not affect the first of the three essential attributes of a jury trial—number. As we already have pointed out, the trial is by a jury of 12 in every essential particular. Twelve persons, neither more nor less, determine the issues of fact and render the verdict. The same 12 by whom the verdict is rendered have seen and heard, with equal opportunities, all the witnesses in the case, have received the same court instructions, and, under the same legal sanctions, have had imposed upon them the same obligation well and truly to try the matter in issue.

It seems clear that the section cannot affect the second essential of a jury trial—im-

partiality. The juror who, up to the time when he replaces the dead or incapacitated juror, has sat throughout the trial as an "alternate," hearing and seeing all of the witnesses, has been chosen as such alternate only after an examination as to his qualifications, subject to the same challenges as the other jurors, and upon his being selected as an alternate—i. e., before the introduction of any evidence whatever—he has taken the same oath that was taken by the other jurors—an oath well and truly to try the matter in issue and a true verdict render according to the evidence. Section 1089, Pen. Code, and section 604, Code Civ. Proc. We may not assume that an "alternate," merely because he is conscious that it is possible that he may never be required finally to decide the case as one of the 12 by whom the verdict is rendered, will violate his oath and pay less heed to the evidence than he would if he were impaneled as one of the regular jurors from the inception of the trial. On the contrary, we must assume that he will obey his oath, and that he will well and truly try the matter in issue, as he has sworn to do, just as he would if he were one of the original 12 jurors. Every safeguard that the law has thrown around the regular jurors to insure an impartial verdict, even to the extent of being kept in the custody of the sheriff during the trial, the alternate juror is surrounded with from the commencement to the end of the trial.

Nor can section 1089 affect the third of the three essentials of a jury trial, unanimity. The verdict still must be the unanimous verdict of the 12 jurors to whom the case is finally submitted, even though one of them, before taking the place of the incapacitated juror, sits as an "alternate."

To hold, under these circumstances, that a defendant is deprived of the right to a trial by a jury of 12 simply because one of the 12 by whom the verdict is rendered may, throughout a part of the trial, have sat and listened to the evidence as an "alternate" and not as a regular juror, would be to exalt mere form above substance. To so hold would be to leave untouched the vital springs of reality and grasp at the merest shadow of substance, forgetting that "the letter killeth, but the spirit giveth life." Our conclusion on this branch of the case is that our Code provision for the selection of an "alternate juror," and, if need be, for his impanelment as one of the 12 to whom the case is finally to be submitted, does not impair any of the essential attributes of a trial by jury.

[31, 32] It next is claimed that the act whereby section 1089 was added to the Penal Code violates the constitutional requirement that "every act shall embrace but one subject, which subject shall be expressed in its title." Section 24, art. 4. The title of the act reads:

"An act to amend the Penal Code by adding a new section, to be known as section one thousand eighty-nine of the Penal Code of the state of California, relating to alternate jurors."

Appellant's argument is substantially this: The section relates to proceedings to be had when a juror becomes unable to perform his duties, and provides for the selection of a juror to take his place; the words "alternate jurors" are unknown to the law; therefore, so the argument runs, the words "alternate jurors" give no clue to the purpose of the act. We are unable to agree with this contention. One of the meanings that Webster gives to the word "alternate," used as a substantive, is:

"A substitute; one designated to take the place of another, if necessary, in performing some duty."

For example, in political conventions in the United States an "alternate" is "one authorized to take the place of another in his absence; a substitute." *State v. Carroll*, 160 Mo. 368, 60 S. W. 1087, quoting from the Century Dictionary. In the title to the act here in question the word "alternate," though employed as an adjective qualifying the word "jurors," is obviously used in the same sense as that above given when employed as a substantive. It is clear, therefore, that the title does express the subject of the act, viz. the substitution for a dead or incapacitated juror of one who has previously been designated to take his place, if necessary. The constitutional provision requiring the subject of an act to be expressed in the title has always been liberally construed. Our Supreme Court has said that this must be so, because the Constitution itself does not define the degree of particularity required, and the matter must therefore be left largely to judicial discretion. It has been said by the Supreme Court that if the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain (*Ex parte Liddell*, 93 Cal. 633, 638, 29 Pac. 251), and that it is not required that the title shall disclose the purpose and scope of the act, but it is sufficient if it intelligently refer the reader to the subject to which the act applies or which is affected by it. *Hellman v. Shoulters*, 114 Cal. 136, 150, 44 Pac. 915; 45 Pac. 1057. Under the construction thus given to this constitutional provision, it cannot be held that the title here in question does not state the subject of the act with a sufficient degree of particularity. See *Deyoe v. Superior Court*, 140 Cal. 476, 488, 74 Pac. 28, 98 Am. St. Rep. 73.

[33] If it be true, as counsel assert, that section 1089 by implication amends or repeals section 1123 of the Penal Code, the section may not for that reason be held to be unconstitutional. Section 24 of article 4 of the Constitution declares that—

"No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."

It is established by the decisions of this state that an act is not revised nor a section amended, within the purview of the above inhibition, by an act which adds a new Code section and does not purport to repeal or amend any of the sections of the Code to which it is added. An amendment by implication is in no proper sense of the word an "amendment" within the meaning of this constitutional provision. It is not within the evils aimed at by the inhibition. *Hellman v. Shoulters*, supra, 114 Cal. p. 152, 44 Pac. 915; 45 Pac. 1057; *Deyoe v. Superior Court*, supra; *Matter of Coburn*, 165 Cal. 202, 211, 131 Pac. 352.

[34] Equally devoid of merit is the contention that the act whereby section 1089 was added to the Penal Code is unconstitutional because, according to counsel's unsupported assertion, the bill was not read three several days in each house, as provided by section 15 of article 4 of the Constitution. The validity of a statute that has been duly verified, enrolled, approved, and deposited in the office of the Secretary of State cannot be impeached by a resort to the journals of the Legislature or by extrinsic evidence of any character whatever. *People v. Camp*, 183 Pac. 845, and cases there cited.

[35] Finally, it is urged by defendant that the district attorney was guilty of misconduct during his examination of certain witnesses and in the course of his argument to the jury; and this misconduct is now assigned as reversible error. On his examination of certain of the witnesses the district attorney asked several obviously improper questions. In each instance an objection was at once made and sustained, and the court promptly directed the jury to disregard the question and its implication. It does not appear that the district attorney contumaciously persisted in repeating any improper question after an objection made and a ruling thereon. There is nothing in the record indicating bad faith, or that the questions were asked for the wanton purpose of raising a prejudice against the defendant. It frequently happens that in the heat of a trial counsel ask improper questions. But judgments cannot be reversed for an inadvertence of this character, unless, from an examination of the record, we may be of the opinion that it has caused a miscarriage of justice. In view of the court's prompt rulings and instructions to disregard the questions, which it will be presumed were heeded by the jury, it cannot be said that defendant's cause suffered by reason of anything contained in these questions, however improper they may have been.

[36-38] In the course of his argument to the jury the district attorney, notwithstanding

ing the defendant had not taken the stand as a witness in her own behalf, commented upon her appearance while sitting as a prisoner before the bar, saying, among other things, that an innocent woman, facing an ordeal such as defendant was then passing through, could not sit in the courtroom without a tear. This conduct was clearly reprehensible and inexcusable, and it was the duty of the court to have interposed for defendant's protection, as doubtless it would have done had its attention been specifically called to the remarks by timely objection. The district attorney's improper comments on defendant's appearance should, and, had timely objection been made, doubtless would, have met with prompt and effective rebuke. Defendant, who had not tendered herself as a witness in the case, was at the bar of justice, not voluntarily, but by compulsion; and the prosecutor went outside the circle of fair debate when he called attention to her demeanor while at the bar to which she had been haled by the strong arm of the law. *Bessette v. State*, 101 Ind. 85; *Perez v. Territory*, 12 Ariz. 16, 94 Pac. 1097. But it does not necessarily follow that this misconduct necessitates a reversal. The decisions of our Supreme Court hold that, unless the defendant objects to the improper remarks and requests an instruction that the jury disregard them, the objectionable statements will not justify a reversal unless the district attorney's misconduct is so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court can destroy its influence. Had the court, in response to a seasonable objection, vigorously condemned the prosecutor's remarks, as doubtless it would had its attention been called to them by timely objection, we think that they would have left no prejudicial impression on the minds of the jury. The misconduct complained of in *People v. Kromphold*, 172 Cal. 512, 523, 157 Pac. 599, was as flagrant as any shown here. Nevertheless, it was held in that case that it would be most unreasonable to assume that the jury could have been influenced to the prejudice of the defendant if the judge had stated his disapproval of the objectionable remarks. By prompt action, defendant's counsel might have obtained an effective antidote for the poison in the district attorney's improper reference to the accused's appearance. But he failed to act, and defendant is therefore not in a position to have her complaint now considered. *People v. Nakis*, supra; *People v. Shears*, 133 Cal. 154, 159, 65 Pac. 295; *People v. Babcock*, 160 Cal. 537, 544, 117 Pac. 549; *People v. Wong Hing*, supra.

For the same reason defendant cannot now be heard to complain of the district attorney's verbal assaults on defendant's counsel when criticizing the course pursued by the latter in his conduct of his client's case. Defendant, who, for financial reasons, was un-

able to employ counsel of her own choice, was represented throughout the trial by the public defender of Los Angeles county, a paid public officer of the county, holding an office of dignity and responsibility, and who seems to have represented defendant with fidelity and zeal, with marked ability and dignified endeavor. Though the remarks directed by the district attorney towards his fellow member of the bar and corepresentative of the public weal may have been a display of poor taste, we do not see how they possibly could have prejudiced the defendant. On the contrary, addressed to fair-minded jurors, they must have recoiled to the prosecution's dire discomfiture—if, indeed, they had any effect whatever. But, be this as it may, inasmuch as the court was not once, during the course of the argument to the jury, requested to instruct the jury to disregard the improper statements of the district attorney, and as such an admonition would, doubtless, have been sufficient to cure any effect the remarks might have produced, the claimed misconduct in the argument cannot be considered on this appeal.

The defendant was ably defended, every opportunity was given her to meet the evidence adduced by the prosecution in support of the charge, the verdict was justified by the evidence, and there is no prejudicial error appearing in the record.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

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IMPERIAL VALLEY CO. v. GLOBE GRAIN & MILLING CO. et al. (L. A. 6233.)(Supreme Court of California, Nov. 12, 1921.
Rehearing Denied Dec. 12, 1921.)**1. Landlord and tenant — 326(1), 328(1)—
Lessor held not to have lien on portion of
crop.**

Where lessees were to raise cotton and deliver to lessor one-fourth thereof as rental, such one-fourth merely measured in cotton the amount of the rental to be paid, and lessor had no title to such portion of the cotton or lien thereon.

**2. Trover and conversion — 32(3)—Allegation
of ownership held insufficient.**

Recitals, in complaint for conversion of cotton, that defendant held warehouse receipts of lessee, including receipts for one-fourth of lessee's cotton owned by the plaintiff, etc., held not a sufficient allegation of ownership, nor to be so construed on appeal to reverse a judgment for the defendant, where directly contrary to direct and specific allegations of the complaint.

**3. Appeal and error — 169—Matter not raised
in trial court not considered.**

A question cannot be considered on appeal which was not raised in the lower court.

**4. Appeal and error — 1071(5)—Findings out-
side of issues tried, disregarded.**

Findings of trial court outside of the issues raised by the pleadings and those actually submitted to and tried by the court will be disregarded on appeal.

**5. Appeal and error — 931(7)—Presumption
indulged in favor of judgment.**

On appeal presumptions are indulged in favor of judgments and not against them, and it will be assumed that issues submitted to the trial court were decided in favor of prevailing party.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Valley Company against the Globe Grain & Milling Company and others. Judgment for defendants, and from an adverse judgment plaintiff appeals. Affirmed.

Sloss, Ackerman & Bradley and Lloyd S. Ackerman, all of San Francisco, and Jas. W. Glassford, of El Centro, for appellant.

J. Stewart Ross and R. B. Whitelaw, both of El Centro (Hickcox, Crenshaw & Trude, of El Centro, of counsel), for respondents.

WILBUR, J. This is an action to recover \$8,470.37 damages for the conversion of 94 bales of cotton. The plaintiff secured judgment against the defendants R. G. Erskine and C. Curtis for this amount sued for, less a payment of \$1,499.80 made after the complaint was filed; but the judgment was in

favor of the other defendants, Globe Grain & Milling Company, California Food Products Company, First National Bank of Calexico, and First National Bank of Los Angeles. Plaintiff appeals from that portion of the judgment in favor of the defendants upon the judgment roll containing a bill of exceptions in which the only specification of error is that the findings do not support the conclusions of law or the judgment. In appellant's briefs, however, the only portion of the judgment complained of is that in favor of the First National Bank of Los Angeles. Before stating the points relied upon by the parties, some additional facts should be stated.

[1] Plaintiff leased 1,000 acres of land in Lower California, Mexico, to defendants R. G. Erskine and C. Curtis. The lessees were to raise cotton upon the land, and upon harvesting and ginning the same, agreed to render and deliver to the plaintiff one-fourth of the crop as rental. The cotton crop so raised amounted to 378 bales, 94 bales of which plaintiff claims that defendants wrongfully converted to their own use. It is evident that plaintiff's rights must turn upon the question of whether or not it had title to or a lien upon this 94 bales of cotton. The respondent claims that the 94 bales of cotton merely measured in cotton the amount of the rental to be paid by the tenants to the landlord, for which indebtedness they are liable; but this agreement created no title in the landlord to the cotton grown upon the land. This position is correct and is conceded to be so by the appellant. *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708.

[2] The complaint does not state a cause of action against the First National Bank of Los Angeles, for the reason that it fails to allege that plaintiff owned the 94 bales of cotton alleged to have been converted by the bank. This point is made for the first time in respondents' final brief, filed after argument. A summary of the allegations of the complaint upon that subject follows:

It is alleged that the cotton crop grown upon the leased land was delivered to the compress yard in Calexico, Cal., by C. Curtis, one of the tenants; that warehouse receipts were taken by him and pledged to the First National Bank of Los Angeles. It is alleged:

"That all of said warehouse receipts including the warehouse receipts for the one-fourth ($\frac{1}{4}$) of said cotton owned by the plaintiff herein, the title to which one-fourth ($\frac{1}{4}$) interest was transferred to the plaintiff herein by the said Erskine and Curtis as payment for rent of the said premises hereinbefore described, and that all of said warehouse receipts are now being held by the said defendant, First National Bank of Los Angeles, or by its agent, the First National Bank of Calexico, and held by them in escrow to satisfy a purported bill of

sale and a chattel mortgage, said bill of sale and mortgage heretofore made and delivered by said Erskine and Curtis to the defendant California Food Products Company."

This parenthetical recital cannot take the place of a direct allegation of ownership, nor can it be so construed on appeal to reverse the judgment where the recital is directly contrary to the direct and specific allegations of the complaint. In that regard it is expressly alleged that, under the lease, Erskine and Curtis, the tenants, were to yield and pay as rental one-fourth of the cotton grown on the premises, and that the defendants have, notwithstanding demand therefor, *failed, neglected and refused to deliver said one-fourth of said cotton or any part thereof* to the plaintiff, and that 378 bales of cotton were grown upon said premises, "of which under the terms of the aforesaid lease the plaintiff is entitled to and *should receive* free of all charges to the plaintiff at the compress yard in the city of Calexico 94 bales; that the defendants herein unlawfully and in violation of the rights of the plaintiff converted to their own use the said 94 bales of cotton and sold the same, realizing therefrom the sum of \$8,470.37," and further alleged that, though often requested, "the defendants, and each of them, have failed, neglected, and *refused to pay the plaintiff* the value of the share of the plaintiff of the cotton grown on said premises amounting to the sum of \$8,470.37" (*Italics ours.*) The complaint is framed upon the theory that the tenants failed to deliver the cotton to the plaintiff as they had agreed to do and that the subsequent sale and appropriation of the proceeds was a conversion of the property. Under these allegations no cause of action is stated against the First National Bank of Los Angeles, because it is affirmatively alleged that it was holding warehouse receipts issued to one of the tenants entitled to its possession and delivered to the First National Bank as security for an indebtedness owing to the bank, and this the bank had a right to do. The only cause of action stated is against Erskine and Curtis for unpaid rent.

We will not dispose of the appeal wholly upon the ground that the complaint does not state a cause of action against the First National Bank of Los Angeles, because this point was not raised by respondent until its final brief, and no reply was filed thereto. However, the sufficiency of the complaint is involved in the points presented which we will now consider. For that purpose we will state additional facts.

The defendants answered the complaint, after a general demurrer interposed by the Globe Grain & Milling Company was overruled. The answer contained a denial of the allegations of the plaintiff relating to the lease and cotton crop. Among other things, it was denied that the cotton evidenced by

the warehouse receipts was grown upon plaintiff's land or that plaintiff had any interest in or to the 94 bales of cotton. Affirmative allegations were made in the answer, to which we will presently refer, which, being quoted in the findings, have given rise to a misunderstanding as to the meaning and intent of the findings leading to a reversal of the judgment in favor of the bank by the District Court of Appeal, which court directed a judgment against the First National Bank of Los Angeles for the full amount claimed. Respondent claimed that this reversal was due to a misunderstanding of the record and, upon its petition, the case was transferred to this court for decision. It has since been argued and briefs filed, by the parties in addition to the petition for transfer and the answer thereto.

The District Court of Appeal reversed the judgment in favor of the First National Bank and ordered judgment against it upon the ground that the findings showed that the bank's claim had been fully paid and there remained in its hand sufficient of the proceeds of the cotton crop grown upon the land to pay the indebtedness due to the plaintiff. We will therefore first address ourselves to a consideration of that question.

The defendants' answer, after a denial of the allegations of the complaint, affirmatively alleges the facts concerning the pledging of the cotton by Erskine and Curtis to the First National Bank of Los Angeles. It alleges the loaning of money by the California Food Products Company to defendant Curtis upon the security of certain cotton, and that this company also advanced money to R. G. Erskine & Co. upon a chattel mortgage and bill of sale of cotton grown on other lands farmed by them, with a guaranty of such indebtedness by C. Curtis. That these obligations and securities were all transferred to the bank, and were all paid, and thereafter the First National Bank of Los Angeles advanced \$21,000 to Erskine and Curtis, for which Curtis executed and delivered the collateral notes of Erskine and Curtis and did pledge to and deposit with the First National Bank of Los Angeles cotton represented by negotiable compress receipts as collateral security for the payment of the new liability created by said note, and that at the same time and under the same conditions and with the same understanding the defendant bank advanced \$9,000 to R. G. Erskine & Co., and further alleges that "all of which said sums have since been paid by said C. Curtis."

The findings of the court follow word for word the affirmative allegations of the answer with reference to the \$21,000 and the \$9,000 loans, and recites, in the language of the answer, "all of which said sums have since been paid by said C. Curtis." From this answer it appeared that the defendants were contending, not only that the cotton had

been hypothecated to the bank by C. Curtis for an indebtedness, but also admitting that said indebtedness had been fully paid. The answer does not state what became of the cotton, but it does deny any conversion of any interest of the plaintiff therein and denies that plaintiff had any interest therein. The findings in addition to covering and conforming to the affirmative allegations of the answer, contain the following statement concerning the disposition of the cotton not made an issue by either the complaint or the answer.

"6. The crop of cotton raised by the defendants Erskine and Curtis on the land of plaintiff under the aforesaid lease between said defendants and plaintiff was sold as aforesaid and the proceeds thereof paid on the indebtedness of Erskine and Curtis to the First National Bank of Los Angeles, leaving an excess, the amount of which was the sum of \$10,434.58; that the rent due plaintiff under its lease with the defendants Erskine and Curtis was the sum of \$8,470.37, of which amount \$1,499 was paid by the defendants Erskine and Curtis, after all indebtedness to said First National Bank of Los Angeles was satisfied, leaving unpaid and due from the defendants Erskine and Curtis to plaintiff the sum of \$6,971.37."

From this condition of the record and findings the Court of Appeal deduced the following conclusion:

"Neither the findings nor the evidence give any justification for the retention of plaintiff's money by the First National Bank of Los Angeles, and, in view of the findings of the trial court that the indebtedness of Erskine and Curtis and of R. G. Erskine & Co. was all paid to the bank and that the bank received from the proceeds of the sale of this property an excess over such indebtedness amounting to over \$10,000, it is fair to assume that the bank still held that sum at the time of the trial, or that, in the absence of any reason for its failure to pay to plaintiff the amount due, any disposition which the bank made of the excess was illegal."

Thus the District Court of Appeal reached the conclusion that the bank had in its hands \$10,000 belonging to Erskine and Curtis after the payment of all indebtedness due to it by them. We mention this because it now seems to be conceded by both parties that the real situation with reference to the \$10,000 is this: That while it is true there was a surplus of \$10,000 received from the cotton crop raised upon plaintiff's land, over and above the indebtedness of Erskine and Curtis to the First National Bank, that this balance, with the exception of \$1,499 paid to the plaintiff, was applied by the bank to the indebtedness owing by R. G. Erskine & Co. and guaranteed by C. Curtis, and that it was the application of this amount that paid the \$9,000 indebtedness of R. G. Erskine & Co., guaranteed by Curtis. In other words, the bank, instead of having \$10,000 over and above all indebtedness due it had only \$1,499,

which has already been applied to the plaintiff's claim. Viewed in the light of this admission, a critical analysis of finding 6, above quoted, reveals that the finding is not inconsistent with the facts as now admitted. That finding was evidently for the purpose of fixing the liability of the defendants Erskine and Curtis and not of the bank.

Before considering the other contentions of the parties, it is proper to say that the District Court of Appeal was no doubt misled as to the facts by the statements and admissions in the briefs of the parties, and in view of the situation now developed, it is proper to call attention to some of the statements in those briefs. In appellant's opening brief, after reciting the advancement of the \$21,000 and the \$9,000, it is said:

"These loans were made on the additional security of a personal guaranty by C. Curtis, one of the tenants to whom appellant leased, and subsequently C. Curtis paid all of said notes and advances. Appellant's position at the trial was and now is that after Erskine & Curtis' debts had been paid there was a surplus of \$10,434.58 out of which appellant was entitled to its rental or crop share, the value of which was \$8,470.37; that of this amount \$1,499 was paid and the respondent First National Bank of Los Angeles became and was indebted to appellant in the sum of \$6,971.37." (Italics ours.)

It was further stated by appellant that there was no dispute on the facts, most of the evidence having been by way of stipulation and there having been no rebuttal by the defendants at the trial. Upon this statement the court was hardly to be expected to note that \$9,000 of the \$10,434.58 was applied to Curtis' pledge and that it was in this manner only that he paid "all of said notes and advances." The impression gained from this statement is that C. Curtis, from his own resources, had paid the amount of the loan made to him and to his principal, and that there still remained the amount of \$10,434.58 in the bank's possession. Respondent did not clear up this uncertainty in his reply brief, but, on the contrary, stated:

"Respondents have only one issue with appellant in the statement of facts: There is no evidence nor finding of any partnership of Curtis and Erskine, nor of R. G. Erskine & Co."

Thus, the respondent apparently conceded that the defendant had in its possession \$10,000, belonging to Erskine and Curtis which the plaintiff was justly entitled to apply to the indebtedness due it from Curtis and Erskine.

[3] The contentions of the parties in this court are therefore directed mainly to the question as to whether or not it was proper for the bank to apply the balance of the money received from the cotton grown on plaintiff's land to the indebtedness of R. G. Erskine & Co. guaranteed by C. Curtis, when

authorized so to do by C. Curtis. In short, the question raised here is as to the authority of Curtis to pledge the interest of Erskine, as copartner or cotenant, in the cotton grown upon plaintiff's land. This question, which the appellant now seeks to have us determine, was not raised in the lower court and cannot be determined upon this appeal. The allegation of the plaintiff with reference to the lease was merely by way of derailing title to the cotton it claimed had been converted and showing that its claim for rent was unpaid. As already stated, it did not state a cause of action either for conversion or for rent against the defendant bank. A denial of these allegations by the defendant bank raised no material issue. The affirmative allegations of the answer were entirely unnecessary and offered no material issue. The apparent purpose of the respondent bank in the answer was to show good faith in that it had derived nothing from the sale of the cotton over the amount of its indebtedness. Later, a small excess of \$1,499 was turned over to plaintiff. It is evident from the record in the trial court that the respondent bank never had its attention directed to the contention now made by the appellant. Its admission in its answer and by a stipulation and the finding based thereon prepared by the defendant clearly indicates that its attention was never directed in that court to the contention made here by appellant.

[4] Not only was there no issue upon the question as to the application of the balance due Erskine and Curtis to the guaranty of Curtis on the R. G. Erskine & Co. indebtedness, but the plaintiff objected to testimony along that line. The objection is as follows:

"Here plaintiff objected to any testimony regarding any negotiations between Clifton Curtis and the First National Bank of Los Angeles and R. G. Erskine & Co., upon the ground that plaintiff is not concerned with any negotiations had between those parties and upon the ground that said negotiations are incompetent, irrelevant, and immaterial and not within the issues made by the complaint, and upon the further ground that the only subject in controversy is whether or not the Imperial Valley Land Company is entitled to *one-fourth of defendants' share of the cotton crop grown upon their land*, which objection was overruled by the court and to which ruling plaintiff now excepts." (Italics ours.)

Although the objection was overruled, no evidence was offered with reference thereto other than the stipulation of facts literally conforming to the affirmative allegations of the answer subsequently quoted in the findings of fact by the court referred to above, and so far as the record shows, apart from the admissions of the parties in their briefs in this court, it is a matter of doubt as to whether the balance of \$9,000 was paid upon

the R. G. Erskine & Co.'s indebtedness. It cannot therefore be said that the right of Curtis to pledge the assets of his copartner or cotenant Erskine was either raised in the pleadings or by consent tried as an issue in the case. That the findings, so far as they tend to support a judgment in favor of the plaintiff against the defendant First National Bank of Los Angeles, are outside of the issues raised by the pleadings and those actually submitted to and tried by the court, and therefore should be disregarded.

[5] On appeal, presumptions are indulged in favor of judgments, and not against them; but, if we assume that the issue of title to the 94 bales of cotton was in fact submitted to and decided by the trial court, its decision was against plaintiff on that issue. The respondent bank has contended throughout the progress of the case in the trial court and on appeal that plaintiff had failed to show any title to the cotton and hence could not recover damages for its conversion. In view of our conclusions, it is unnecessary to consider the effect of the negotiability of the warehouse receipts.

Judgment affirmed.

We concur: SLOANE, J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.

187 Cal. 419

OBENCHAIN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Sac. 3337.)

(Supreme Court of California. Nov. 14, 1921.)

Mandamus $\S$ 3(1)—Writ on direct application to Supreme Court denied, where petitioner had remedy in District Court of Appeal.

The remedy after denial in the District Court of Appeal of a petition for mandate to compel the superior court to dismiss and quash an indictment against the petitioner or to grant immediate trial is by way of petition to the Supreme Court within the 60 days allowed by the Constitution for an order vacating the judgment and directing a rehearing, so that a direct application for a writ of mandate will be denied.

In Bank.

Application by Madalynne C. Obenchain for writ of mandamus to the Superior Court of California in and for Los Angeles County, and Sydney N. Reeve, Judge, requiring the dismissal and quashing of an indictment. Writ denied.

Cooper, Collings & Shreve, of Los Angeles, Charles E. Erbstein, of Chicago, Ill. (Ralph Obenchain, of Los Angeles, of counsel), for petitioner.

SHAW, C. J. The petition for a writ of mandate herein, directed to the superior

court, Los Angeles county, to compel said court to dismiss and quash the indictment pending therein against petitioner or to grant her an immediate trial of said cause, is denied upon the ground that the remedy of the petitioner in this court, after denial of her petition for such mandate in the District Court of Appeal, is by way of petition to this court, within the 60 days allowed by the Constitution, for an order vacating the judgment of the District Court of Appeal and directing a rehearing of the case in this court.

(187 Cal. 322)

In re CHEDA'S ESTATE. (S. F. 9998.)

(Supreme Court of California. Nov. 8, 1921.)

Appeal and error ⇨77(1)—Order directing executors to transfer stock appealable.

An order made by the superior court, under Code Civ. Proc. § 1597 et seq., directing executors to transfer and deliver to a third party certain shares of bank stock, based on a contract for the sale thereof, was a final judgment, and appealable under section 963, subd. 1, the proceeding being practically one in equity, not controlled by subdivision 3.

In Bank.

In the matter of the estate of S. H. Cheda, deceased. From an order directing delivery of certain stock, the executors appeal. On motion to dismiss appeal. Motion denied.

Henry E. Greer and Thos. P. Boyd, both of San Rafael, for appellants.

Jos. K. Hawkins, of San Rafael, for respondent.

PER CURIAM. Motion to dismiss appeal from order on ground that the same is not an appealable order.

The order was one made by the superior court under section 1597 et seq., Code of Civil Procedure, directing the executors to transfer and deliver to a third party certain assets of the estate, being certain shares of bank stock. The application for the order and the order were based on a contract for the sale thereof alleged to have been made by the deceased.

The claim that the order is nonappealable is based on the fact that such an order is not specified as an appealable order in the statute specifying the probate judgments and orders from which an appeal may be taken. Subdivision 3, § 963, Code Civ. Proc. If the order here were exclusively a probate order, there would be much force in the claim. We are of opinion, however, that the proceeding authorized by section 1597 et seq. is in substance more than this, being practically a proceeding in equity terminating in a final judgment, having the full force and effect of a final judgment in an action for specific per-

formance of a contract. As such we deem the order made therein a final judgment, appealable under subdivision 1 of section 963, Code of Civil Procedure.

It was for this reason that the motion to dismiss the appeal was denied from the bench.

ANGELLOTTI, C. J., and WILBUR, SHAW, SLOANE, SHURTLEFF, LAWLOR, and LENNON, JJ., concur.

(187 Cal. 343)

STATE, by CHAMBERS, Controller, v. ROYAL CONSOL. MINING CO. et al. (Sac. 2892.)

(Supreme Court of California. Nov. 12, 1921.)

1. Taxation ⇨647—Judgment against state claiming under invalid tax sale erroneous, in view of tax liens, in decreeing it had no interest or lien.

In view of the lien of taxes, not discharged till payment or a valid sale therefor (Pol. Code, §§ 3716, 3717, 3719), judgment against the state because of invalidity of tax sale under which it claims land is erroneous to the extent that it decrees that because of such invalidity the state has no interest in or lien on the property.

2. States ⇨191(1)—Consent necessary for cross-action for independent affirmative relief against state.

Without consent of the state there cannot be maintained against it a cross-action for independent affirmative relief, so defendant cannot have title quieted in him in action on behalf of the state for possession under tax deed; the general provisions of the law authorizing cross-complaints not giving such consent.

3. Constitutional law ⇨56—States ⇨200—Provision of Constitution as to jurisdiction of courts binding on state.

Const. art. 6, § 5, giving the superior court of the county in which land is located exclusive jurisdiction of action to quiet title to or for possession of it, is binding on the state, because dealing with its sovereign powers; so Pol. Code, § 3773, in terms, conferring on the superior court of a certain county, irrespective of location of land, jurisdiction of action on behalf of the state for possession of land sold to it for taxes, is invalid.

4. Venue ⇨5(3)—Where real question is title location of land determines venue, though action is for rents as well as land.

Where the real question is title, location of land determines venue of action, though it is not only for land, but for the rents and profits thereof.

5. Venue ⇨16½—Location of land governs where action is for possession thereof, though essentially one involving legality of tax.

Though action be essentially one involving legality of a tax, yet it being also one for po-

session of land, jurisdiction is in the superior court of the county where the land is located.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the State of California, by John S. Chambers, controller, against the Royal Consolidated Mining Company and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions to dismiss.

U. S. Webb, Atty. Gen., Charles A. Snyder, W. A. Gett, of Sacramento (Downey & Downey, of Sacramento, of counsel), for appellant.

Alfred J. Harwood, of San Francisco, for respondents.

WILBUR, J. This action is brought by the controller of the state of California, acting under and by virtue of authority conferred upon him by section 3773 of the Political Code to secure the possession of, and the rents, issues, and profits derived from, certain mining properties described in the complaint. Plaintiff alleges that the state of California ever since July 12, 1910, has been the owner of the real property described in the complaint, "being the same land conveyed by Louis Cadematori, tax collector of Calaveras county, state of California, to the state of California, on the 12th day of July, 1910." The defendants deny that the state of California was the owner of said properties on the 12th day of July, 1910, or of any part thereof, and deny that the state of California is the owner of said real property, or any part thereof. They deny that the land or any part thereof was conveyed by Louis Cadematori, tax collector, to the state of California on July 12, 1910, or at any other time. Defendants further aver that the Royal Calaveras Mining Company is the owner in fee simple absolute of the property in question. Defendants pray judgment that plaintiff take nothing by the action, and that defendants have judgment for their costs of suit. The court found that the state of California was not the owner of the property and stated its conclusions of law, as follows:

"I. That the plaintiff is not the owner of the real property described in the complaint, or any part or portion thereof, and that plaintiff has no right, title, or interest in said real property.

"II. That the defendant Royal Calaveras Mining Company, a corporation, is the owner and seized in fee thereof, and is in possession and is entitled to the possession of the same and the whole thereof.

"III. That defendants are entitled to judgment and to their costs of suit."

In the judgment it is ordered, adjudged, and decreed:

"That the plaintiff is not the owner of the real property described in the complaint or any part or portion thereof, and that plaintiff

has no right, title or interest in said real property. * * *

"That defendant Royal Calaveras Mining Company is the owner and seized in fee of said real property described in the complaint, and is in possession and is entitled to the possession of the same and the whole thereof."

Then follows the judgment for costs.

The adjudication is, in effect, a judgment quieting the title of the defendant to the property in question against all claims of the state of California of every nature and description.

[1] The judgment here is particularly objectionable by reason of the fact that under our system of taxation the liens for taxes imposed for the five years immediately succeeding the sale and prior to the execution of the deed do not result in a sale and remain liens on the property until payment or a valid sale from the state of California. For the years subsequent to the deed to the state the property is not assessed at all on the theory that the property then belongs to the state, but if the deed to the state is void the inchoate lien of the state for the taxes of succeeding years remains as a burden upon the property until discharged, and therefore a judgment against the state decreeing that the state has not interest in or lien upon the property in question because of defects in or the invalidity of the original tax sale to the state in 1905 is erroneous.

It is well settled that such relief will be denied to a property owner notwithstanding errors in the sale or in the assessment, if it can be ascertained from the assessment that the property owner is liable in justice and good morals to pay a tax thereon which has not been paid. *Savings & Loan Society v. Burke*, 151 Cal. 616, 91 Pac. 504. Under our system of taxation the lien therefor attaches on the first Monday in March of each year.

"Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." Section 3716, Pol. Code.

Taxes upon personal property and upon the improvements upon real property are also liens upon the real property. Sections 3717 and 3719, Pol. Code. The lien attaches and remains upon the real estate until payment or sale, notwithstanding defects in the assessment, and if the sale is for any reason void, it, of course, does not discharge the lien. If the judgment in this case had been confined to the right of possession of the plaintiff, which depends upon the validity of the tax sale relied upon, the court could have entered such a judgment without requiring the defendant to pay the taxes upon

the property. But where, as here, the judgment goes further, and awards affirmative relief to the defendants, it is clearly erroneous, and must be reversed.

[2] The court by its judgment in effect treated the answer as a cross-complaint to quiet title, and quieted the title of the defendant against all claims of the state of California, although such relief was not expressly prayed for by the defendant. The state controller, under the provisions of section 3773 of the Political Code, represents the state for the purposes of requiring an accounting for rents and profits and securing possession of the real property, but he had no authority to represent the state as a defendant in a suit to quiet title, nor had the state authorized itself to be sued in an action to quiet title to determine the validity of liens for taxes or tax deeds issued to it. The defendant, of course, could resist the claims of the state controller made for possession and for an accounting of rents and profits on behalf of the state by any appropriate defense, including the defense of the invalidity of the tax deed (36 Cyc. 910, § 7a), but it could not convert the action brought by the state controller into one against the state for affirmative relief by an application for affirmative relief. The claim against the state could not be maintained in the absence of statutory authority (*People v. Talmage*, 6 Cal. 256; *People v. Miles*, 56 Cal. 401; *People v. Lee Chuck*, 74 Cal. 32, 15 Pac. 322), either by complaint or by cross-complaint.

The rule is thus stated in 36 Cyc. 910:

"As a part of his defense defendant may maintain against the state a cross-bill or cross-complaint, provided it relates only to the subject-matter of plaintiff's suit and does not pray for original and independent relief; but he cannot maintain such cross-action for independent affirmative relief; nor can he, without clear statutory authority therefor, claim the benefit of a set-off or counterclaim against the state, constituting an independent cause of action, for this would contravene the rule that a state cannot be sued without its consent, although there is some authority to the contrary"—citing *People v. Miles*, *supra*.

The general provisions of the law authorizing cross-complaints do not give the consent of the state to such cross-complaint in an action brought by the state. *People v. Miles*, *supra*.

[3] For the reasons above given it will be necessary to reverse the judgment in this case. If the case were to go back for a new trial, it would be proper for us to consider the various points raised as to the validity of the tax deed upon which the plaintiff relies; but we were in doubt as to whether or not the superior court of the county of Sacramento had jurisdiction of this action, notwithstanding the express provisions of section 3773 of the Political Code purporting to grant such jurisdiction. The question is as

to the jurisdiction of the superior court under the Constitution itself (article 6, § 5). By this section of the Constitution the superior court of the county in which the land is located is given exclusive jurisdiction of actions to quiet title to or for the possession of such real estate. As this action is clearly one for the possession of real estate, and as the question had not been presented by counsel, we called for argument as to the constitutionality of section 3773, Political Code, which expressly confers jurisdiction upon the superior court of Sacramento county, regardless of the location of the land.

The Attorney General claims that the superior court of Sacramento county has jurisdiction under the provisions of section 3773, Political Code, and that that section is constitutional for the reason that the state is not bound by the general words of the Constitution or statute unless expressly declared so to be, and hence is not bound in actions instituted by it to begin a suit in the superior court of the county where the land is located. He relies upon the rule declared and applied in *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 240, 241, 90 Pac. 936; *City Street Imp. Co. v. Regents*, 153 Cal. 776, 778, 780, 96 Pac. 801, 18 L. R. A. (N. S.) 451; *Clark v. Los Angeles*, 160 Cal. 30, 39, 41, 116 Pac. 722; *Miller v. Pillsbury*, 164 Cal. 199, 201, 202, 204, 205, 128 Pac. 327, Ann. Cas. 1914B, 886; *Witter v. Mission School Dist.*, 121 Cal. 351, 53 Pac. 905, 66 Am. St. Rep. 33. We have had occasion recently to consider the rule with reference to the applicability of laws of general nature to the state and its subdivisions, and a reference to those cases will be sufficient to show the general rule on the subject. See *Balthasar v. Pac. Elec. Ry. Co.*, 202 Pac. 37.

These cases, however, have no applicability to the facts in this case. The people of the state in forming its government, divided its sovereign powers into separate departments—the judicial, the legislative, and the executive. Article 3, § 1, Constitution of California. The people vested directly in the superior court of a county the exclusive jurisdiction to determine controversies over the possession of land and to quiet title thereto. Constitution, art. 6, § 5. If the people by the Constitution had simply directed the Legislature with reference to the establishment of jurisdiction of the several superior courts of the state to give such exclusive jurisdiction, it might be contended with some force that the general direction to the Legislature to vest jurisdiction over cases of certain types to certain superior courts did not apply to actions begun by the state itself. The situation, however, is altogether different. Where the Constitution itself has expressly defined and fixed the exclusive jurisdiction of its courts with reference to actions concerning

the possession of real estate, the Legislature cannot, under its general power to legislate, infringe upon the jurisdictional limits established by the Constitution itself, by giving jurisdiction to the superior courts of Sacramento county which the Constitution confers upon the superior court of Calaveras county exclusively. In interpreting the constitutional provisions concerning the organization and jurisdiction of courts we are dealing with the sovereign powers of the state and vesting such sovereign powers in certain departments; hence there is no room for the application of the rule that the state is not affected in the exercise of its sovereign powers by the general language of statute or Constitution applicable to private citizens and alone apparently applicable to the state because of the comprehensive character of the terms used. Here the Constitution is expressly dealing with such sovereign powers. We are dealing as much with the sovereign power of the state in determining the limitation of the jurisdiction of the courts as we are in determining where the legislative power of the state is to be vested. The superior court of a county in exercising its jurisdiction is exercising the sovereign power of the state. Where the limitations of that power are fixed by the Constitution, the mere fact that the state Legislature has all the sovereign powers of legislation, except where restricted by the Constitution, does not authorize the Legislature by statute to vest jurisdiction in opposition to the express terms of the Constitution itself.

It may be conceded, as contended by the Attorney General, that where the government in the exercise of its sovereign power is attempting to use the process of court for the collection of taxes essential to its existence, such actions stand on an altogether different basis from the ordinary actions between citizens. It is recognized in *People v. Central Pacific Railroad*, 105 Cal. 576, 588, 38 Pac. 905, that special provisions as to procedure may be made by the Legislature in such cases. This concession, however, does not meet the situation with which we are confronted. The people by their Constitution have expressly limited the powers of the superior courts of the state so that no superior court has any right to try actions for the possession of real estate or the quieting title thereto, except such actions as involve real estate within the boundaries of the county, except upon transfer from the superior court of such county. If the Legislature in the exercise of its taxing power desires to avail itself of the courts for the purpose of the collection of taxes, it must act in accordance with the constitutional limitations placed upon the courts. We conclude from the foregoing that the statute in so far as it attempts to give jurisdiction to the superior court of Sacramento of actions for the possession of real estate locat-

ed in other counties is unconstitutional and void.

[4] The Attorney General also contends that, as the complaint not only prayed for the possession of the land, but also for the rents, issues, and profits thereof theretofore accrued and for a receiver, the action is thus one for both personal relief as well as for possession of land, and hence the constitutional provision does not give exclusive jurisdiction over such an action to the superior court of the county in which the court is located. Upon this proposition the Attorney General relies upon *Le Breton v. Superior Court*, 66 Cal. 27, 30, 4 Pac. 777, *Wood v. Thompson*, 5 Cal. App. 247, 248, 90 Pac. 38, and also upon cases interpreting section 392, Code of Civil Procedure, as to the jurisdiction of superior courts, such as *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *Nason v. Feldhusen*, 34 Cal. App. 789, 795, 168 Pac. 1162; *Weyer v. Weyer*, 40 Cal. App. 765, 182 Pac. 776; *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523; *Clark v. Brown*, 83 Cal. 181, 23 Pac. 289; *Peninsular, etc., Co. v. Pacific S. W. Co.*, 123 Cal. 696, 56 Pac. 604. On this point it is sufficient to say that the action, in so far as it relates to rents, issues, and profits, is essentially one to quiet title within the meaning of the Constitution, because the right thereto depends upon the issue of title and an adjudication of the right to rents is necessarily determinative of the right to the land itself. This principle was laid down in *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867. In that case the plaintiff owning land in Siskiyou county brought suit in Del Norte county to enjoin the defendant from depositing mining debris in Indian creek to the injury of plaintiff's land in Siskiyou county. The complaint alleged that the defendant claimed adversely an easement so to do. The plaintiff disputed the claim, and the court found that there was no easement. The court held that by reason of these issues the exclusive jurisdiction of the case was in Siskiyou county. In the case at bar plaintiff's claim to the rents, issues, and profits of the land is based upon a claim of title thereto, and the defendant resists on the ground that it has title. The court on this issue finds that the defendant has title, and that the plaintiff has no title, and bases its judgment upon this finding. The case of *O'Meara v. Hables*, 163 Cal. 240, 124 Pac. 1003, is not opposed to this view; that was a suit by a landlord for rents reserved in a lease, and it was held that neither the possession of nor right of possession to the land was a material issue in the case.

The action for rents and profits of land where the right to the title is involved is not a transitory action. The distinction between local and transitory actions is thus stated in 40 Cyc. 59, 63:

"The action must be brought where the land lies if these two things concur: (1) If the sub-

ject of inquiry is a right or interest in the land; and (2) if the judgment in the case will operate directly upon this right or interest." 40 Cyc. p. 59.

"When the determination of an estate or interest in land is not an incident in the determination of a cause for equitable relief in trust, fraud, or contract, but is itself the immediate question before the court, and may come within the immediate effect of its decree operating *ex proprio vigore*, then the venue is local. The real question in all these cases is as to the true nature of the action: Does it turn on the personal obligation or on the title? Does it take immediate effect in personam or upon the interest in the land? And the test here is found, not in any formal characteristic, but in the substantial nature of the action as shown in the pleading, and the kind of judgment which may be rendered." 40 Cyc. p. 63.

It is clear that the demand for rents, issues, and profits of the land in this case does not destroy the local character of the action for possession of the land, and that this case does not come within the purview of cases holding that where a transitory cause of action is properly joined with a local one, the local court does not have exclusive jurisdiction.

It must be concluded that section 3773, Political Code, in so far as it authorizes an action to be brought in Sacramento county for either the possession of lands or for the rents, issues, and profits thereof because of a tax deed to the state, where such lands are in other counties, is void, as a violation of the jurisdiction vested by the Constitution in the superior courts of the respective counties in which the land is located.

[5] It is contended that this action is essentially one "involving the legality of a tax" (article 6, § 5), and hence triable in any county, but if it be conceded to be such an action, it is also one for the possession of real estate and comes within the proviso in article 6, § 5, vesting exclusive jurisdiction in the superior court of the county in which the land is located.

The judgment is reversed, and the trial court directed to dismiss the case without prejudice to the rights of the state to renew the action in Calaveras county.

We concur: SLOANE, J.; SHAW, J.; LENNON, J.

187 Cal. 331

JONES v. DE SHIELDS, Auditor of Tehama County. (Sac. 3233.)

(Supreme Court of California. Nov. 10, 1921.)

1. Counties ⇨74(6)—Provision in Constitution cannot be read into a freeholders' county charter from which it was omitted.

The provision in Const. art. 11, § 7½, subd. 5, that a county freeholders' charter shall pro-

vide for fixing and regulation by boards of supervisors by ordinance of the appointment of deputies in the offices of the county, and for their compensation, cannot be read by implication into a charter from which it was omitted.

2. Counties ⇨74(6)—Deputy county clerk and recorder held not a special officer under the freeholders' charter.

Where a county freeholders' charter adopted in pursuance of Const. art. 11, § 7½, did not provide an office of deputy county clerk and recorder, although it fixed the salary of the chief deputy of the county clerk and recorder, the office of deputy county clerk and recorder is not thereby rendered a special one.

3. Counties ⇨74(6)—Freeholders' county charter held not to provide for appointment and compensation of deputy county clerks.

Where the chief deputy county clerk and recorder was not a special county office in a county governed by a freeholders' county charter, the appointment and compensation of the office are governed by Const. art. 11, § 7½, providing that the charter shall provide for the appointment and compensation of such officers by ordinance of the board of supervisors, and where the charter omitted such a provision, a clause contained in the charter fixing the salary of the chief deputy county clerk and recorder is inoperative, either as creating an office, prescribing the manner of appointment, or fixing the salary, and another clause of the charter denying to the board of supervisors the power to legislate concerning the appointment and compensation of assistants and deputies already provided for by the charter is unconstitutional.

4. Statutes ⇨64(4)—Freeholders' county charter not rendered invalid as a whole because omitting regulation of deputyships by board of supervisors.

A county freeholders' charter omitting a provision for the regulation of deputyships in county offices by ordinance of the county board of supervisors as required by Const. art. 11, § 7½, is not rendered invalid as a whole thereby.

5. Counties ⇨74(6)—General law held to apply to office of deputy county clerk in absence of provision in county freeholders' charter.

Under Const. art. 11, § 7½, providing that county freeholders' charter, upon being ratified by the Legislature, shall supersede all laws inconsistent with such charter relative to the matters provided in it, and that the general laws shall be superseded by the charter as to such matters for which it is competent to make provision in the charter, and for which the provision is made therein, where a county freeholders' charter failed to provide for the appointment and compensation of a deputy county clerk and recorder by the board of supervisors, as required by Const. art. 11, § 7½, the general law applies, and under Pol. Code, § 4266, a deputy county clerk appointed regularly under the provisions of section 4024 is entitled to a salary of \$1,200 per year.

6. Officers ↵47—In appointment as chief deputy, there being no such office, the word "chief" is immaterial.

Where the instrument of appointment designated the appointee as chief deputy when the office was deputy, the word "chief" should be considered immaterial in considering the validity of his appointment. (Per Shaw, J.)

7. Counties ↵74(6)—Attempted provision in freeholders' charter for salary of chief deputy county clerk prevents setting of salary by county board of supervisors.

Where a county freeholders' charter attempted to provide for the salary of the chief deputy county clerk, a provision of the charter that the board of supervisors should appoint county and district officers other than elective officers, their assistants and deputies, and should provide by ordinance for the terms of office and compensation, cannot be construed to authorize the supervisors to provide compensation for the chief deputy county clerk. (Per Shaw, J.)

In Bank.

Application by Sutherland H. Jones for writ of mandate against George M. De Shields, as auditor of Tehama County. Writ to issue.

F. L. Butterway, of Red Bluff, for petitioner.

M. J. Cheatham, Dist. Atty., of Red Bluff, for respondent.

LAWLOR, J. Petitioner seeks a writ of mandate directed to respondent as auditor of Tehama county, commanding him to draw a warrant upon the county treasurer for the payment of petitioner's salary as chief deputy county clerk for the month of November, 1920.

The facts are not in dispute. Petitioner on April 5, 1920, was appointed by the county clerk of Tehama county to the position of chief deputy county clerk. The appointment was made in writing, which was filed in the office of the county clerk, and petitioner took the oath of office. From April 5 to December 1, 1920, petitioner performed the duties of the office and regularly on the 1st of each and every month drew his salary of \$100 for the previous month. On the latter date respondent refused to draw his warrant for petitioner's salary for the month of November, and petitioner sued for a writ of mandate in the District Court of Appeal for the Third Appellate District. The writ was issued. A petition for a hearing of the matter in this court was granted.

The county of Tehama adopted a freeholders' charter pursuant to section 7½ of article 11 of the Constitution, which was subsequently ratified by the Legislature. Stats. 1917, p. 1877. The said section requires that charters adopted under it shall provide:

"5. For the fixing and regulation by boards of supervisors, by ordinance, of the appoint-

ment and number of assistants, deputies, clerks, attaches, and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons, the times at which, and the terms for which they shall be appointed, and the manner of their appointment and removal."

It declares further that—

The charter "may provide as follows: For officers other than those required by the Constitution and laws of the state, or for the creation of any or all of such offices by boards of supervisors for the election or appointment of persons to fill such offices, for the manner of such appointment, for the times at which and the terms for which such persons shall be so elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors."

The Tehama county charter contains no provision for the fixing and regulation, by the board of supervisors, of the manner of appointment or removal, the number, or the compensation of deputy county clerks. In fact, deputies and assistants of elective officers are excepted from the list of such officers as are to be appointed by the supervisors. The charter does provide for a county clerk, who is to be elected, and who is to be ex officio recorder. It also provides that—

"Each county officer shall have the powers and perform the duties now or hereafter prescribed by general law as to such officer, except as otherwise provided by this charter, and shall have and perform such other powers and duties as are or shall be prescribed by this charter."

There is no provision that the county clerk or any other officer may appoint his deputies. The position of chief deputy county clerk is not expressly created, but in section 2 of article 4, concerning salaries, it is provided that the county clerk's "chief deputy shall receive one thousand two hundred dollars per annum." The board of supervisors has never created the position of chief deputy county clerk or provided compensation for such office.

Petitioner contends that it was the intention of the framers of the charter to make the office of chief deputy county clerk and recorder of Tehama county a special office, and that as such it would not be subject to change in any way except by a vote of the electors amending the charter; that section 4266 of the Political Code, providing salaries for officers of counties of the class within which Tehama county falls, has been superseded by the charter, and that therefore he is entitled to his salary under the charter provision, but that, if it be held that petitioner is not legally entitled to his salary under the charter, then section 4266 of the Po-

litical Code must be applied, and that he would be entitled to his salary for November, 1920, under that section.

Respondent asserts:

"Our claim is that, in attempting to fix or limit the salaries of deputies directly by the charter and by not making any provision for the board of supervisors to so fix such salaries, the framers of the charter exceeded their authority, and that so far as the charter purports to fix such salaries of deputies that portion of the charter is unconstitutional."

[1] Respondent further states that—

"Since subdivision 5 provides for the fixing and regulation by the supervisors by ordinance of the appointment and number of assistants, deputies, etc., and for their qualifications and compensation, and the Tehama county charter contains no provision for such method of prescribing the compensation of the deputies in the several offices of the county of Tehama, we claim that the board of supervisors would be authorized to make the provision by ordinance for the number of deputies, their qualifications and compensation by virtue of the Constitution itself which can be read into the charter the same as if it had been made a part thereof by the framers of the charter themselves."

We do not think the charter can be thus interpreted, for it is not to be assumed that it would have been adopted by the voters had the additional provision required by the Constitution been included. To add this provision would be to create a new and different charter.

[2] Petitioner's contention that he occupies a special office of deputy county clerk and recorder cannot be maintained. The charter does not create such an office, nor provide compensation therefor. It does fix the salary of the county clerk as county clerk and recorder, and does provide that "his chief deputy shall receive one thousand two hundred dollars per annum." It cannot be held that the charter by this provision has made petitioner's office a special one thereunder—one not within the mandate of the Constitution. In providing the salary the charter only has reference to the office as a deputyship in the office of the county clerk. As such it is one of the positions contemplated by section 7½, art. 11, of the Constitution, for that provision concerns the appointment and regulation of deputies generally, and does not except chief deputies.

[3] As pointed out, that section of the Constitution requires that a charter adopted pursuant thereto shall provide for the fixing and regulation by ordinance of the board of supervisors of the manner of appointment or removal, the number and the compensation of deputies. Petitioner's position being that of a deputyship in a county office, and such deputyship not being a special county office, it is to be governed by section 7½ of article 11 of the Constitution so far as the manner of appointment and compensation

are concerned. Therefore that portion of section 2 of article IV of the charter, prescribing the salary of the chief deputy, is inoperative, either as creating the office, prescribing the manner of appointment, or fixing the salary. Also section 9 of article II of the charter, in so far as it denies to the board of supervisors the power to legislate concerning the offices of assistants and deputies, is not in conformity with section 7½ of article 11 of the Constitution, and is invalid. There is, therefore no provision in the charter of Tehama county for the appointment and compensation of deputy county clerks.

[4] It thus appears that the charter is not in conformity with the Constitution in this respect, inasmuch as it does not contain a provision which the Constitution declares is essential. The question has been suggested whether this failure to observe the constitutional requirement does not render the charter entirely inoperative. In *Brooks v. Fischer*, 79 Cal. 173, 177, 21 Pac. 652, 4 L. R. A. 429, the court, in discussing the charter of the city of Los Angeles, said:

"The further objection is that the charter, if properly adopted, must be held to be invalid, for the reason that it is in conflict with the general laws of the state.

"Under the provisions of the Constitution, the charter * * * must be 'consistent with and subject to the Constitution and laws of this state.' It is contended by the petitioner that certain provisions of the charter are inconsistent with existing general laws, and particularly that it is in conflict with the general law with reference to the improvement of streets. It may be that certain of its provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws, but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with the general statutes now in force."

In *Winter v. De Shields*, 189 Pac. 703, it was contended that the same charter of Tehama county under consideration in the case at bar was unconstitutional as a whole. Among the reasons assigned was that sections 5, 9, 10, and 11 of article II of the charter contravened subsections 4 and 5 of section 7½ of article 11 of the Constitution. The court, holding the charter as a whole to be valid, declared:

"Without entering into an examination of the objections raised by the petitioner to the charter, it is sufficient to say that, even if these objections possessed merit, still they would not render the whole charter of the county null and void and would have no bearing upon the question of the validity of the provision of the charter which fixes the salary of the assessor at the sum of \$2,000 per annum.

"The rule is well settled in California that, while a charter should be consistent with the Constitution of the state, the whole charter cannot be declared null and void because it

may contain certain provisions that are inconsistent with the Constitution of the state at the time of its adoption."

It follows that the charter does not become totally invalid because it failed to provide for the regulation of deputyships by the board of supervisors.

[5] Respondent further states that—

"No provision having been made by the Tehama county charter for the payment of the salary of the deputy county clerk, it might be determined that he would be entitled to his salary under the provisions of section 4266 of the Political Code, which provides a salary of \$1,200 per annum for a deputy county clerk."

Section 7½ of article 11 of the Constitution provides:

That a charter upon its ratification by the Legislature "shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided, * * * and shall supersede all laws inconsistent with such charter *relative to the matters provided in such charter*," and that "whenever any county has framed and adopted a charter, * * * the general laws * * * shall, as to such county, be superseded by said charter as to such matters for which, under this section it is competent to make provision in such charter, *and for which provision is made therein*, except as herein otherwise expressly provided." (Italics ours.)

These provisions contemplate that there may be a case where a charter will fail to provide for matters which it properly should cover, and the intention is clear that in such a situation the general law, which in such a case has not been superseded by the charter, shall govern. See *Cline v. Lewis*, 175 Cal. 316, 165 Pac. 915. Such a situation is presented here, and it follows that the general law on the subject of petitioner's appointment and compensation has not been superseded, but remains effective. The provision of the general law which is applicable to Tehama county in the absence of a charter provision is contained in section 4266 of the Political Code, which reads in part as follows:

"In counties of this class the county clerk may appoint a deputy, which office of deputy county clerk is hereby created, and said deputy shall receive as compensation for his services the sum of twelve hundred dollars per annum."

Section 4024 of the Political Code provides:

"Every county, township, or district officer, except a supervisor or judicial officer, may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy."

The petition in this case shows, as stated above, that the requirements of this section of the Code have been complied with; that petitioner's appointment was in writing; that it was filed in the office of the county clerk; and that he has taken the oath of office. Consequently he is entitled to receive his salary as deputy county clerk. However, he is to receive compensation under the provisions of section 4266 of the Political Code, and not by virtue of the charter of Tehama county.

For the foregoing reasons, it is ordered, adjudged, and decreed that a peremptory writ of mandate issue out of this court, directed to respondent auditor of Tehama county, commanding him to draw his warrant upon the treasurer of said county for the sum of \$100 in payment of petitioner's salary as chief deputy county clerk and recorder for the month of November, 1920.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

ANGELLOTTI, C. J. I concur in the judgment.

SHAW, J. I concur in the judgment, but for reasons somewhat different from those set forth in the opinion of Mr. Justice LAW-LOR.

[6] The petitioner was appointed deputy county clerk of the county of Tehama by the clerk thereof. In the instrument of appointment he was named as "chief deputy." The word "chief," however, should be considered immaterial in considering the validity of his appointment as a deputy county clerk, if, as is contended, there is no office specifically designated as "chief deputy county clerk." He prays for a writ of mandate to compel the auditor to issue a warrant for his salary at the rate of \$100 a month for services rendered as such deputy county clerk; the auditor having refused on demand to issue such warrant.

Tehama county is operated under a special charter framed and adopted in pursuance of section 7½, art. 11, of the Constitution. That section authorizes any county to frame a charter for its own government in the manner therein provided. It provides that, when such charter is duly framed and approved by the Legislature, it—

"shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter."

Subdivision 4 of the portion thereof declaring what it shall be competent to insert in such charters is as follows:

"For the powers and duties of the board of supervisors and all other county officers, for

their removal and for the consolidation and segregation of county offices, and for the * * * filling of all vacancies occurring therein; provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

This proviso is probably modified to some extent by a subsequent provision as follows:

"Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature, as herein provided, the general laws adopted by the Legislature in pursuance of sections four and five of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided."

Sections 4 and 5 of this article referred to in the last quotation are the sections which authorize the Legislature to establish a system of county governments and to provide by law for the appointment of the several county officers named in said section 5 and to prescribe their duties and regulate their compensation.

It will be seen from these provisions of section 7½ that the powers and duties of county officers in any county adopting a special charter under that section remain subject to and controlled by general laws respecting anything relating thereto concerning which the charter makes no provision. If, therefore, we find no valid provision in the charter with respect to the appointment and compensation of deputy county clerks, it would follow that the provisions of the general law regarding them would prevail. The charter contains certain provisions on that subject with respect to county clerks. It provides that there shall be a county clerk and that he "shall be ex officio recorder." Stats. 1917, p. 1883. It further provides that his salary as clerk and recorder shall be \$2,400 per annum and that "his chief deputy shall receive one thousand two hundred dollars per annum." Article 4, § 2, Stats. 1917, p. 1883. It also provides in section 4 of article 3 that—

"Each county officer shall have the powers and perform the duties now or hereafter prescribed by general law as to such officer, except as otherwise provided by this charter."

[7] Section 9, art. II, of the charter, provides that—

"The supervisors shall appoint all county and district officers other than elective officers, their assistants and deputies, except as otherwise provided in this charter," and shall provide by ordinance for the terms of office and for the compensation of these appointive officers, "unless such terms of office * * * are otherwise provided by law or by this charter."

Inasmuch as the compensation of the chief deputy clerk was attempted to be provided for by the charter in article IV aforesaid, it follows that this last provision cannot be construed to authorize the supervisors to provide compensation for such chief deputy county clerk.

It is conceded by the parties hereto that the supervisors have never by ordinance or otherwise appointed or provided for the appointment of any deputies or fixed the compensation of any of them.

The provisions of section 7½ of article 11 of the Constitution above set forth, it is to be observed, do not authorize the Legislature, or the county, by means of a freeholders' charter, to provide directly for the appointment of deputy county officers or for their compensation. On the contrary, that section prescribes in subdivision 5, as above shown, that the charter shall provide for the fixing and regulation by the board of supervisors by ordinance for such appointment and compensation. The matter is not to be fixed by the charter itself, but by ordinance adopted by the board of supervisors. It follows, therefore, that the charter contains no valid provision either for the appointment of the petitioner or other person as deputy county clerk, or for his compensation when appointed. Also it follows from the fact that the charter contains no provision therefor that the provisions of the general law empowering the county clerk to appoint his own deputy and fixing the compensation of such deputy are not superseded by the charter, but remain in full force as if no charter had been adopted. The conclusion is therefore inevitable, since the general law allows the deputy county clerk a salary of \$100 per month, and since his appointment as chief deputy is in substance an appointment as deputy county clerk, that the petitioner is entitled to the salary demanded by him, and that the writ of mandate should issue as prayed for.

187 Cal. 409

KERR v. REED et al. (L. A. 6547.)

(Supreme Court of California. Nov. 12, 1921.)

1. Vendor and purchaser ⇨76, 148—Payment and execution of deed held concurrent conditions; tender necessary to put vendee in default, unless waived.

When the final payment comes due under a contract in which time is of the essence, the obligation to make the payment and the obligation on the part of the vendor to make a deed are dependent and concurrent conditions, under Civ. Code, § 1439, and vendee is not in default until vendor has tendered a deed, or tender has been waived.

2. Vendor and purchaser ⇨334(6)—Vendee entitled to rescind and recover money paid on breach by vendor.

If a vendor under a contract for sale of land sells the land to a third party while the contract is still in force, without any arrangement by which he can subsequently make title to the vendee, the sale constitutes a breach of contract, which entitles the vendee to rescind and recover money paid.

3. Vendor and purchaser ⇨335—Defaulting purchaser cannot recover purchase money.

A purchaser in default cannot recover purchase money paid.

4. Vendor and purchaser ⇨341(3)—Finding that vendee did not waive tender of deed sustained.

In an action by vendee to recover money paid on contract to purchase land, *held*, that a finding that the vendee had not waived tender of deed by vendor after final payment was due was warranted by the evidence.

5. Vendor and purchaser ⇨148—Tender of deed by vendor, how waived.

Tender of deed by vendor after installment is due entitling vendee to a deed under a contract of which time is of the essence, may be waived by the vendee expressly or by implication, or excused by conduct showing that the tender would be in vain and a useless ceremony.

6. Appeal and error ⇨842(2)—Waiver by vendee of tender of deed after payment due question of fact.

The question of waiver by a vendee of tender by vendor of deed after installment due entitling vendee to the deed, under a contract of which time was of the essence, is a question of fact, and a finding of waiver, supported by sufficient evidence, is binding upon appeal.

In Bank.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by John N. Kerr against David C. Reed and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 39 Cal. App. 11, 179 Pac. 399.

M. A. Luce, of San Diego, and Frank M. Gunter, Robert B. Murphey, and Hunsaker,

Britt & Cosgrove, all of Los Angeles, for appellants.

Dwight D. Bell, of San Diego, for respondent.

WILBUR, J. This is an action brought by a vendee of real estate to recover from the vendor installments of the purchase price paid to him, amounting to \$5,600, upon the theory that the contract dated December 4, 1912, had been rescinded by mutual consent. The contract price was \$25,000; \$5,000 paid upon the execution of the contract; \$5,000 and a mortgage for \$15,000 for the balance of the purchase price to be paid December 4, 1913, interest at 6 per cent. payable quarterly. Interest was paid as follows: \$300, March 15, 1913; \$150, June 4, 1913; \$150, July 1, 1913; \$65.63, September 4, 1913; \$69.-03, November 10, 1913. The vendee on December 4, 1913, was in default as to the interest, \$165.34, and also had failed to pay the taxes due in November, but in lieu thereof had given a note for \$182.87. Time was made of the essence of the contract by the following clause:

"Time is hereby declared to be of the essence of this contract, and should purchaser fail or neglect to make said deferred payments, or any of them, at the times and in the manner herein provided, then and in that event this receipt and contract shall at once become null and void, and the said parties of the first part shall be at once released from any and all obligations to make any conveyance hereunder, or to convey the property herein described to said purchaser. It being agreed that it is impossible to fix and determine the actual damage arising out of the failure of said purchaser to make said preferred payments, it is hereby agreed that all moneys paid upon the purchase price of said property shall be by the parties of the first part retained and held as and for liquidated damages arising and caused by the failure of the said purchaser to comply with the terms hereof.

"And the parties of the first part, on receiving such payment, at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, or to his assigns, a good and sufficient deed conveying said property to said party of the second part or his lawful assigns, and to furnish a certificate of title from the Union Title & Trust Company, showing property free and clear of incumbrance from date of November 23, 1912."

[1] Nothing was done on the 4th of December, 1913, by either party. The vendee had been placed in possession under the contract, that is to say, under the arrangement made the rents from the property were collected by an agent and credited to the vendee on account of the interest due on the contract. Some time after the 4th day of December, 1913, at the direction of the defendant, this agent began to credit the rentals to

the vendor. It is thoroughly established that when the final payment comes due under a contract in which time is the essence of the contract, the obligation to make the payment and the obligation on the part of the vendor to make a deed are dependent and concurrent conditions. Section 1439, Civ. Code; *Boone v. Templeman*, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126, and cases cited; *Sausalito, etc., Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 308, 136 Pac. 57; *Lemle v. Barry*, 181 Cal. 6, 10, 183 Pac. 148; *Lemle v. Barry*, 181 Cal. 1, 3, 183 Pac. 150; *Hoppin v. Munsey*, 193 Pac. 398.

[2, 3] On December 4, 1913, the date of the final payment, the vendor was to give the deed and the purchaser to tender the purchase money. Without action on the part of either, neither could claim the other was in default. The plaintiff testified and the court found that he was totally unaware of any intention on the part of the vendor to declare a forfeiture or to consider the contract terminated until July, 1914, when he was notified that the vendor had sold the property. This sale was made June 15, 1914, without any arrangement by which the vendor could subsequently make title to the plaintiff herein, and, consequently, if the contract was then in force as to both parties, the sale constitutes a breach of contract on the part of the vendor which the vendee might take advantage of by rescission and suit to recover money paid on account of purchase price. *Brimmer v. Salisbury*, 167 Cal. 522, 140 Pac. 30. The vendor has never tendered the vendee a deed, nor has the purchaser ever tendered the purchase money. The plaintiff does not allege that he was at any time ready, able, and willing to pay the purchase price, and relies wholly upon the implied rescission arising from the sale by the vendor to a third party and plaintiff's subsequent demand for a return of the purchase money theretofore paid by him as a consent thereto.

This case was previously tried and a motion for a nonsuit was granted. An appeal was taken to this court and assigned to the District Court of Appeal, Second Division, where the judgment was reversed. *Kerr v. Reed*, 39 Cal. App. 11, 179 Pac. 399.

Upon the new trial the plaintiff recovered judgment for the full amount paid by him on the contract, less the rental value of the premises during the time he was in possession. The vendor appeals from this judgment. He claims that the respondent waived a formal tender of the deed on December 4, 1913, and therefore that such tender was unnecessary to put the vendee in default. *Hoppin v. Munsey*, supra. Mr. Swayne, Mr. Fleet, and the defendant testified that the day before the final payment came due, to wit, December 3, 1913, the vendee stated to the vendor that it would be impossible for him to make the payment which was due

the next day; that he was "all in" and could not raise the money; and that the vendor thereupon stated that he would give no extension of time and would stand on the contract. The defendant also testified that the plaintiff had made similar statements in September, 1913; that plaintiff then said that he would be unable to meet his payments any more; that he was "all in"; that he had to pay some notes for his father-in-law in Denver, and he could not pay any more. He said he had put in about \$25,000 in San Diego and it would all be a loss. This testimony, if believed by the trial court, would undoubtedly be sufficient to justify a finding by that court that the tender of the deed on December 4th was waived, and that the purchaser being in default, had no right to recover the purchase money theretofore paid by him. *Hoppin v. Munsey*, supra. The testimony of the plaintiff, however, conflicted with that of the defendant and his witnesses.

[4] The plaintiff testified that in July, 1913, he was unable to pay the full amount of the \$300 due as interest, and that the defendant told him to do the best he could and that he would let the rents apply on the interest as collected; that about November 20, 1913, the payment of \$5,000 due December 4, 1913, was mentioned by Mr. Fleet, defendant's agent. Plaintiff testified: "I told him I didn't think I would be able to meet it at that time, and he said not to let it worry me; that they would take care of it all right." At that time it was arranged that the defendant would pay the taxes then due on the premises, which the vendee had contracted to pay, and to accept a written agreement of plaintiff bearing interest in lieu of such payment. Plaintiff testified that no other conversation occurred with either Mr. Fleet, Mr. Swayne, or Mr. Reed until December 10, 1913, and that he had not seen any of them between November 20th and December 10th; that on December 10th he asked Mr. Fleet, defendant's agent, for a written statement as to when he might pay the balance due on the contract. To his request Mr. Fleet responded: "Well, don't ask Mr. Reed for any written statement on this. He has never taken anybody's money and he won't take yours." Subsequently plaintiff stated he talked with Mr. Reed, the defendant, who told him not to worry; that it could be arranged some way; that neither the defendant nor Mr. Fleet informed the plaintiff at these conversations that they considered the contract forfeited or that they considered themselves in possession of the property. The plaintiff admitted on cross-examination that on December 4, 1913, he did not have sufficient funds to meet the \$5,000 payment, but that he did have some money and property from which

money could be raised. The plaintiff does not specifically deny the above-mentioned conversations testified to by defendant and the witnesses Swayne and Fleet as having occurred between November 20th and December 4th, except by denying that any conversation occurred between November 20th and December 4th. It is contended by appellant that plaintiff in effect merely denied the date of the conversations and not the conversations themselves. But the court may well have believed that he meant to deny the conversations. If we accept the plaintiff's testimony, it follows that, whatever may have been said before the 20th of November 1913, the parties then regarded the contract as still in force. The plaintiff then gave a new obligation to pay the taxes then due under the contract, and requested and received assurance that he would not be pressed for the payment due December 4, 1913.

[5, 6] The tender of the deed was due from the defendant on December 4th. The tender could have been waived by the vendee expressly or by implication or excused by conduct showing that the tender would be a vain and useless ceremony. *Hoppin v. Munsey*, supra. There was no express waiver of the tender of the deed, and the implied waiver to be inferred from the conversation of November 20th, testified to by the plaintiff, was, of course, conditioned upon the waiver of payment when due. Hence, if the defendant had tendered his deed on December 4th, he might be in a condition to declare a default for the nonpayment of the amount then due, but without such tender it is clear he could not declare such default unless the tender was excused under the law, on the theory that it would have been a useless ceremony. *Hoppin v. Munsey*, supra. But here, according to plaintiff's testimony, both parties regarded the contract as still in force, after the plaintiff's statements of his inability to pay, and for that reason made arrangements to pay the taxes, and, according to the plaintiff, on December 10th defendant recognized the contract as still in force. In this state of the evidence the trial court found the fact to be:

"That plaintiff never, by act, word, or otherwise, waived any provision or covenant of, or right under, the contract. * * *"

While this finding is attacked as not supported by the evidence, the testimony of the plaintiff was sufficient to support the finding, notwithstanding his failure to specifically deny the conversations attributed to him by defendant's witnesses. The question of waiver is a question of fact, and when supported by sufficient evidence to justify the inference of waiver is binding upon this court. In view of this finding and others

by the court along the same line, we have the simple situation where both parties to a contract in which time is made the essence thereof, allow the date of final payment to pass without action. Under these circumstances neither party can be subsequently placed in default by the other without a tender. *Lemle v. Barry*, supra. It follows that the contract was in full force and effect at the time the vendor made the conveyance to a third party and thereby breached his obligation. The plaintiff was justified in treating this as a rescission and upon consenting thereto to sue for a recovery of the money paid by him.

Appellant strongly relies upon the cases of *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, 159 Pac. 420, and also upon the case of *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363. It is sufficient to say that the contract in the case at bar is substantially identical with that involved in the recent cases of *Lemle v. Barry*, supra, and *Hoppin v. Munsey*, supra, and, being controlled by these late cases if any inference is to be derived from the cases relied upon by the appellant pointing to a different conclusion, a point which we need not decide, these cases are controlled by the more recent decisions of *Lemle v. Barry*, supra, and *Hoppin v. Munsey*, supra.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SHURTLEFF, J.

SLOANE, J., deeming himself disqualified, does not participate herein.

187 Cal. 415

ELDER et al. v. DOSS et al., Board of Sup'rs.
(S. F. 9908.)

(Supreme Court of California. Nov. 12, 1921.)

1. Counties ⇨2—Statute for creation may prescribe conditions in addition to those prescribed by Constitution.

While under Const. art. 11, § 3, a new county cannot be created except under general and uniform laws which the Legislature may provide subject to certain limitations, the Legislature may prescribe conditions for such formation other than those prescribed by the Constitution, so long as they are consistent therewith.

2. Mandamus ⇨10—Statutes ⇨64(4)—Invalidity of condition in acts for formation of new counties held to render whole of such acts void; mandamus not granted for consideration of petition for formation of county contrary to provision of statute, it being valid or there being no statutory authority.

It cannot be assumed that the acts for formation of new counties (St. 1907, p. 275, § 1,

amended by St. 1909, p. 194, § 1) would have been passed without the provision thereof that no new county shall be formed which shall reduce the area of an existing county to less than 1,200 square miles; so, if such condition is not valid, the whole of such acts is void, and there is no general law for the formation of new counties, as is necessary under Const. art. 11, § 3; either alternative preventing the granting of mandamus compelling the consideration of a petition for formation of a new county which would so reduce an existing county.

In Bank.

Original mandamus proceeding by James W. Elder and others against H. F. Doss and others, constituting the Board of Supervisors of the County of Sonoma. Dismissed.

Hartley F. Peart, of San Francisco, and Frank J. Burke and E. J. Dole, both of Petaluma, for petitioners.

G. W. Hoyle, Dist. Atty., of Santa Rosa, for respondents.

ANGELLOTTI, C. J. This is an application for a writ of mandate to compel the board of supervisors of Sonoma county to appoint a day for the hearing of a petition for the organization of a new county out of territory wholly within the territory of Sonoma county. The petition failed to show that the creation of the new county would not reduce the area of Sonoma county to less than 1,200 square miles, and it is conceded that it would so reduce such area. Both the act of 1907 providing for the formation of new counties (Stats. 1907, p. 275) and the act of 1909 amendatory thereof (Stats. 1909, p. 194), the only statutes on the subject, provided as follows:

"Nor shall any new county be formed which shall reduce to less than twelve hundred square miles the area of any existing county from which territory is taken to form such new county."

The petition purported to be signed by more than one-half of the qualified electors living within the territory to be comprised in the new county, a sufficient compliance in that respect with the act of 1907, but it did not purport to be signed by 65 per cent. of such qualified electors, as required by the amending act of 1909, or by not less than 50 per cent. of the qualified electors residing in the county, as required by such amending act. For these reasons the board refuses to proceed on the petition, and denied the same.

At the very threshold plaintiffs are met by a condition that, in our opinion, requires a denial of their application. Their claim, in brief, is that the amendatory act of 1909 is void for failure of its title to sufficiently state its scope, with the result that the only act in force is that of 1907, and that the petition, being signed by the requisite number

of electors as prescribed by that act, is sufficient in respect to signatures. With regard to the provision common to the act of 1907 and that of 1909, that no new county shall be formed which shall reduce to less than 1,200 square miles the area of any existing county from which territory is taken to form such new county, the claim is that the provision is violative of our Constitution for several reasons, and must be disregarded, leaving the act of 1907 in force without such provision.

[1] It was said in *Los Angeles County v. Orange County*, 97 Cal. 329, 331, 32 Pac. 316:

"Counties are merely local subdivisions of the state, created by the Legislature for governmental purposes, and are denominated public corporations for the reason that they are but parts of the machinery employed in carrying on the political affairs of the state. *The Legislature, except as restrained by constitutional limitations, may change their boundaries and extent, consolidate two or more into one, or divide and create new counties out of the territory of one or more previously existing ones.*" (Italics ours.)

At the time of this decision, as now, the only constitutional provision on the subject was section 3 of article 11 of the Constitution, which then simply provided that—

"No new county shall be established which shall reduce any county to a population of less than eight thousand; nor shall a new county be formed containing a less population than five thousand; nor shall any line thereof pass within five miles of the county seat of any county proposed to be divided. * * *"

These were prohibitions pure and simple, and, subject only to them, the power of the Legislature in the matter of the creation of new counties by either general or special law (see *Wheeler v. Herbert*, 152 Cal. 224, 228, 92 Pac. 353; *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950) was unlimited. In 1894 the constitutional provision was amended by inserting at the beginning of the section the words, "The Legislature, by general and uniform laws, may provide for the formation of new counties; provided, however, that," and in 1910 it was further amended by inserting in this clause after the words "may provide for" the words "the alteration of county boundary lines, and for," with the result that the section now reads:

"The Legislature, by general and uniform laws, may provide for the alteration of county boundary lines, and for the formation of new counties; provided, however, that no new county shall be established which shall reduce," etc. Const. art. 11, § 3.

By the amendment of 1910 the minimum population of the old county was also fixed at 20,000 instead of 8,000, and the minimum population of a new county at 8,000 instead of 5,000, matters immaterial here. The ef-

fect of these changes was considered in the recent case of *Mundell v. Lyons*, 182 Cal. 289, 187 Pac. 950, and it was substantially held that the provision authorizing the Legislature "by general and uniform laws" to provide for the formation of new counties was designed to prohibit the formation of new counties by the Legislature by special act or provision by the Legislature for their formation in any other way than by general and uniform laws. In the language of *Mundell v. Lyons*, supra:

"It is at once evident that the section, as it so read, was designed to be prohibitory and a limitation upon the authority of the Legislature."

It was simply another "constitutional limitation" upon the power of the Legislature in the matter of the creation of new counties, which, subject to the prohibitions contained in the section, was still left with full power in such matters. Whether there should be any law under which new counties might be formed was left to the Legislature. The language in this respect is entirely permissive, being, "The Legislature, by general and uniform laws, may provide," etc., and clearly the case is not one where the word "may" can be read as "shall" or "must." If, in its wisdom, it concluded that provision for the formation of new counties should be made, it could make it only "by general and uniform laws," and, in view of its power in such matters, it seems perfectly clear that in such laws it could prescribe such conditions as it saw fit, in addition to and consistent with the conditions prescribed in the constitutional provision.

[2] In the exercise of the power vested in the Legislature, the provision against a reduction in area of the old county to less than 1,200 square miles was inserted in the acts of both 1907 and 1909. Such, in the judgment of the Legislature, was deemed an indispensable condition to the creation of a new county from the territory of an old county. We are aware of no authority that would warrant us in holding that the Legislature would have enacted these laws in the absence of such a provision, even if we assume for the purposes of this decision that it is violative of certain provisions of our Constitution inhibiting special legislation and requiring that all acts of a general nature shall have a uniform operation. It was the judgment of the Legislature that no new county should be formed if its formation would have any such effect. If, then, this provision is void, the whole act of 1907 must necessarily be void, and likewise the whole act of 1909. The result, if that is the case, obviously would be that no valid general and uniform law for the formation of new counties has been enacted. Without such a law there can

be no proceeding for the formation of a new county, and plaintiff's petition was properly denied by the board of supervisors of Sonoma county. If, on the other hand, the act of 1907 was a valid enactment, the petition was properly denied for the reason that the formation of the proposed new county would be in violation of the terms thereof in the respect discussed, as prescribed both in such act and the amendatory act of 1909. In either event plaintiff's proceeding before the board of supervisors must be held ineffective for any purpose.

Under the circumstances stated, discussion of the objections on constitutional grounds to the provision in these acts prohibiting reduction in area below 1,200 square miles of the county from the territory of which the new county is proposed to be formed, as well as to the amendatory act of 1909, would be futile. We are not to be understood, however, as assenting to the claim that the area provision is invalid, or as expressing any opinion as to the objections made to the amendatory act.

The order to show cause is discharged, and the proceeding dismissed.

We concur: SHAW, J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; WILBUR, J.

187 Cal. 399

MAHONY v. STANDARD GAS ENGINE CO.
(S. F. 9538.)

(Supreme Court of California. Nov. 12, 1921.
Rehearing Denied Dec. 12, 1921.)

1. Sales $\S$ 390—Action to recover money paid on contract not within statutes as to damages.

In action to recover a deposit paid under a contract for gas engines where the cause of action was not based on an express warranty nor the action one to reform a contract and recover damages for its breach, Civ. Code, § 3308, which establishes the measure of damages for the breach of an agreement by the seller of personal property not fully paid for in advance, and Civ. Code, § 3313, which provides the rule of compensation for a breach of warranty of personal property, do not apply.

2. Sales $\S$ 390—Contract to furnish and install gas engines not within provision as to warranty of specially manufactured article.

An action to recover a deposit paid under a contract to "furnish and install" gas engines is not within Civ. Code, § 1770, which provides that one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose.

3. Sales $\S$ 390—Where, under contract, there is failure of consideration, no request necessary before suing for return of deposit.

Where there was a total failure of consideration for a deposit under a contract for the

purchase of gas engines, in that the engines tendered did not comply with those to be furnished under the contract, a promise on the part of the seller that he would repay it was raised by law without any request, and an action for money had and received was maintainable.

4. Sales ⇨128—Refusal to accept gas engines developing less than required horse power was rescission of contract.

Under Civ. Code, § 1689, providing that a party to a contract may rescind it where, "through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part," the refusal by plaintiff to accept gas engines that developed less than the agreed horse power was a rescission of the contract, though he had previously insisted on delivery.

5. Sales ⇨392—Total failure of consideration when engine valueless to buyer, so that formal rescission not necessary before suing.

Where gas engines ordered from defendant by plaintiff were valueless to plaintiff because of their failure to develop the specified horse power, the failure of consideration for plaintiff's deposit under the contract was total, so that formal rescission before suing for money paid by buyer was unnecessary.

6. Reformation of instruments ⇨19(1)—To express intention.

Notwithstanding Civ. Code, § 1625, providing that the execution of a contract in writing supersedes all negotiations and that such prior negotiations cannot be availed of to vary the terms under Civ. Code, § 3399, where there has been a mutual mistake, the contract may be revised so as to express the intention of the parties.

7. Reformation of instruments ⇨46—Finding held equivalent to finding of mutual mistake.

In an action to recover a deposit under a contract for the purchase of engines, in which plaintiff sought to revise the contract under Civ. Code, § 3399, a finding that the omission of a provision that the engines would develop specified horse power was a mistake of the parties held equivalent to a finding that it was a mutual mistake.

8. Reformation of instruments ⇨47—In action to recover money paid on account of contract in which there was mutual mistake, not necessary to have reformation before recovery.

In an action for the recovery of money paid on account of a contract for gas engines which were to develop 150 brake horse power, where there has been a finding of mutual mistake in not including such stipulation in the contract, it is not necessary that the contract be formally revised, where the reformation is not for the purpose of enforcing it as reformed but to show a failure of consideration.

9. Reformation of instruments ⇨48—Findings as to mistake held to justify a reformation.

In action for money paid under a contract for gas engines omitting a stipulation that such engines should develop 150 brake horse power,

findings that there was a mistake on the part of the parties, and that plaintiff signed the agreement in the "belief" that it contained such stipulation, justified a reformation of the contract.

10. Appeal and error ⇨1170(3)—Overruling of demurrer to complaint harmless, defendant's answer construing alleged mistake in contract as mutual.

In action for money paid under a contract for gas engines, the overruling of a demurrer to complaint for failure to state that the omission of a stipulation was a mutual mistake of the parties or a mistake of the plaintiff which the defendant at the time knew or suspected was not prejudicial; defendant's answer construing such alleged mistake as a mutual one, and the substantial rights of the parties not being affected under Code Civ. Proc. § 475.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Andrew Mahony against the Standard Gas Engine Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. F. Lemberger and V. G. Skinner, both of San Francisco, for appellant.

Henry A. Jacobs and G. B. Blanckenburg, both of San Francisco, for respondent.

SHURTLEFF, J. This appeal is upon the judgment roll alone and is from a judgment in favor of plaintiff, against the defendant.

The allegations of the amended complaint, essential to the determination of the questions presented, are that the parties entered into an agreement whereby defendant agreed to furnish and install two gas engines, "240 I. H. P. [indicated horse power] * * * for the price of forty thousand (40,000) dollars"; that such agreement was executed in confirmation of a written proposal theretofore submitted by defendant to plaintiff and verbally accepted by the latter, which provided that the engines should develop not less than 150 brake horse power; that it was the intention of the parties that a stipulation to that effect should be included in the contract; that the contract erroneously omitted any reference to, or warranty of, the development of 150 brake horse power; that plaintiff executed said agreement in the belief that said provision was therein contained; that the omission of said provision warranting the development, by said engines contracted for, of 150 brake horse power was a mistake. "That at the time of entering into said agreement and prior thereto defendant was informed and advised by plaintiff of the particular purpose for which said engines were to be used, and defendant at all times was informed and advised and had actual knowledge that it was required by plaintiff,

and it was necessary that said engines develop not less than 150 brake horse power, otherwise said engines would be of no use for the purpose required." That defendant at all times, both prior to and at the time of entering into said contract, agreed with and warranted to plaintiff that each of said engines would actually develop in excess of 150 brake horse power. That plaintiff, relying upon said warranty and agreement on the part of the defendant, paid defendant the sum of \$10,000 as a deposit on account of the purchase price of said engines.

That thereafter defendant notified plaintiff that the engine mentioned in the said written agreement "would develop only 140 brake horse power, whereupon plaintiff refused to accept delivery of said engines and demanded a return of said deposit of \$10,000," which defendant refused. The prayer is for a money judgment only, to wit, the sum of \$10,000 and interest. The defendant demurred generally and specifically to the complaint, which demurrer was overruled. Whereupon the defendant answered, admitting the execution of the agreement, which is set forth in *hæc verba*, but denied all of the aforementioned allegations of the complaint, particularly the one to the effect that it was agreed that the engines should develop 150 brake horse power, or any other brake horse power, and averred that the only proposal submitted to the defendant by plaintiff was embodied in the agreement set forth in the answer, which agreement makes no mention whatever of "brake horse power." It denied that the omission from the contract of a provision warranting the development by the engines of 150 brake horse power, or any other brake horse power, was a mistake, or that there was any mistake made by either plaintiff or defendant in the execution of the contract and averred:

"That the said contract embodied all and every condition, warranty and reference intended by the parties to be contained therein."

Payment of \$10,000 is admitted, coupled with the averment that it was paid under the terms of the contract set forth in the answer.

The defendant also filed a cross-complaint, which refers to the contract mentioned in its answer, makes it part of such cross-complaint, and alleges upon information and belief that plaintiff entered into a contract with the Standard Oil Company to furnish the latter two engines which would develop "in the amount of 150 brake horse power," which were the engines covered by the contract between plaintiff and defendant. It is further stated in the cross-complaint that "after the engine had been built by the manufacturer as called for in the contract," defendant (cross-complainant) was informed by the manufacturer that it would only develop

140 brake horse power, although built in accordance with the terms of the contract between plaintiff and defendant; that defendant informed plaintiff of that fact and offered to rescind the contract between plaintiff and defendant "and tender to the said plaintiff the sum of \$10,000" paid by plaintiff to defendant under the terms of the contract, which offer plaintiff refused to accept, "but demanded that this defendant procure the engine from the manufacturer, and in reliance upon the terms of said contract and in pursuance of the said demand" the defendant ordered the "said engines shipped"; that plaintiff refused to take delivery, and that by reason thereof defendant has been damaged in the sum of \$20,000, upon which amount \$10,000 has been paid. A demurrer to the cross-complaint was overruled; thereupon plaintiff answered denying the material allegations of the cross-complaint with the exception that the Standard Oil Company was a corporation, and repeating certain allegations of his amended complaint, and averring that the engines called for by the contract between him and the defendant were "to be installed in a motor boat being constructed by plaintiff for the Standard Oil Company, and which, under the terms of the contract of plaintiff with said Standard Oil Company," it was "agreed would develop 150 brake horse power," of which the defendant at all times had knowledge.

The necessity for the foregoing exhaustive résumé of the pleadings is apparent from what follows.

The court made its findings covering every material issue raised by the pleadings and rendered judgment in favor of plaintiff, from which judgment defendant prosecutes this appeal.

The defendant contends that the judgment is erroneous because not supported by the findings in the following particulars: First, that there was no expressed or implied warranty as to brake horse power; that the engines tendered by defendant were in full performance of the contract and that plaintiff, in not accepting them when tendered, violated his contract. Second, "That plaintiff has mistaken his remedy in seeking to recover the part payment for the reason that the findings show that he has at all times refused to cancel the contract even after knowledge that the engines would not develop over 140 brake horse power; that he has not rescinded nor offered to rescind and that he has not sought to reform the contract and sue for the damages sustained by reason of the alleged breach of the reformed contract."

[1, 2] We think most of the foregoing contentions are predicated upon a misconception by defendant of plaintiff's cause of action and the theory of his claim for recovery. He is not suing upon an express warranty as to brake horse power, neither is the action pri-

marily one to reform a contract and recover damages for its alleged breach as so reformed. We agree with defendant that neither the provisions of section 3308 of the Civil Code, which establishes the measure of damages for the breach of an agreement by the seller to sell personal property, not fully paid for in advance, nor of section 3313 of the same Code, which prescribes the rule of compensation for the detriment caused by the breach of a warranty of the quality of personal property, are applicable here. Furthermore, this is not a case falling within section 1770 of the Civil Code, which declares that "one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose," for it is not alleged, nor found, that the defendant manufactured, or agreed to manufacture, the engines covered by the contract—his undertaking was to "furnish and install" them.

[3] Plaintiff's claim for the recovery of the \$10,000 paid by him on account of the price of the engines in question is based upon an alleged total failure of the consideration upon which it was paid in that the engine tendered did not comply with those to be furnished under the contract which the court found was entered into by him with the defendant. In short, the action is for money had and received, which this court has held may be maintained whenever an equity or legal right arises from the circumstances that one person has money which he ought to pay to another. *Quimby v. Lyon*, 63 Cal. 394. In such a case, the law raises a promise on the part of the receiver of the money that he will pay it to the person entitled thereto, and that, too, without any previous request. *Hawley v. Sage*, 15 Conn. 56. The gist of the present action is that the law will not permit defendant to retain money paid it for an article which the trial court found failed to comply with what defendant had agreed to furnish plaintiff.

[4, 5] The Code declares that a party to a contract may rescind it where "through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part." Civ. Code, § 1689.

The following, taken from *S. C. V. Peat Fuel Co. v. Tuck*, 53 Cal. 304, is in point:

"The substance of the complaint was that the defendant, by a written contract (a copy of which was annexed to the complaint), had agreed with the plaintiff to construct a peat machine and its appurtenances within sixty days, at his own expense, and put the same in running order at a point on the San Joaquin river. The contract specifies the machinery, and as a part of it a scow of certain proportions; and the complaint avers that at the time of the execution of the agreement and soon thereafter the plaintiff paid to the defendant in advance, as a part of the contract price, several sums of money, amounting in the aggregate

to four hundred and thirty-three dollars and fifty cents, and that though the time for performing the contract by the defendant had elapsed, he had never 'built, furnished, or put in running order, any peat or other machinery, * * * and refused so to do; and said plaintiff has never accepted any machinery from said defendant.' We think this is substantially an averment that the defendant had failed and refused to perform any part of the contract; and the action is to recover the money advanced, on the ground that the consideration upon which it was paid had wholly failed. The authorities appear to be uniform to the effect that where a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it."

See, also, *Rose v. Foord*, 96 Cal. 152, 30 Pac. 1114; *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 62 Pac. 39.

We cannot concede the correctness of defendant's contention that there was no rescission of the contract in question by plaintiff. It is true that the court found that defendant at one time offered to cancel the contract, which offer was refused, and that plaintiff demanded that defendant fulfill it, but the court further found:

"That thereafter defendant tendered to plaintiff * * * the same engines that defendant notified plaintiff would develop only 140 brake horse power; that plaintiff refused to accept [them] * * * and thereupon demanded of said defendant the return of the said deposit of \$10,000."

This is clearly a finding of rescission by plaintiff, and it was in fact a rescission; plaintiff could not have done more, except, possibly, to have said, which would have added nothing to the efficiency of the rescission, "I rescind the contract existing between us."

In *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 373, 62 Pac. 39, 40, this court said:

"Nor, where the failure of the consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid. * * * In the authorities cited [except one] it is held that, where there has been a total failure of consideration as to one party, the law implies a promise on the part of the other to repay what has been received by him under the contract."

In the case at bar the failure of consideration was total, for it clearly appears from the findings that unless the engines developed not less than 150 brake horse power, they would be of no use for the purpose required, and hence of no value to plaintiff.

[6, 7] Appellant correctly affirms that the law is well settled, to use the language of the statute, that "the execution of a contract in writing, * * * supersedes all the ne-

gotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument" (Civ. Code, § 1625), and adds that such prior "negotiations and agreements cannot be availed of by either party to vary the terms of a subsequent written instrument"; but, as the findings indicate was done, the plaintiff in offering, and the court in receiving, evidence tending to show that the agreement of the parties was that the engines should develop 150 brake horse power, did not transgress this well-established principle of law. It was not an attempt to vary, and, if satisfactorily established, did not vary, the terms of the contract. Its purpose was to revise the contract, which, due to a mutual mistake of the parties thereto, did not, as written, truly express their intention—a remedy expressly given by section 3399 of the Civil Code, which provides:

"When through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

The court found "that the omission of said provision stating that said engines contracted for would develop 150 brake horse power was a mistake on the part of the parties hereto," which was the equivalent of finding that it was a mutual mistake.

[8] It is not necessary that the contract be formally revised (*Gardner v. Cal. Guarantee, etc., Co.*, 137 Cal. 71, 75, 69 Pac. 844), and especially in a case where, as here, the reformation is not for the purpose of enforcing it as reformed, or seeking damages for its breach, but to show a failure of consideration. Moreover, there is no allegation that the rescission prejudiced rights acquired by a third person.

The authorities cited by respondent to the proposition that a contract cannot be revised by a party thereto because of an omission due to his own negligence are not pertinent to the discussion of any of the questions arising here, for there is no finding that the mistake was due to the negligence of plaintiff.

[9] Defendant further urges that the finding that plaintiff executed the agreement in the belief that it contained the provision

which called for the development by the engine of 150 brake horse power does not justify a reformation of the instrument. In view of the fact that there is a general finding that such omission "was a mistake on the part of the parties," which was the ultimate fact to be found, we can see no merit in this contention. Moreover, the "belief" of plaintiff was in the nature of a probative fact and in no manner inconsistent with the ultimate fact found—indeed, it tends to sustain the latter finding.

[10] There remains for consideration the contention that the amended complaint, as framed, does not raise the issue of "mutual mistake." It alleges "that the omission [from the contract] of said provision warranting the development by said engines contracted for of 150 brake horse power was a mistake," which allegation was challenged by the special demurrer upon the ground of uncertainty in that it failed to state whether it "was a mutual mistake of the parties, or a mistake of plaintiff which the defendant at the time knew or suspected," which is practically the language of the section of the Code just quoted. As we have said, the demurrer was overruled. While we think this was error (*Peasley v. McFadden*, 68 Cal. 611-616, 10 Pac. 179), it was not prejudicial to defendant, since it did not affect any of its substantial rights (Code Civ. Proc. § 475). Its answer indicates that it construed the complaint as alleging that the mistake in it mentioned was a mutual one, for it contains a denial that "there was any mistake made by either the plaintiff or this defendant in the execution of the said contract," and, in addition, states the following:

"And in this behalf defendant alleges that the said contract embodies all and every condition, warranty and reference intended by the parties to be contained therein."

The pleadings and the finding of the court hereinbefore mentioned indicate that the issue of mistake was fully presented at the trial.

We find no error in the record justifying a reversal, and are of the opinion that the findings amply support the judgment, and it is therefore affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; SHAW, J.

54 Cal. App. 407

GATES v. GATES. (Civ. 2240.)

(District Court of Appeal, Third District, California. Sept. 30, 1921. Hearing Denied by Supreme Court Nov. 28, 1921.)

1. Divorce $\hookrightarrow$ 245(1)—Where interlocutory decree provided for alimony until final decree, final decree could provide for future alimony.

Under Civ. Code, § 139, providing that, when a divorce is granted for an offense of the husband, the court may make suitable allowance to the wife for her support during her life "or for a shorter period," and from time to time modify its order, where the interlocutory decree awarded alimony until the entry of final judgment, the court in making its final decree could grant future alimony, although the interlocutory judgment had then become final, and no authority to modify it was reserved therein, and section 139 was enacted before section 131 was changed to provide for interlocutory judgments.

2. Divorce $\hookrightarrow$ 286—On appeal from order recalling execution, award assumed suitable in absence of evidence.

On appeal from an order recalling and modifying an execution for alimony, the court must assume, in the absence of the evidence, that the allowance of alimony was suitable under the circumstances of the parties, as required by Civ. Code, § 139.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Suit by Jessie Harkness Gates against Laud C. Gates. From an order recalling and modifying an execution, plaintiff appeals. Reversed.

H. S. Henion and Whitmore & Henion, all of Oakland, for appellant.

R. R. Fowler and James C. Nichols, both of Turlock, for respondent.

BURNETT, J. The facts and the legal controversy involved herein, as stated in our former opinion, are as follows:

"The plaintiff, on the 12th day of January, 1917, filed a verified complaint in a suit for divorce against the defendant on the ground of cruelty. On the 15th day of January, 1917, the defendant filed an answer, denying the charge of cruelty so alleged, and on said 15th day of January, 1917, the court granted an interlocutory decree to plaintiff, declaring her to be entitled to a divorce from defendant and awarding to her alimony in the sum of \$75 per month, 'the first payment to be made on the 10th day of February, 1917, and thereafter on the 10th day of each succeeding month until the entry of final judgment or decree herein.' The court did not in said decree reserve the right to make any order for further alimony.

"During the time intervening between the granting of the interlocutory decree and the granting of the final decree, a child was born to the parties, as to the legitimacy of whom no question is raised.

"After the birth of said child and prior to the granting of the final decree, the plaintiff through her attorneys, served upon opposing counsel a notice that she would on Friday, the 25th day of January, 1918, make an application for a modification of that part of the decree relating to alimony so that it would provide as follows: That the custody of the minor child be awarded to plaintiff, and that 'defendant be required to pay to plaintiff the sum of \$75 per month until further order of the court as an allowance for the support and maintenance of said plaintiff and said minor child, and the further sum of \$100 as attorney's fees in connection therewith, and for the costs of this proceeding.' This notice was dated the 17th day of January, 1918, two days beyond the year after the interlocutory decree was granted, and was filed with the records of the case in the office of the clerk of the court on the 18th day of January, 1918.

"On the 30th day of January, 1918, more than one year after the granting of the interlocutory decree, the court made its final decree, granting to plaintiff a divorce, and therein inserted a provision that the custody of the minor child be awarded to plaintiff, and that 'the defendant pay to plaintiff monthly an allowance for the support of said plaintiff and said minor child the sum of \$60, whereof \$25 is for the support of said minor child, and \$35 is for the support of plaintiff, payments to be made monthly, beginning with this decree, and that the defendant further pay to the plaintiff as attorney's fees in this proceeding the sum of \$25, and the costs of this proceeding.'

"After the granting of the final decree, the defendant gave notice of appeal therefrom to the Supreme Court, but the same was thereafter dismissed on the stipulation of the parties.

"It appears that defendant failed and refused to make the monthly payments required by the final decree, and on the 11th day of February, 1920, the sum of \$1,468.55 having accrued to plaintiff under the terms of said decree, a writ of execution was issued on the application of plaintiff out of the superior court of Stanislaus county, directing the sheriff to enforce the collection of the sum named by seizure and sale of so much of the property of defendant as might be necessary to satisfy the same.

"Subsequently, and prior to the satisfaction of said writ by the sheriff, defendant served upon plaintiff a notice of a motion for an order recalling, modifying, and correcting said writ of execution. The said motion, in pursuance of the terms of the notice thereof, was regularly called for hearing on the 1st day of March, 1920. At said hearing the court, over the objection of the plaintiff, admitted and received in evidence a certain written agreement, entered into between the parties to the divorce action on the 9th day of January 1917 (six days prior to the entry of the interlocutory decree), wherein and whereby, after reciting the differences arising between them and declaring it to be impossible by reason of such differences for them further to live together as husband and wife, the defendant agreed to pay to the plaintiff the sum of \$75 per month, payable monthly and on the 10th day of each month, said payments to begin on the 10th day of January, 1917, and to continue for one year from said date. Said

agreement thus concluded: 'Said payment of \$75 per month to be in lieu of and as and for alimony paid by said first party to said second party and for the support and maintenance of said second party and for the support and maintenance of the expected child of said parties during said period of 12 months.'

"At the hearing of said motion it was admitted that the sum of \$380 had been paid on account of the sum of \$1,468.55, specified as due in said execution.

"The court on the 12th day of May, 1920, rendered its decision granting the motion, and the execution was accordingly recalled and modified, and denied the plaintiff any sum whatsoever for her own support, as provided for in the said final decree of divorce, and also denied plaintiff counsel fees in defense of said motion to modify said writ of execution. The court also, by said order of modification, awarded plaintiff the sum of \$235.25 found to be due to her for the support of the minor child.

"The appeal here is by the plaintiff from the last-mentioned order.

"The contention of the appellant is that the order complained of is the result of a collateral attack upon the final judgment granting plaintiff a divorce from defendant, and that the judgment, not being void upon its face, is not subject to such an attack.

"It is, of course, the established rule that a judgment cannot be assailed in a collateral proceeding or except by appeal unless it is void upon its face. 'In a collateral attack every intendment is in favor of the judgment, and the judgment will be set aside, generally speaking, for but one of three reasons—lack of jurisdiction of the person, lack of jurisdiction of the subject-matter of the action, or an absolute lack of jurisdiction to render such a judgment as the one given.' *Baldwin v. Foster*, 157 Cal. 643, 646, 108 Pac. 714. No question is raised here of the power of the court to provide in its final decree for the support and maintenance of the minor child of the parties. The sole question here is whether, in view of the terms of the interlocutory decree as to alimony, the court in making provision in the final decree for the support and maintenance of the wife was within its jurisdiction. If the court has the legal authority for making such provision, then, obviously, an objection to the judgment in that particular may be presented to a court of review only by appeal. On the other hand, if the making of such a provision in the final decree is in excess of its (the court's) jurisdiction, then, when such provision is so made, the judgment to that extent is invalid, and such invalidity is of a character to be apparent upon an inspection of the judgment roll."

[1, 2] After a more deliberate examination of the law we feel entirely satisfied that the trial court in making said modification of the award to the plaintiff acted within the limits of its jurisdiction, and therefore that the judgment roll did not authorize the court to recall said execution. We think that this follows clearly from the plain language of section 139 of the Civil Code, providing:

"Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the

marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

It is true that this section was enacted before the law was changed providing for interlocutory judgments in divorce cases (section 131, Civ. Code), but that circumstance is entirely immaterial; the difference being that now the allowance for support is provided by said interlocutory judgment, and it may or may not be carried into the final judgment.

Applying said section 139 to the situation presented herein, we must find legal warrant in every particular for said modified order. In the first place, the divorce "was granted for an offense of the husband." The court in granting said divorce, as shown by the interlocutory judgment, made an "allowance to the wife for her support." We must assume, of course, in the absence of the evidence, that such allowance was "suitable" under "the circumstances of the parties respectively." This allowance was made "for a shorter period" than "during her life," namely until the entry of final judgment. Respondent seems to think that the section applies to a permanent award rather than to one of a temporary character, but there is nothing in the language of the section to justify the contention. The authority indeed extends to cases wherein the award is for life or for any "shorter period." It would be hard to conceive of language that would more closely fit the situation shown herein.

In considering the question it is to be borne in mind that the first award was not for "suit money," as it is sometimes called. It was not made on motion at the beginning of the action to enable her to prosecute the case. If it had been, there might be some force in respondent's contention. The award was made, however, after trial for the support of the wife and possible issue, and was a part of the judgment settling the property rights of the parties and decreeing that the plaintiff was entitled to a divorce.

That the interlocutory judgment had become final before the modification was made does not render said section 139 inapplicable. The provision rests upon the theory that the trial court has a continuing jurisdiction in reference to such award. Its authority is not exhausted by the original order, nor is it foreclosed by the expiration of the time for an appeal.

It is equally plain that the court is not required by express provision to reserve the authority to modify the award in order to justify such action. The language of said section becomes a part of the original order as though written therein. The section itself

reserves to the court the authority to modify the allowance.

It may be added that the decisions are in harmony with appellant's position. Indeed after an examination of a large number of cases we think none can be found involving a similar statute and similar facts, wherein it was held that the court had no jurisdiction to make such modification of the original judgment.

In *Soule v. Soule*, 4 Cal. App. 97, 87 Pac. 205, after quoting said section 139, the court said:

"This statutory provision enters into every decree in an action for divorce which provides for the payment by the husband of an allowance for the support of the wife as fully as though it should be incorporated into the terms of the decree. The authority of the court to modify its decree in this respect does not depend upon a reservation therefor in the decree itself, but exists by virtue of a statute, and, being conferred by the Legislature, it is beyond its power to divest itself of such authority."
* * *

"Under this section it may modify its former order either by increasing or reducing the amount of money to be paid at any one time, or enlarging or diminishing the frequency with which the payments are to be made. Neither is the authority to modify the decree limited by the section to a mere change in the amount of the allowance to be paid, but it includes a modification of the order in any respect which under the circumstances of the particular case may seem just to the court. * * * In the present case the right of the plaintiff to alimony was established by the decree in her action for divorce, and section 139 gives to the court the authority to modify it."

In *Mathews v. Mathews*, 193 Pac. 586, it is said:

"Thus, when the court by its judgment does require the husband to pay alimony, and that judgment is not appealed from or vacated, it stands as a judicial determination of the right of the wife to such alimony, subject always to the retention by the court of jurisdiction to modify its judgment from time to time in that respect. That the court may modify its order with respect to alimony there can be no question."

In *Willey v. Willey*, 196 Pac. 101, the court said:

"We hold, however, that the court was not limited by the somewhat inartificially drawn prayer of the complaint as to its power to require the defendant to pay plaintiff alimony in the action based upon charges of desertion and failure to provide sustained by a showing of the plaintiff's necessities and of the defendant's financial ability to relieve them. It possessed that power under section 137 of the Civil Code, and it also possesses the power to modify its orders made in that respect from time to time under its express reservation of that power, and also under section 139 of the Civil Code."

In *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520, it is said:

"The judgment, in the first instance, might have been for a gross sum, or for periodical payments, either for a stated period, or, as in effect was done, during the life of the plaintiff. Civ. Code, § 139. To change this judgment so as to require the payments for a stated period only would not be an annulment of the original judgment, but only a modification thereof. Therefore such modification would be within the power of the court, even if it were conceded that the power to modify did not give authority to vacate such order in its entirety."

The decisions in other states having a statute similar to ours are in line with the foregoing, a few of which may be cited: *Skinner v. Skinner*, 205 Mich. 243, 171 N. W. 383; *Martin v. Martin*, 195 Ill. App. 32; *Delbridge v. Sears*, 179 Iowa, 526, 160 N. W. 218; *Holmes v. Holmes*, 90 Minn. 466, 97 N. W. 147; *Smith v. Smith*, 190 Mass. 573, 77 N. E. 522, 5 Ann. Cas. 939. For many others we may refer to *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721, wherein is found a comprehensive review of the authorities, including some of the text-books. In the Washington case, supra, it is admitted that the court may make such modification where said power is reserved in the original decree or where statutory authority exists, but, in the absence of such reservation or statutory authority, it was held that the court could not modify "a decree for alimony, payable in periodical instalments, as fixed by a decree of divorce."

In none of the cases cited by respondent does anything appear contrary to the foregoing.

In *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, there was no judgment for alimony, and the court held that—

"The provision of section 139 of the Civil Code authorizing the court from time to time to modify its orders for the maintenance and support of the wife and children contemplates that the right to alimony as well as other property rights shall have been presented in the action and established by the judgment, and there can be no modification of an allowance for alimony where there is no allowance to modify."

O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225, is to the same effect, wherein it was held that—

"Where the question of alimony was in issue in a divorce suit, and no finding was made thereupon, and no alimony was awarded in the order of judgment, or in the entry thereof, the error is judicial, and after the entry of judgment the court loses jurisdiction to amend it so as to reserve the question of alimony or to award alimony upon motion."

In *Bancroft v. Bancroft*, 178 Cal. 367, 173 Pac. 582, the question was whether the trial court had power, upon the motion of either party, to set aside the interlocutory decree in a divorce case at any time prior to the entry of the final decree, and it was properly held

that it was subject to attack, like other judgments, only upon appeal or by proceedings under section 473 of the Code of Civil Procedure, "within six months after the entry of such decree, and that, after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to alter or set aside its interlocutory decree."

We think there is no escape from the conclusion that the court had jurisdiction to make such modification, and that it was error to recall said execution, and the order is therefore reversed.

We concur: FINCH, P. J.; HART, J.

54 Cal. App. 465

CAHILL et al. v. VERDIER. (Civ. 3884.)

(District Court of Appeal, First District, Division 2. California. Oct. 6, 1921.)

Trial $\Rightarrow$ 9(2)—Statute held not to confer power to shorten time for serving notice of trial.

Code Civ. Proc. § 1005, relating to the time when notice of motion must be given, confers the power to shorten the time for filing and serving a notice of motion, but does not confer power on the trial court to shorten the 5-day period required by section 594, providing for 5 days' notice of trial of a fact issue, in the absence of the adverse party, and hence a 2-day notice of trial pursuant to order of court was insufficient to support a judgment taken in defendant's absence.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Lawrence M. Cahill, Jr., and others, copartners doing business under the firm name and style of California Garage, against Paul Verdier, to recover for labor and materials furnished. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

William A. Kelly, of San Francisco, for appellant.

J. E. McCurdy, of San Mateo, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendant for the reasonable value of labor and materials furnished the defendant at his special instance and request. The plaintiffs recovered a judgment in the trial court, and the defendant has appealed under section 953a of the Code of Civil Procedure.

The defendant complains because the trial was had in the absence of the defendant and of defendant's counsel. In this behalf it becomes pertinent to note that on February 9, 1921, the plaintiffs' attorney served and

filed a notice of motion to set the case for trial. In that notice it was stated that the motion would be made February 17, 1921. On the date last mentioned, Kenneth M. Greene, Esq., representing William A. Kelly, Esq., attorney for defendant appeared, and J. E. McCurdy, Esq., appeared representing the plaintiffs, and on motion of counsel the hearing of the motion to set was continued to the 24th day of February, 1921. On the latter date, no one appearing for the defendant, the case was set for trial at 10 o'clock a. m., February 28, 1921. On the same date the trial court made an order that the time for serving and filing the notice of the date of the trial be shortened to 2 days. On the same day the attorney for the plaintiffs served on the attorney for the defendant a formal written notice of the time and place of trial.

Under the foregoing circumstances a trial was had before the court sitting without a jury, the plaintiffs introduced their proof, and, in the absence of the defendant, took a judgment as prayed for. The appellant contends that the trial was had, therefore, in violation of the provisions of section 594 of the Code of Civil Procedure. Replying to this contention, the respondents place much stress upon the record as showing that on the 8th day of February, 1921, they gave a written notice of intention to move to set the cause for trial; that the hearing of the notice came up on the 17th day of February, 1921, in the presence of himself and the representative of the attorney for the defendant; that the further hearing of the motion to set was continued until the 24th day of February, 1921. These matters concerning "notice of intention to set" are wholly without the provisions of section 594 of the Code of Civil Procedure. They neither sustain, nor violate, the calls of that statute. McNeill & Co. v. Doe, 163 Cal. 338, 341, 125 Pac. 345. The respondent further relies upon the fact that on the day the order was made setting the cause for trial the judge of the trial court made an order shortening the time for filing and serving the notice of the time and place of trial. As to this element the appellant contends that section 1005 of the Code of Civil Procedure confers the power to shorten the time for filing and serving a notice of motion, but does not confer the power on the trial court to shorten the 5-day period provided by section 594 of the Code of Civil Procedure. In this contention we think that the appellant is correct. If the trial court can, pursuant to the provisions of section 1005, shorten the time prescribed by section 594, it can reduce the period of time from 5 days to 4 days or to one hour. All of these things it had the power to do before the amendment to section 594. But if it has the same power after the amendment to the sec-

tion, then no force or effect is given to the mandate of the legislative enactment amending the section. Stats. 1899, p. 5. In *Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470, 471, the court was considering whether subdivision 7 of section 581, Code of Civil Procedure (Stats. 1889, p. 398), was directory or otherwise. The court said:

"It is prohibitory, otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion when there had been culpable failure to prosecute. To hold this statute directory would therefore be to repeal it."

Referring to the case just cited, in *Modoc Land, etc., Co. v. Superior Court*, 128 Cal. 255, 256, 60 Pac. 848, 849, the court said:

"True, in that case more than 16 years had expired before the summons was returned, whereas in the present case the summons was returned only 11 days after the expiration of this period; but the statute imposes the penalty of dismissal in all cases where the return is made more than 3 years after the commencement of the action. The court is deprived of jurisdiction to take any other action than to dismiss the cause, whether 1 day or many years elapse before its attention is called to the subject. The declaration that 'no further proceedings shall be had therein' is a statutory prohibition against any further proceedings, and, if the court should assume to act in disregard of this prohibition of the statute, it would be acting without any jurisdiction."

Counsel have cited no case that directly rules the point and we have not found a case directly in point. True it is that in the instant case the trial court made a formal order shortening time, and true it is that the plaintiffs served the defendant with that order. But the fact of service or nonservice of the order shortening time is not by the terms of the statute made a controlling feature. The gravamen of the matter is 5 days' notice. If the respondents' contention that the trial court has the right to shorten time is sound, then it would seem to follow that the case entitled *Estate of Dean*, 149 Cal. 487, 87 Pac. 13, was incorrectly decided. The only difference would be that in the instant case the trial court made a formal order shortening time, and that that formal order was served, whereas in the *Dean* case the trial court impliedly shortened the time. In the case of *Hagenkamp v. Equitable L. Assur. Soc.*, 29 Cal. App. 713, 156 Pac. 520, the facts were that the cause was regularly set for August 7, 1913; that at 5:15 p. m. of August 5, 1913, plaintiffs served a notice on the intervener that the cause was set for trial on the 7th day of August, 1913. On the latter date the cause was tried in the absence of the intervener, but when the irregularity was called to the attention of the trial judge he vacated the judgment and ordered a new trial. It was also contended that the cause had been part-

ly tried on August 5, 1913, by the same judge sitting in another department. On page 716 of 29 Cal. App., at page 521 of 156 Pac. the court said:

"The order thus made was in effect a resetting of the cause for trial; and it not having been shown that it was made with the knowledge and consent of the counsel for the intervener, a further trial of the case could not be had in his absence without giving him the 5 days' notice required by section 594 of the Code of Civil Procedure."

The respondent cites and relies on *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44. However, we find nothing in that case that is helpful. In that case the defendant's attorney attended the trial, cross-examined witnesses, and made various objections. On appeal the court held that section 594 of the Code of Civil Procedure applies only to trials had in the absence of a party and of his attorney. *Handy v. Handy*, 31 Cal. App. 590, 161 Pac. 21, and *Estate of Wempe*, 197 Pac. 949, are to the same effect. It has been ruled more than once that the 5-day notice may be shortened by waiver or by the consent of the parties. *Townsend v. Driver*, 5 Cal. App. 581, 585, 90 Pac. 1071; *Estate of Dean*, 149 Cal. 487, 492, 87 Pac. 13. The expression, it seems, was carefully chosen.

As the case must be remanded for a new trial it is not necessary for us to pass on the point made by the appellant as to the insufficiency of the evidence. The judgment is reversed.

We concur: NOURSE, J.; LANGDON, P. J.

54 Cal. App. 322

GOLDSTEIN v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3950.)

(District Court of Appeal, First District, Division 2, California. Sept. 24, 1921.)

1. Carriers ⇨344—Passenger's contributory negligence not inferable from happening of accident.

Where a passenger was injured by a fall from a street car which she alleged was caused by a sudden start or jerk of the car, which defendant denied, defendant was not entitled to inference of negligence on the part of plaintiff from the mere fact of injury and on the assumption that the car was properly managed; that being a fact in issue.

2. Carriers ⇨316(3)—Injury to passenger held to place burden of proof on carrier.

Where the evidence showed relation of carrier and passenger, and that the fall which injured a passenger was caused by the violent jerking of the car, a prima facie case was established casting on the carrier the burden of proving that the injury was not the result of its negligence.

3. Carriers $\hookrightarrow$ 318(4)—Evidence held to sustain verdict for injury caused by sudden jerking of street car.

Evidence of injury resulting from a fall alleged to have been caused by the sudden jerking of street car *held* sufficient to sustain a verdict for the plaintiff.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Sarah Goldstein against the United Railroads of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, Wm. M. Cannon and Kingsley Cannon, all of San Francisco, for appellant.

Andrew W. Roberts and M. H. Hernan, both of San Francisco, for respondent.

NOURSE, J. This is an action for damages for personal injuries sustained while plaintiff was a passenger on a street car of defendant. A verdict of \$1,250 was returned in favor of plaintiff, and from the judgment following defendant appeals.

With relation to the circumstances of the accident the evidence shows: About midnight of November 30, 1917, plaintiff, accompanied by a woman friend, boarded a street car of defendant in front of the Ferry Building, in the city and county of San Francisco. The track at this place forms a loop or curve leading back into Market street and away from the Ferry Building. The car in question stopped about the middle of this loop. Plaintiff entered the car and was just about to be seated when it started around the loop to go out Market street, and she fell or was thrown to the floor, suffering the injuries complained of. The complaint alleges that the motorman turned on the electric current suddenly and with great force and strength, causing the car to start or bound forward with great speed around the loop or curve, and that the sudden speed with which the car was started around the loop or curve caused plaintiff to be precipitated to the floor of the car, and in falling her head, limbs, and body were thrown on and against the seats of the car with great force and violence, severely bruising and injuring her. Plaintiff's proof consists of the testimony of herself and companion and that of two disinterested fellow passengers who witnessed the accident; there being on the car at the time but three passengers besides plaintiff and her friend. Their testimony fully substantiated the allegations of the complaint. Opposed to this was the testimony of the motorman and one Shields, the third passenger on the car. The motorman testified that the car moved slowly around the curve in question, and that from the time he started the car until he received the three bells he had never had his control-

ler beyond two points; that a car is hardly moving at two points. Shields testified that he was sitting in a lengthwise seat on the left-hand side of the car about four or five feet from the door when plaintiff fell; that the car "was going the same way they always go, moderate rate of speed, not very fast; it was not going fast at all, for that matter;" that he noticed no jerk whatsoever, and, so far as he could observe, plaintiff lost her balance.

[1] The points raised on appeal are: (1) Insufficiency of the evidence to establish negligence of defendant; (2) negligence of plaintiff; and (3) error in instructing the jury. Referring first to respondent's alleged negligence, there is no evidence of either the commission or omission by respondent of any act from which such negligence might be inferred. Appellant's whole argument in support of this contention assumes that the car was properly operated—the very question in issue—and that therefore the fact that respondent fell and was injured while the car was traveling around the curve is proof that she failed to guard against the swaying and swinging necessarily incident thereto, and amounted to negligence. Negligence on the part of respondent cannot be established in this way.

The instruction under review is:

"You are instructed that contributory negligence upon the part of the plaintiff cannot be presumed from the mere fact of injury, but must be proved. On the other hand, proof of the injury, proof that it proceeded from a sudden, unusual, or violent jerking or swinging or swaying of the car while the plaintiff was preparing to seat herself in the car, casts upon the defendant the burden of proving that the injury was occasioned by unavoidable casualty or some other cause which human care and foresight could not reasonably prevent, or by contributory negligence upon the part of the plaintiff."

[2, 3] Appellant urges that the evidence does not show facts which justified the giving of this instruction and that it was misleading to the jury; that the evidence relating to the circumstances of the accident consisted of mere expressions of conclusions of witnesses that the jerk was unusual and violent. This criticism is not merited. The witnesses testified to the physical facts. The evidence shows the relation of carrier and passenger and that the fall which resulted in respondent's injuries was caused by the violent jerking of the car. There is no question here of negligence on the part of respondent; no evidence whatever having been introduced tending to show such negligence.

Under these circumstances a *prima facie* case was established (*Renfro v. Fresno City Ry. Co.*, 2 Cal. App. 317 84 Pac. 357).

"It must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant. When this is done, the law then presumes, prima facie, that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made." *Wyatt v. Pacific Elec. Ry. Co.*, 156 Cal. 170, 174, 103 Pac. 892; *McCurrie v. S. P. Co.*, 122 Cal. 558, 55 Pac. 324; *Babcock v. Los Angeles, etc., Co.*, 128 Cal. 173, 60 Pac. 780.

In *Renfro v. Fresno City Ry. Co.*, supra, 2 Cal. App. 321, 84 Pac. 359, the court said:

"Ordinarily a passenger injured while riding on a car is not in position to know more than that by some unusual movement of, or happening to, the car he has received injury. What caused the movement or happening he cannot be expected to know, and it is for this reason and for the further reason that the persons operating the car should know the cause and be able to explain it that the presumption of negligence arises, and that the burden is cast upon the railroad company to explain the cause. The present case fairly illustrates the wisdom and justice of the rule. The proximate cause of plaintiff's injury was the sudden jerking of the car forward when he had reason to believe that it was about to stop. Beyond this he was in no position to know the cause. If such sudden movements of street cars, under like circumstances, are necessary or unavoidable, in their operation, we think the rule would cast the burden upon the company operating the cars to show this fact as part of its defense. * * * He [plaintiff] showed enough to raise a presumption of negligence on the part of the defendant, and it was for the defendant to rebut this presumption to the satisfaction of the jury."

There is no error in this instruction.

Applying the rule of the foregoing authorities, it follows that the evidence offered by respondent was sufficient, if believed by the jury, to establish a case of negligence on the appellant's part.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 563

ALVES et al. v. ALVES et al. (Civ. 3555.)

(District Court of Appeal, Second District, Division 2, California. Oct. 15, 1921.)

Costs $\$$ 260(4)—Appellants not fined for frivolous appeal where showing good faith.

Where the briefs of appellants failed to raise substantial point, no fine would be imposed for the prosecution of a frivolous appeal where, notwithstanding the condition of their briefs, counsel for appellants seem to be in earnest in their effort to present the appeal.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by John R. Alves and others against Manuel Alves and another. From judgment for defendants, plaintiffs appeal. Affirmed.

Chauncey Gardner and Robert P. Rivera, both of Los Angeles, for appellants.

Durley & Downes, of Oxnard, for respondent Manuel Alves.

WORKS, J. This action represents a controversy between plaintiffs and defendant Manuel Alves; Soila Alves Carcarbur having been made a defendant because she refused to join as a plaintiff. Plaintiffs' pleading sought to enforce a trust against certain property held by defendant Alves, and he filed a cross-complaint, demanding that his title to the property be quieted. Defendant Alves had judgment under both his answer and his cross-complaint, and plaintiffs appeal.

In their opening brief appellants quote portions of the evidence, and claim that it establishes certain ultimate facts, but they make no assertion that any of the findings is not supported by the evidence. They cite authorities to a few abstract propositions of law in another part of the brief, but make no contention that the points decided by the cases they submit have any bearing upon errors of law committed by the trial court, nor do they direct our attention to any such errors. In short, the opening brief of appellants is utterly pointless. Respondent Alves, after taking exception in his brief to the barren effort of appellants, is forbearing enough to assume that they intend to assail certain findings, and he points to parts of the evidence as yielding a support to those findings. In fact, he sets up a straw man for appellants, but only to destroy it, for he shows that the findings he mentions—and they are the ones covering the important issues in the cause—have an abundant support in the record. Appellants, in their closing brief, seek to repair their earlier omissions in the matter of the findings, but they do so by the mention of certain findings by number, without giving us an inkling as to what facts are found by them. Under these circumstances, we do not feel that it is incumbent on us to recite the evidence upholding the findings to which respondent has called our attention. From our reading of the parts of the evidence noticed by both sides we are unable to say that any single finding in the cause fails of ample and substantial support.

As to the law of the case, there is none. In that matter the final brief of appellants does not better their opening brief, and respondent Alves does not come to their relief.

Notwithstanding the condition of their

briefs, counsel for appellants seem to be in earnest in their effort to present the appeal. For that reason, and even if their zeal be both misguided and fruitless, we impose no fine for the prosecution of a frivolous appeal.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(54 Cal. App. 543)

LAKE v. O'BRIEN. (Civ. 3553.)

(District Court of Appeal, Second District, Division 2, California. Oct. 14, 1921.)

1. Estoppel ⇨92(3)—One receiving proceeds of sale by apparent owner estopped to deny purchaser's title.

Where plaintiff, to keep property from creditors, executed and recorded a deed to C., who sold the property to defendant and turned over the selling price to plaintiff, and plaintiff never offered to return the money, she was estopped to deny defendant's title, though it did not appear that defendant had no knowledge of C.'s lack of title.

2. Estoppel ⇨52—Definition of "estoppel."

"Estoppel" is a rule of evidence by which a man is precluded from alleging or denying a fact in consequence of his own previous action, inaction, allegation, or denial, which has led another to so conduct himself that, if the truth were established, such other would be damaged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

3. Trial ⇨163—Motion for nonsuit held sufficient to show ground of motion.

In an action to quiet title, a motion to dismiss on the ground that plaintiff had not made a prima facie case as to title, but had shown that her title had been conveyed away, and that she got the money and never challenged the transaction, was sufficient to show that it was based on estoppel arising from plaintiff's retention of the proceeds of the sale by an apparent owner of the property.

Appeal from Superior Court, Imperial County, Franklin J. Cole, Judge.

Action by Helen M. Lake against Thomas O'Brien. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. Crawford, of Los Angeles, and Dorsey Whitelaw, of El Centro, for appellant.

Conkling & Brown, of El Centro, for respondent.

CRAIG, J. This action is one to quiet title. The complaint was in the usual form; the answer denied plaintiff's ownership, and on the trial the following facts were established

in connection with the introduction of plaintiff's evidence:

That she was the owner of the property from June, 1913, to October, 1914; that she deeded the property to one Creighton in October, 1914. This deed was recorded at plaintiff's request, but not delivered to Creighton; that the deed was made to avoid plaintiff's creditors taking the property to satisfy debts; that while he was still the record owner, Creighton deeded the land to the defendant, and received therefor from the defendant \$400, which he immediately gave to the plaintiff and informed her of what he had done. Plaintiff kept this money, and has never offered to return it. There is an absence of evidence tending to show that O'Brien had no knowledge that Creighton was not the holder of the full title to the property.

[1-3] We have no doubt that upon this statement of facts, the plaintiff is estopped to maintain the action. Estoppel is a rule of evidence by which a man is precluded from alleging or denying a fact, in consequence of his own previous action, inaction, allegation, or denial which has led another to so conduct himself that, if the truth were established, that other would be damaged. 3 Black. Com. 308. But appellant contends that the defendant's motion for nonsuit was insufficient, in that the motion did not state the particular grounds upon which it was based, and should therefore have been denied. Immediately after the plaintiff rested her case, defendant's counsel moved for a nonsuit in this language:

"At this time we move to dismiss the action on the ground that the plaintiff has not made a prima facie case as to his title. He has shown that the deed was made from a man named Griffin to the petitioner, and it has been conveyed away, and the petitioner got the money for it, and never, at any time challenged the transaction."

While not in terms stating that the ground of the motion was that the evidence showed that the plaintiff was estopped to assert that she was the owner of the property, the statement was sufficiently definite to inform counsel on the other side and the court that this was the basis of the motion. It is apparent that this was the understanding of the trial court. Before granting the motion to review the facts constituting the estoppel, the court concluded by saying:

"I do not think that she can be heard, in this action, to claim a better title than the one in whom she has permitted the title to vest. I think the motion for a nonsuit should be granted."

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

54 Cal. App. 251

JOHNSON v. DAVIDSON et al. (Civ. 3927.)

(District Court of Appeal, First District, Division 1, California. Sept. 15, 1921. Opinion of Supreme Court in Bank Denying Hearing Nov. 14, 1921.)

1. Trusts — 89(1)—Evidence held to sustain finding of trust in land paid for in part with plaintiff's earnings.

In action against heirs and estate of deceased attorney to establish joint ownership in real property, in that plaintiff's earnings as employee in deceased's office had been invested therein, evidence held to sustain finding that a one-half interest in the property was held in trust for the plaintiff by deceased.

2. Contracts — 138(5)—Action lies to recover property acquired with funds derived through illegal contract.

Where plaintiff and an attorney enter into an illegal contract of partnership, plaintiff not being an attorney, recovery can nevertheless be had by plaintiff of money derived from the business and invested jointly in real estate for the joint benefit of both parties, such an action not being one to enforce the illegal contract, but to establish title to property acquired thereunder.

3. Evidence — 271(17)—Self-serving declarations of deceased party not admissible.

Declarations of a person since deceased, but in support of his own interests, and tending to show that property belonged exclusively to him, are not admissible in favor of those who claimed rights which the declarations would maintain.

On Hearing in Supreme Court.

4. Attorney and client — 30—Agreement by attorney to pay layman fixed percentage of fees held not to create illegal partnership to practice law.

It is lawful for an attorney to employ a layman to take charge of the management of the work to be done in his office, to the extent of drawing pleadings and other papers, and to agree to pay such person for such services a fixed percentage of the receipts of the attorney from his clients; such an agreement not being one to become partners in the practice of law.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Lygia Johnson against Winn W. Davidson, as administrator of the estate of W. W. Davidson, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

McWilliams & Hatfield and Paul A. McCarthy, all of San Francisco, for appellants.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment declaring that a certain parcel of real property situate in the city and county of San Francisco was held by W. W. Davidson at the time of his death for the joint benefit of himself and the plaintiff, each owning an undivided one-half interest therein.

The defendants and appellants are the sons of the deceased, one of them being the administrator of the estate. It is their contention that the contract with Davidson relied upon by the plaintiff to establish her claim to the said undivided interest constituted a partnership to practice law, and that, since the plaintiff was not an attorney at law, the contract was contrary to public policy, and void, thence affording no foundation for her claim. They also contend that the court erred in refusing to admit certain evidence.

W. W. Davidson for more than 20 years preceding his death was a duly admitted practicing attorney, devoting his attention principally to divorce litigation. From January, 1904, to January, 1913, he was a teacher in one of the public night schools of San Francisco. He had for many years been addicted to the excessive use of intoxicating liquors, which habit manifested itself periodically, and at such times the volume of his law business would be seriously diminished. In January, 1904, he was enjoying one of these lapses, which had lasted for about three months, during which time he had not visited his office, and had incurred debts amounting to about \$2,000. At this time he encountered the plaintiff. She had been one of his pupils in the public school, and in the conversation which ensued she informed Davidson that she had been following the occupation of nurse, but was at that time disengaged, and she asked him if he could help her get employment. He replied that he needed a clerk in his office. To her objection that she knew nothing of stenography or typewriting or the business of a law office, he insisted that she could learn the duties of the position he offered her. Upon this phase of the case the plaintiff herself testified as follows:

"We went down to the office. We talked about the work, and he told me what it was, what kind of work he did, and his price for it. We talked a lot about his desire to get away from drink. I told him about the experience I had had in nursing, and about how I had taken care of men who had been addicted to drink, and that I thought if he would try we could soon get him to quit drinking, and he said if I could do that it would be a great thing for him. He gave me the keys to the office that night and told me to come the following morning, and to do any service in the morning that he would tell me, and that he would try to tell me what kind of work to do and what to do as my services in the office; I was to do anything that he wanted me to do,

and to help him break away from drink. As compensation for that I was to have one-eighth, after the expenses of the office were paid, of all the income that came in from the office. I was to keep the office open evenings while he was at school, where he was a teacher, and the salary from the school was to be included in the money taken in at the office."

The plaintiff learned typewriting, and shortly after her employment, having progressed sufficiently to do so, she prepared complaints, answers, cross-complaints, demurrers, orders for and affidavits of publication of summons in divorce cases, and the like, bills of sale and bankruptcy petitions. She frequently consulted with clients about divorces, ascertained the facts, and prepared the necessary pleadings. While not admitted to practice, she became very proficient in the particular work of that office, leaving little for Davidson to do but the actual conduct of proceedings in court. In addition to the performance of these duties, she rehabilitated Davidson and restored him to his earning capacity. At the beginning of her employment her share of the profits of the business was but \$12 a month, but her income increased as time went by, and at the end of 1905, she was receiving as her share of the income from \$75 to \$80 per month. In December, 1905, she had several conversations with Davidson with regard to an increase of her interest in the income of the business. Realizing the prosperous condition of his business, and the volume and character of the work done by the plaintiff, he agreed that she should have one-half the net income of the business, including his salary as school teacher, after deducting therefrom the expenses of the office and the personal living expenses of both parties. Four months later it was agreed by plaintiff and Davidson that their savings should be invested by Davidson in real property, each to own a one-half interest in any property so purchased, and it was under this arrangement that he used their surplus earnings in the purchase of the property described in the complaint. The deceased frequently referred to the plaintiff as his partner in the law business and in the ownership of said real property.

[1] Our examination of the record in this case leads us to the conclusion that the evidence abundantly sustains the findings of the trial court that an undivided one-half interest in the real property in question was held in trust for the plaintiff by the deceased.

[2] Where, as in this state, a license or certificate is required by statute as a condition for one to practice law, an agreement to engage in such practice without a license or certificate is ordinarily held illegal and void. 13 C. J. 423. Part of the services performed by the plaintiff in the office of Davidson were of a legal nature, and constituted the practice of law. It is not essential that

one actually participated in the trial of causes in order to practice law. To draw up pleadings and findings, to examine witnesses, and prepare cases for trial, as the evidence shows the plaintiff did, is to practice law. But, however this may be, and conceding that the business arrangement, whether it constituted a partnership or not, was contrary to public policy, and void, still we think the plaintiff was entitled to recover. If the original contract between the plaintiff and Davidson were void, as claimed, nevertheless, that agreement having been performed, and the money derived therefrom having been collected and invested in real property by Davidson for the joint benefit of both parties, this action to enforce a trust as to the plaintiff's one-half interest in such property against the successors of Davidson cannot be affected by any illegality in the original agreement, through the performance of which the purchase price of the property was acquired. It cannot be doubted that courts will refuse to enforce contracts which have for their object some act which is contrary to law or sound public policy. But where, as here, the action is not to enforce such contract, but is to establish title to property acquired under such a contract, the action may be maintained. The difference between the enforcement of an illegal contract and a suit to recover property acquired with funds derived through such a contract has always, been recognized by the courts. In *Andrews v. New Orleans Brewing Ass'n*, 74 Miss. 362, 20 South. 837, 60 Am. St. Rep. 509, it is held that one in possession of the gains and profits of an executed transaction cannot retain them as against another party thereto on the ground that the business which produced the fund was illegal. In the case of *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732, it is held that, after a partnership contract, admittedly against public policy has been carried out, and money contributed by one of the partners had passed into other forms of property, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract.

In *De Leon v. Trevino*, 49 Tex. 89, 30 Am. Rep. 101, it is held that, although a contract may be illegal, it does not follow that it is illegal or immoral for the parties to it after its completion to fairly settle and adjust the profits and losses which have resulted from it. The vice of the contract does not enter into such settlement. It appears to be well settled that after an illegal contract has been executed one party in possession of all the gains resulting from the illicit transactions will not be permitted to interpose the objection that the business which produced the fund was one conducted in violation of law. *Gilliam v. Brown*, 43 Miss. 641; *McDonald v. Lund*, 13 Wash. 412, 43 Pac.

348. The doctrine is thus stated in 13 Corpus Juris, p. 505:

"Certainly, when the profits of an illegal transaction have been actually divided or invested in other property, the illegality of the other transaction in no way affects the title to such property or subsequent dealings in regard to it."

See, also *Wayman Inv. Co. v. Wessinger*, 13 Cal. App. 108, 108 Pac. 1022; *Cal. Cured Fruit Ass'n v. Stelling*, 141 Cal. 714, 75 Pac. 320; *Blochman v. F. G. Invest. Co.*, 177 Cal. 762, 171 Pac. 943.

In the case at bar, the funds of the plaintiff, derived, it is true, from a transaction not legally enforceable were invested in the real property for her benefit as the result of an agreement collateral to and independent of the illegal contract and under the authorities cited this action to enforce the trust is clearly maintainable.

[3] It is also claimed that the court committed error in excluding evidence of statements made by Davidson tending to show that the property belonged exclusively to him. The rulings of the court in this behalf were justified by established rules of evidence.

"Declarations of a person, since deceased, * * * but in support of his own interest, are not admissible in evidence in favor of those who claim rights which the declarations would maintain." *Poorman v. Miller*, 44 Cal. 270.

This rule was approved in the case of *Hausman v. Hausling*, 78 Cal. 286, 20 Pac. 570, where, in referring to the admission in evidence of certain letters written by the defendant, the court said:

"It is entirely clear that the letters were not admissible in evidence, and that the objection to them should have been sustained. A litigant is not permitted to strengthen his case by his own declarations, whether written or verbal. They may be used against him, but not for him."

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM, [4] The petition for a rehearing in the Supreme Court after decision of the District Court of Appeal in this cause is denied.

That portion of the opinion of the District Court of Appeal declaring that the services performed by the plaintiff in the law office of the deceased, W. W. Davidson, constituted the practice of law is, in our opinion, not warranted by the record. It is lawful for an attorney to employ any person to take charge of the management of the work to be done in his office to the extent of drawing pleadings and papers necessary to be drawn

by such attorney in his practice, and to agree to pay such person for such services a fixed percentage of the receipts of the attorney from his clients. Such an agreement is not an agreement to become partners in the practice of law. It is an agreement to hire the person as an assistant or clerk in the office, the wages being fixed by reference to the fixed percentage of the receipts of the office. The evidence and the findings show, and the findings declare, that this was the relation between the plaintiff and the deceased attorney. The additional agreement, whether made at the same time as the other or subsequently, that the attorney should invest the money due to the plaintiff for such services in land was in no wise against public policy. This is decisive of the case, and the discussion upon the subject of the effect of the supposed partnership should be disregarded. There was no partnership for the practice of law, or any other partnership relation between the parties.

The statement to the effect above set forth was not necessary to the decision of the District Court affirming the judgment, and we therefore allow that judgment to stand.

SHAW, C. J., and WILBUR, LENNON, SLOANE, and SHURTLEFF, JJ., concur.

54 Cal. App. 568

ROSS v. McCARTHY. (Civ. 3999.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1921.)

1. Appeal and error ⇨907(3)—Every essential fact presumed proven on appeal on judgment roll alone.

On appeal from a judgment on the judgment roll alone, every fact essential to support the court's finding and judgment must be presumed to have been proved.

2. Appeal and error ⇨907(3)—Findings construed to uphold rather than defeat judgment on appeal upon judgment roll.

On appeal on the judgment roll alone the findings will receive such construction as will uphold rather than defeat the judgment, and, whenever from the facts found other facts may be inferred which support the judgment, such inference will be deemed to have been made by the trial court and will be followed by the appellate tribunal.

3. Appeal and error ⇨907(3)—No reversal on findings alone unless affirmatively showing improper rendition of judgment.

Judgment will not be reversed on the findings alone unless they affirmatively show that no such judgment could properly have been rendered.

4. Trial ⇨395(2)—Finding held sufficient to support judgment.

In action for the contract price of berries sold at an alleged price of \$125 per ton, a find-

ing that defendant agreed to pay "\$75 per ton and the Berry Growers' raise" held sufficient to support the judgment based on price of \$125 per ton, in view of a stipulation as to the price paid by a certain berry growers' association.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action upon an account stated by I. D. Ross against John W. McCarthy, Jr., doing business under the name and style of the Green Valley Canning Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul A. McCarthy, of San Francisco, for appellant.

Geary & Geary and Jos. P. Berry, all of Santa Rosa, for respondent.

WASTE, P. J. The defendant appeals from a judgment against him in an action brought by plaintiff, and as assignee of nine others, to recover from defendant balances alleged to be due on account from defendant to plaintiff and his assignors for berries sold. The appeal is on the judgment roll alone. Each of the ten causes of action set out in the complaint is in the form of a common count for berries sold and delivered to the defendant at the contract price of \$125 per ton, with appropriate allegations as to the amounts paid and unpaid, by reason of each particular transaction. The answer traversed the allegations of the complaint, other than admitting that the defendant purchased berries during the year 1918 from plaintiff and his various assignors for the price of \$75 per ton, and alleged that defendant paid that amount for all the berries purchased. Judgment was entered for the plaintiff in accordance with each of the counts in the complaint.

Appellant seeks a reversal on the ground that the findings are too indefinite and uncertain to sustain the conclusions of law or the judgment. His point may be illustrated by referring to the finding as to the first cause of action, which relates to plaintiff's own transaction with the defendant. It is as follows:

"That during the year 1918 plaintiff delivered to the defendant at Graton, in Sonoma county, Cal., 16,722 pounds of loganberries and 10,559 pounds of blackberries; that the defendant agreed to pay to the plaintiff therefor \$75 per ton and the Berry Growers' raise; that for the crop of blackberries and loganberries during the year 1918 the Sebastopol Berry Growers' Association paid for similar berries in the same locality as hereinabove referred to for the crop of blackberries raised during 1918 the sum of \$123 per ton, and for loganberries \$125 per ton; that defendant has paid to plaintiff for all of said berries the sum of \$75 per ton and no more; that there now remains due and unpaid from the defendant to

plaintiff on account of said berries so delivered the sum of \$401.32 for the loganberries delivered as aforesaid, and the sum of \$263.97 for the said blackberries delivered as aforesaid."

[1-3] Appellant argues that the finding that defendant agreed to pay plaintiff \$75 per ton "and the Berry Growers' raise" is meaningless, and that it is not helped out by the further finding as to what the Sebastopol Berry Growers' Association paid for berries in the same locality during the season. We agree with the appellant that the finding is not as explicit as it should be, but on appeal from a judgment on a judgment roll alone every fact essential to support the court's finding and judgment must be presumed to have been proved. The findings will receive such construction as will uphold, rather than defeat the judgment, and whenever from the facts found by the court other facts may be inferred which support the judgment, such inference will be deemed to have been made by the trial court, and will be followed by the appellate tribunal. Judgment will not be reversed on the findings alone unless they show affirmatively that no such judgment could properly have been rendered. *Burnham v. Abrahamson*, 21 Cal. App. 248, 131 Pac. 338; *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Semple v. Cook*, 50 Cal. 26.

[4] It is alleged in the various counts that the contract price for the berries was \$125 per ton. The court found that the defendant agreed to pay "\$75 per ton and the Berry Growers' raise." There appears in the judgment roll a stipulation to the effect that the Sebastopol Berry Growers paid \$125 per ton for berries during the season of 1918. From this stipulation and from the findings it is very apparent that the parties to the action, and the court, considered the amount paid by the Sebastopol Berry Growers' Association during 1918 as a material fact in determining the rights of the parties in the transaction. There is no difficulty in inferring that the defendant agreed to pay \$75 per ton plus the difference between that sum and the amount paid by the Sebastopol Berry Growers for the season of 1918 crop. The two amounts added together make the price \$125 per ton as alleged.

What we have already said disposes of appellant's contention that there is a fatal variance between the pleading that there was a contract price of \$125 per ton and the finding that defendant agreed to pay plaintiff \$75 and the Berry Growers' raise. Under the facts found the allegation and the finding amount to one and the same thing.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 565

KOHN v. RUPLEY et al. (Civ. 2341.)

(District Court of Appeal, Third District, California. Oct. 15, 1921. Hearing Denied by Supreme Court Dec. 12, 1921.)

Executors and administrators §513(11)—**Order settling claim against estate, and allowing executor's account, held conclusive as against defense of limitation.**

Where the owner of a note and mortgage presented his claim thereon in the mortgagor's estate three months prior to bar by limitations, and the court allowed the claim a few days after it had apparently become barred, in the holder's subsequent action thereon, *held*, in view of Code Civ. Proc. §§ 1628, 1635-1637, that the order settling and allowing the executor's account in which the claim sued on was duly reported is conclusive on the defendants, and the claim is not barred.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by N. L. Kohn against John B. Rupley, as executor of William Rupley, deceased, and others. From judgment for plaintiff, defendants appeal. Affirmed.

Charles A. Swisler, of Sacramento, and Abe Darlington, of Placerville, for appellants.

Aitken, Glensor, Clewe & Van Dine, of San Francisco, for respondent.

FINCH, P. J. Plaintiff, being the owner of a promissory note and mortgage executed by the testator, presented his claim for the amount due thereon more than three months prior to the time the same would have become barred by the statute of limitations. The executor and the judge of the superior court allowed the claim a few days after it had apparently become barred. Thereafter, as required by law, the executor rendered "a full account and report of his administration." The report contained a list of claims allowed and filed, among which was plaintiff's claim, with a statement of the name of the claimant, the amount of the claim, that it was secured by mortgage, and the dates of presentation and allowance thereof. After due notice and hearing the account was by the court "allowed, settled, and approved." Thereafter this suit was brought, and the defendants pleaded the statute of limitations as a defense thereto. The court rendered judgment for plaintiff, reforming the mortgage and foreclosing the same as so reformed.

The only question presented by the appeal is whether the allowance of the account as stated is a conclusive adjudication against the defendants as to the validity of the claim upon which this suit is based. The question was answered in the affirmative in *Estate of*

McDougald, 146 Cal. 191, 79 Pac. 878, and *Kowalsky v. Superior Court*, 13 Cal. App. 218, 109 Pac. 158, where the same issue was presented. Appellants contend that these cases have been overruled by the later decisions in *Haub v. Leggett*, 160 Cal. 494, 117 Pac. 556, where it is said that "an allowed claim against an estate does not attain to the dignity and force of an absolute judgment until, upon the settlement of an account, an order is made directing the executor to pay it," and *Estate of Bell*, 168 Cal. 258, 141 Pac. 1179, where similar language is used. With equal logic it might be said, however, that the cases last cited have been overruled by *Estate of Hellier*, 169 Cal. 80, 145 Pac. 1008, wherein it is said that—

"Until a claim has been passed upon on settlement of an account or rendition of an exhibit, or in making a decree of sale, * * * it may be contested by the heirs or legatees."

The decisions in the five cases cited are not inconsistent. The first two decide the identical question here raised. The others decide only that the allowance of a claim by the executor and the judge of the superior court, "is not the equivalent of an ordinary judgment." It is what is decided, and not what is said, in an opinion which is controlling. In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 817, it is said:

"This court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

The executor is required to "render a full account and report of his administration." Code Civ. Proc. § 1628.

"Any person interested in the estate may appear and file his exceptions in writing to the account, and may contest the same." Section 1635.

"All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs for cause shown." Section 1636.

"The settlement of the account and allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate." Section 1637.

From the foregoing Code provisions and the cases cited, it seems clear that the order settling and allowing the executor's account, in which the claim sued on was duly reported, is conclusive upon the defendants.

Appellants urge that the note on which the claim against the estate is based was barred by the statute of limitations when the claim was allowed, and that therefore the court was without jurisdiction to allow it.

"The jurisdiction of a question is the lawful power to enter upon a consideration of and to decide it," and "it is not limited to authority to render a correct decision, but * * * includes the power to decide wrong as well as right." *Ex parte Moran*, 144 Fed. 594, 75 C. C. A. 396.

This court cannot infer from an inspection of the claim that it was in fact barred. Section 1499 of the Code of Civil Procedure provides:

"When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any legal evidence touching the validity of the claim."

From legal evidence, the judge may have determined that the maker was absent from the state, as in the case of *Scott Stamp, etc., Co., Ltd., v. Leake*, 9 Cal. App. 511, 99 Pac. 731, for such length of time as to prevent the bar of the statute, or other facts may have been proven to avoid the apparent limitation.

The judgment appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

54 Cal. App. 537

FIRST NAT. BANK OF ESCONDIDO v. WILLIAMS et al. (Civ. 3392.)

(District Court of Appeal, Second District, Division 2, California. Oct. 14, 1921.)

1. Husband and wife — 232(3)—Finding wife liable as maker and not surety sustained.

In an action on a note brought against a husband and wife as principals, evidence held to sustain a finding that the wife signed as comaker, notwithstanding evidence offered by the wife as permitted by Civ. Code, § 2832, tending to show that she was a surety merely.

2. Bills and notes — 139(3)—Cancellation and delivery of note held consideration for renewal note.

The cancellation and delivery of a note to one person is a sufficient consideration for a new note given as a revival of the first and to secure an extension of time of payment of the debt.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by the First National Bank of Escondido against C. L. Williams and another. From judgment for plaintiff and from order denying a new trial, defendants appeal. Affirmed.

L. E. Dadmun, of San Diego, for appellants.

Bischoff & Thompson, of San Diego, for respondent.

CRAIG, J. Judgment was rendered against the defendants, from which and an order denying a motion for a new trial they appeal. The points to be considered as alleged by appellants are: First, the insufficiency of the evidence to sustain the findings of the court that Mina W. Williams signed the note as principal and comaker and for a valuable consideration; and, second, the right to have findings presented and served upon the opposing counsel five days before the same are signed by the judge.

Concerning the second proposition, we dismiss appellants' contention without passing upon its merits because it nowhere appears in the record on appeal that the findings were not served upon defendants' counsel, as provided by law. The only information which we have to that effect is an assertion contained in appellants' brief. However, it may be said that the provision of section 634 of the Code of Civil Procedure here cited has been held to be directory only. *Amundson v. Shafer*, 36 Cal. App. 398, 172 Pac. 173.

[1] The other ground urged must be determined upon the rule that the findings of the trial court will not be disturbed where there is a substantial conflict in the evidence. We are asked to say that the evidence showed Mina W. Williams to be a surety and not a principal. Upon this issue the court found:

"That the said defendant, Mina W. Williams, executed and delivered to said plaintiff said note as maker or principal, for a valuable consideration, and not as a surety."

There is no doubt but that she, with her husband, signed the notes sued upon. From this fact a strong inference arose that she signed as maker. But section 2832 of the Civil Code provides:

"One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character and principal."

To make the showing thus permitted, C. L. Williams testified that one Hall, representing the First National Bank of Escondido, came to the Williams' house and asked for additional security upon the note in question, which was then due and unpaid; that Hall suggested "that I have Mrs. Williams sign this note as surety"; that Williams then told Hall he would see about it and let him know. L. E. Dadmun, counsel for the defendant, testified to several conversations with a Mr. Thompson, an attorney representing the plaintiff. Dadmun's evidence, which bears upon the capacity in which Mrs. Williams signed the note, was to the effect that Thompson told him that Hall said if Williams would sign a note and get Mrs. Wil-

liams to sign it with him as surety, the bank would agree to an extension; that Dadmun told Mrs. Williams that Thompson said the bank would not bring suit, but would extend the note from time to time if she would sign as surety with Mr. Williams.

As opposed to this testimony, Thompson took the stand on behalf of the plaintiff, and denied that in the conversation related by Dadmun anything was said to the effect that Mrs. Williams should sign the note as a surety and not as a principal. He testified, on the contrary, that what was said was that the bank would "accept a new note."

As to the alleged conversation between Williams and Hall, it is not shown that the statement attributed to Hall was even communicated to Mrs. Williams. Upon this conflicting evidence, the finding of the trial court will not be disturbed.

[2] The claim is also made by appellants that there was no consideration for the note upon which suit was brought. There is no merit in this contention. The cancellation and delivery of the note to one person is a sufficient consideration for a new note given as a revival of the first and to secure an extension of time of payment of the debt. *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; *Miller & Lux v. Dunlap*, 28 Cal. App. 315, 152 Pac. 309.

The judgment is affirmed.

We concur: **WINLAYSON, P. J.; WORKS, J.**

54 Cal. App. 528

LUITWIELER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3765.)

(District Court of Appeal, Second District, Division 1, California. Oct. 13, 1921.)

1. Appeal and error ☞71(3)—Certiorari ☞5(1)—Appeal lies from restraining order, and hence certiorari does not lie.

Under Code Civ. Proc. § 963, allowing appeal from an order "granting or dissolving an injunction," a restraining order in its effect is an injunction, though temporary, for the statute makes no distinction between temporary and permanent injunctions, and the only remedy of a party against whom an injunction pendente lite has been granted is by appeal from the order or a trial of the action on the merits, and, under section 1068, certiorari does not lie.

2. Appeal and error ☞71(3), 460(2)—Appeal allowed for mandatory "injunction"; appeal stays operation of mandatory injunction.

Notwithstanding Code Civ. Proc. § 525, defining an "injunction" as a writ or order requiring refraining from a particular act, an order in a divorce suit requiring defendant husband to vacate the wife's residence and to deliver up the keys thereto was a mandatory in-

junction, so that the order was appealable under section 963, and an appeal from it would stay its operation so far as it was mandatory in character.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injunction.]

Application by Samuel W. Luitwieler for certiorari to review an order of the Superior Court of the State of California in and for the County of Los Angeles, Hon. Thos. O. Toland, judge thereof, in an action by Sophia C. Luitwieler against petitioner for divorce. Writ quashed, and proceeding dismissed.

Taylor & Forgy, of Los Angeles, for petitioner.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondents.

CONREY, P. J. In an action of divorce wherein the petitioner, Samuel W. Luitwieler, is defendant, respondent superior court made an order wherein, among other things, the defendant was required "to forthwith vacate the residence of plaintiff" at a stated address in the city of Los Angeles; also to "deliver to counsel for plaintiff the key to the front door of said premises and any other keys that will give defendant ingress to said premises or any part or portion thereof."

Being of the opinion that respondent court exceeded its jurisdiction in the premises, this court issued the writ of review as demanded by petitioner. Inadvertently we assumed that the order in question, being an order pendente lite and made prior to judgment in the action, was an order from which there is no right of appeal. Respondents now move that the writ be vacated and the proceedings dismissed upon the ground that the order of which petitioner complains is an appealable order.

[1] An appeal may be taken from an order "granting or dissolving an injunction." Code Civ. Proc. § 963. A restraining order in its effect is an injunction, and is an injunction though temporary. The statute, in giving the right of appeal from an order granting an injunction, makes no distinction between temporary and permanent injunctions. *Laam v. McLaren*, 28 Cal. App. 632, 635, 153 Pac. 985. The only remedy of a party against whom an injunction pendente lite has been granted, "if aggrieved by the injunction issued, is an appeal from that order, or a trial of the action on the merits in the superior court." *United Railroads v. Superior Court*, 170 Cal. 755, 766, 151 Pac. 129, 134 (Ann. Cas. 1916E, 199).

"It has been uniformly held by this court, in accord with the provisions of section 1068 of the Code of Civil Procedure, that if a party has the right of appeal from an order in excess of jurisdiction, he cannot have such order reviewed in certiorari proceedings." *Hildebrand v. Superior Court*, 173 Cal. 86, 89, 159 Pac. 147, 149.

[2] Petitioner contends that the foregoing decisions are not applicable in the present case for the reason that the order complained of is not an injunction referring to the definition of an injunction as stated in section 525, Code of Civil Procedure, wherein it is stated that "an injunction is a writ or order requiring a person to refrain from a particular act." Counsel say that the alleged order is not an injunction; that "it is in the nature of a mandamus, or of a judgment in ejectment, or probably an order of arrest, in that it is an order commanding an affirmative personal action on the part of the defendant." The decisions relating to this subject recognize the power of the courts in this state to grant mandatory injunctions.

"When the character of an injunction is subjected to review before a higher tribunal, that tribunal * * * will not condemn an injunction even if it be mandatory in character; for injunctions of this character, when they afford the only adequate means of relief to a petitioner, are steadily growing in favor." *United Railroads v. Superior Court*, 172 Cal. 80, 87, 155 Pac. 463.

It thus appears that the order sought to be reviewed herein is an appealable order; and, if it were necessary to go farther, it might be pointed out that the appeal, if taken, would stay the operation of the order in question in so far as it is mandatory in character. For in the case last cited (172 Cal. 82, 155 Pac. 464) the court said:

"It is well settled, indeed conceded, that an appeal does not stay the operation of a preventive injunction. Equally well settled is it that an appeal does stay the operation of a mandatory injunction."

The writ is quashed, and the proceeding is dismissed.

We concur: SHAW, J.; JAMES, J.

(54 Cal. App. 589)

STEERE v. BARNET, Sheriff, et al.
(Civ. 4005.)

(District Court of Appeal, First District, Division 1, California. Oct. 18, 1921. Hearing Denied by Supreme Court Dec. 15, 1921.)

1. Husband and wife ⚭262(1)—Presumption that property conveyed to husband and wife as tenants in common may be overcome.

The presumption under Civ. Code, § 164, which provided in 1908 that property conveyed

to a married woman and her husband should be presumed conveyed to them as tenants in common, was only a rebuttable presumption which might be overthrown by evidence, showing that the property was community property.

2. Husband and wife ⚭254—Property paid for out of earnings after marriage held community property, notwithstanding form of conveyance.

Under Civ. Code, § 687, defining community property, land purchased and paid for out of the husband's earnings after marriage, and occupied as a home, was community property, though conveyed to the husband and wife so as to create a presumption, under section 164, that they took it as tenants in common.

3. Husband and wife ⚭265½, New, vol. 14A Key-No. Series—Wife's return of inventory held not to estop her to assert community character of property.

That an executrix returned an inventory of her husband's estate, setting out a one-half interest in the land as belonging to the estate, did not estop her from asserting that the land was community property where the return was made by her attorneys in reliance on the form of a deed without understanding the real nature of her interest, especially where the error had been called to the attention of the probate court and the land set apart to her as a homestead.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Minnie A. Steere against Frank A. Barnet, Sheriff of Alameda County, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Cushing & Cushing, of San Francisco, for appellants.

Walter H. Linforth, of San Francisco, for respondent.

WASTE, P. J. This is an action to enjoin the sheriff of Alameda county, and the First National Bank of San Francisco, an execution creditor, from selling, under execution sale certain real property claimed to be exempt by reason of an alleged declaration of homestead, the validity of which is the only issue in the case. Plaintiff obtained a judgment, and defendants have appealed.

On October 8, 1898, Jesse E. Steere, now deceased, and Minnie A. Steere, the plaintiff, were married, and on June 24, 1908, were husband and wife. On that date, by deed designating "Jesse E. Steere and Minnie A. Steere, his wife, of the city and county of San Francisco, state of California, parties of the second part," they acquired the real property here in question. The plaintiff did not know that she was named as one of the grantees in the deed until some time later, when in conversation with her husband he informed her that the property was in her name, as well as in his. A dwelling house was erected on the property. Both the lot and the house were paid for with the earn-

ings of the husband after marriage. The parties continued to live on the premises, and there raised their family. On July 12, 1915, Jesse Steere, the husband, then residing on the premises with his family, filed a declaration of homestead. Thereafter until his death, which occurred on the 16th day of September, 1918, he so resided, and following his decease the family has continued to live on the premises. On April 7, 1920, the First National Bank of San Francisco, one of the defendants here, obtained a judgment against this plaintiff on a promissory note for the sum of \$2,785.59, and costs of suit. Thereafter the bank caused a writ of execution to be issued, and placed in the hands of the defendant Barnet, sheriff of Alameda county. He levied on the homestead, and advertised it for sale. This action was instituted by the plaintiff to enjoin the sheriff from proceeding under the execution, and to quiet her title to the property.

The only issue on the appeal is whether or not the evidence is sufficient to justify the findings of the trial court that the property was acquired, and held until the death of the husband, as community property.

[1, 2] Appellants rely on the presumption laid down in section 164 of the Civil Code, which, at the time of the execution of the deed to respondent and her husband, provided that, whenever any property was conveyed to a married woman and her husband, the presumption arose that the married woman took the part conveyed to her as a tenant in common, unless a different intention was expressed in the instrument of conveyance. From the fact of such a conveyance, however, only a rebuttable presumption arose that any portion of the property was the separate property of the wife. Estate of Young, 123 Cal. 337, 346, 55 Pac. 1011; Fanning v. Green, 156 Cal. 279, 282, 104 Pac. 308; Volquards v. Myers, 23 Cal. App. 500, 504, 138 Pac. 963. In this case the presumption was disputed and overthrown by other evidence amply sufficient to justify the finding of the court that the property was community property when designated as a homestead. Civ. Code, § 687; Fulkerson v. Stiles, 156 Cal. 703, 706, 105 Pac. 966, 26 L. R. A. (N. S.) 181; Fanning v. Green, supra; Hammond v. McCollough, 159 Cal. 639, 643, 115 Pac. 216.

[3] In the course of the administration of her husband's estate, plaintiff, as executrix of the will of the deceased, returned an inventory in which she set out a one-half interest in the property as belonging to the estate. The explanation given by her is that she took the deed, by which the property was conveyed to herself and husband, to her attorneys, who, without explanation or inquiry, returned it as indicated, not understanding the real nature of her interest. The error

in the inventory was called to the attention of the probate court, which thereafter made an order setting apart the property to the plaintiff as a homestead. Under the plain circumstances of the case the plaintiff was not estopped from asserting the community nature of the property by the statement in the inventory. Dean v. Parker, 88 Cal. 283, 288, 26 Pac. 91.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 586

MATSON et al. v. FORTUNA HIGH SCHOOL DIST. et al. (Civ. 2329.)

(District Court of Appeal, Third District, California. Oct. 17, 1921.)

Costs  48—Defendant nonsuited on his motion entitled to costs.

A defendant as to whom a nonsuit is granted on his motion is entitled to costs in view of Code Civ. Proc. § 581, authorizing dismissal on defendant's motion when plaintiff's proof is insufficient to take the case to the jury, and section 1024, authorizing allowance of costs to defendant upon a judgment in his favor in certain proceedings.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Isaac Matson and another against the Fortuna High School District and others. From an order denying a motion to strike out a memorandum of costs as to certain defendants to whom a nonsuit was granted, plaintiffs appeal. Modified and affirmed.

Henry L. Ford and T. H. Selvage, both of Eureka, for appellants.

H. C. Nelson, of Eureka, for respondents.

FINCH, P. J. This appeal is from an order denying plaintiffs' motion to strike out the memorandum of costs of certain defendants and taxing said costs at the sum of \$82.65. At the close of plaintiffs' case the court granted a nonsuit as to those defendants, and judgment was entered in their favor for their costs.

Appellants contend that a defendant is not entitled to recover his costs on the granting of his motion for a nonsuit. Section 581 of the Code of Civil Procedure provides:

"An action may be dismissed, or a judgment of nonsuit entered * * * by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury."

Section 1024 provides:

"Costs must be allowed of course, to the defendant upon a judgment in his favor in the

actions mentioned in section ten hundred and twenty-two, and in special proceedings."

Under these provisions of the Code, the defendants were clearly entitled to costs. In *Spinks v. Superior Court*, 26 Cal. App. 793, 148 Pac. 798, it is held that when a plaintiff dismisses the action pursuant to section 581 of the Code of Civil Procedure the defendant is entitled to recover costs. No reason appears why a different rule should govern where a nonsuit is granted on motion of the defendant under the same section of the Code.

Respondents admit that the court, through inadvertence, allowed the defendants an item of costs in the sum of \$2.50, to which they were not entitled, and consent that their costs be reduced accordingly.

The order appealed from is modified by reducing the amount taxed as costs to the extent of \$2.50, and, as so modified, the order is affirmed, the respondents to recover costs of appeal.

We concur: BURNETT, J.; PREWETT, Justice pro tem.

54 Cal. App. 495

MILLER v. OLIVER et al. (Civ. 2270.)

(District Court of Appeal, Third District, California. Oct. 7, 1921. Hearing Denied by Supreme Court Dec. 5, 1921.)

1. Wills ⚡629—Remainders construed as vested.

If the question be doubtful, the rule is to construe a devised estate as vested, rather than contingent.

2. Wills ⚡634(19)—Remainders held vested; "upon her death," "hold."

Under Civ. Code, §§ 694, 769, a devise to testator's wife L. "for and during the natural term of her life, and upon her death the remainder to" F. and H., "said remainder to be held by" F. and H. "from the time of the death of said" L. "as tenants in common," held to give F. and H. vested, not contingent, remainders, especially in view of the use of the present tense in the words of devise, which were, "I do hereby give and bequeath and deliver," and the presumption against intestacy; for the phrase "upon her death" is equivalent to the phrase, "upon the termination of the life estate," which refers to the time of enjoyment of the remainder, and not to the time when the estate became vested, and the primary significance of the word "hold," as it relates to real property, is to enjoy and possess.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hold.]

3. Wills ⚡634(2)—Statute not render remainders contingent; "to take effect."

Civ. Code, § 780, providing that "when a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be

deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years," does not nullify section 694, as to when remainders are deemed vested, for the phrase, "to take effect," means to become operative or executed, and implies not only a vested interest, but a present right of enjoyment.

4. Descent and distribution ⚡75—Title vests in heirs at death.

On death of an intestate, title to his real property immediately vests in his heirs, subject to the right of his administrator to possession of it for purposes of administration.

5. Descent and distribution ⚡90(1)—Heirs can maintain action for realty of intestate against any one but administrator.

The administrator's title and possession is not adverse to the heir, and under Code Civ. Proc. § 1452, the heir, subject to the right of the administrator to possession of intestate's real property for administration purposes, may sue to quiet his title and recover possession against any one but the administrator, even while the estate remains undistributed.

6. Quieting title ⚡1—Object of action stated.

The object of an action to quiet title is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Charles Elmer Miller against J. E. Oliver, as administrator, and others. From a judgment of dismissal, plaintiff appeals. Reversed in part and affirmed in part.

A. H. Carpenter, of Stockton, for appellant.
Thomas S. Louttit, of Stockton, and S. K. King, of Escalon, for respondents.
George F. McNoble, of Stockton, amicus curiæ.

BURNETT, J. The action was to quiet title, and the court below sustained a general demurrer to the complaint, interposed by J. E. Oliver, as administrator, etc., and dismissed the action as to all the defendants. From this judgment of dismissal, the plaintiff appeals.

The allegations of the complaint are substantially as follows:

That on the 27th day of March, 1892, Charles Sperry was the owner of the real property involved, and on or about that date died testate. That thereafter his will was admitted to probate, and thereafter, after proper notice given and proceedings had, a decree of distribution in the matter of the estate of said Charles Sperry, deceased, was entered, under and by virtue of the terms of which it was provided "that there be, and hereby is, distributed to the said Lydia J. Sperry, for and during the nat-

ural term of her life, and upon her death the remainder to Frank Sperry and Harriet A. Miller, née Sperry, forever, said remainder to be held by said Frank Sperry and Harriet A. Miller from the time of the death of the said Lydia J. Sperry, as tenants in common, in equal proportions forever, of in and to all of the following described property, to wit: [Here follows description.]”

That Lydia J. Sperry, the surviving widow of Charles Sperry, is now living, occupying, and using the real property. That Harriet A. Miller, prior to the 12th day of July, 1917, intermarried with J. E. Oliver. That said Harriet A. Oliver died on or about the 12th day of July, 1917, and thereafter, and after proceedings had, J. E. Oliver was appointed the administrator of her estate. That on the 1st day of July, 1918, T. F. Emerson was appointed the administrator with the will annexed of the estate of Charles Sperry, deceased, “and that as such administrator he claims that, upon the death of the said Harriet A. Oliver during the existence of said life estate, and before the termination as aforesaid, her contingent remainder in said real property, constituting an undivided half thereof, reverted to the said estate of Charles Sperry, deceased.”

That Frank A. Sperry is the son of the said Charles Sperry, deceased, and the person designated in said decree of distribution as entitled to take the remaining undivided half of said real property and premises upon the death of his mother and the termination of her said life estate therein, and that he and the plaintiff herein are the sole heirs of the said Charles Sperry, deceased.

That the plaintiff is the grandson of the said Charles Sperry, deceased, and the sole and only child of the said Harriet A. Oliver, deceased, who was begotten by her and a former husband, and the nephew of the said Frank A. Sperry, and the only person entitled to take and receive his mother's said contingent remainder in all the said real property hereinafter described upon the termination of his said grandmother's life estate therein.

“That the said defendant J. E. Oliver, as the administrator of the estate of Harriet A. Oliver, deceased, claims that he, as such administrator of her estate, and as her surviving husband, is entitled to have said undivided one-half of all said real property and premises set off and distributed to him in the matter of the said estate of Harriet A. Oliver, deceased.

“That the said claims of the said defendant, J. E. Oliver are without merit, invalid, and void.

“That the said defendants J. E. Oliver and T. F. Emerson, as the administrators of their several respective estates, have not, nor has either of them, any interest or estate in or to said real property, or any part or portion thereof.”

It is also stated in the complaint by way of conclusion that:

“The remainder to be taken under the said decree of distribution after the expiration of said life estate by the said Harriet A. Oliver was a contingent one, and was not to take effect until the termination of the life estate of Lydia J. Sperry, and that no title ever vested in said Harriet A. Oliver, and upon her death

an undivided one-half of the property vested in the plaintiff subject, to the life estate of said Lydia J. Sperry.”

Instead of simply alleging the ultimate fact of ownership, as is usual in actions of this character, the plaintiff has set out his asserted chain of title, and we are therefore called upon to determine from this exhibit what interest, if any, the plaintiff has in and to said property. It is admitted that the interest devised and distributed to said Harriet A. Miller is what is known as a “remainder” (section 769, Civ. Code), and the main discussion is over the question whether it is a vested or a contingent interest, appellant contending for the latter and respondent for the former view. If it was a contingent interest, it would lapse on the death of said Harriet A. Miller, and appellant claims that thereby it would become a vested interest in him as the sole heir of his mother. Respondent's position is that, being a vested interest, it was subject to administration and succession, and that, as administrator of his wife's estate, he is entitled to the possession of the property for purposes of administration, and that any claim of appellant to said property must be determined in the probate court.

[1] If the question be doubtful, the rule is to construe the estate as vested rather than contingent. However, under the decisions in this state it can hardly be said that there is any serious doubt as to the character of the estate that was created by said language. The case, indeed, is governed by the decision of this court in the case of *In re De Vries*, 17 Cal. App. 190, 119 Pac. 109, wherein similar language was construed as creating a vested estate. Therein the subject was exhaustively considered with a comprehensive review of the authorities, and it is hardly necessary to do more than refer to said decision as an authority for the conclusion of the lower court herein.

[2] In that case the language of a will was involved, and the particular estate was devised to the wife of the testator “for her natural life, the remainder thereof to my sons hereinafter named in proportions for the time and upon the conditions hereinafter expressed.” The corresponding language of the decree of distribution here is:

“There is hereby distributed to the said Lydia J. Sperry for and during the natural term of her life, and upon her death the remainder to the said Frank A. Sperry and Harriet A. Miller.”

The only substantial difference is that in the latter is found the phrase, “and upon her death.” But in the fourth clause of the *De Vries* will the testator used this language:

“Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries, I give and devise unto my son,” etc.

"Upon the termination of the life estate" is, of course, exactly equivalent to the expression, "upon her death." While there is a slight difference in the structure of the sentences in the two cases, yet the language is properly construed as conveying the same import. It is shown in the De Vries decision that the phrase, "upon the termination of the life estate," refers to the time of enjoyment of the remainder, and not to the time when the estate becomes vested. The reasoning of the De Vries decision and the authorities therein cited are strictly applicable to the situation herein. We may recall that in said decision it was held that a consideration alone of said fourth clause of the will would lead to the conclusion that a vested remainder was created, it being said:

"Where, as here, words of devise refer to the present or are in the present tense, the words, 'upon the termination of the life estate,' or 'after' such termination, relate to the time of the possession or actual enjoyment of the interest so devised, and not to the time at which such interest shall vest or become in the donee a fixed right."

In the will in this case, also, there was a present devise of the remainder as well as of the particular estate, the language being: "I do hereby give and bequeath and deliver," etc. The decree following the will used, too, the present tense, "is distributed," etc.

In aid of this construction may be invoked also the presumption that the testator intended to devise the whole of the estate in said property. If it had been his purpose to create merely a contingent estate, he would quite naturally have made provision to prevent intestacy in case of the death of the remainderman prior to that of the life tenant.

Many authorities could be added to those cited in the De Vries decision, *supra*, but we content ourselves with a reference to 23 R. C. L. p. 500 et seq., for an instructive discussion of the "distinguishing characteristics of vested and contingent remainders," and to the opinion of the learned Chief Justice in the case of *In re Estate of George W. Ritzman*, deceased, 199 Pac. 783, and to *Redman v. Hubbard*, 140 Ky. 71, 130 S. W. 955, 37 L. R. A. (N. S.) 728, and an exhaustive note thereto in 37 L. R. A. (N. S.) 728.

If it be true, as stated in the Ruling Case Law, that "a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estates, or, again, a remainder is vested if it is subject to no condition precedent save the determination of the precedent estates," then it cannot be doubted that the estate created herein was a vested interest. Indeed this rule is embodied in section 694 of the Civil Code, and since at the time of the death of Charles Sperry and the distribution of his estate,

Harriet A. Miller was in being, and would have a right to the immediate possession of the property "upon the ceasing of the intermediate or precedent interest," namely, the life estate of Lydia Sperry, the remainder immediately vested.

It may be added, that this presumption or inference is strengthened by a consideration of the language "said remainder to be held by said Frank Sperry and Harriet A. Miller from the time of the death of said Lydia J. Sperry, as tenants in common," etc. The primary significance of the word "hold," as it relates to real property, is to enjoy and possess. *Cooke v. Doron*, 215 Pa. 393, 64 Atl. 595, 7 L. R. A. (N. S.) 659, 7 Ann. Cas. 505. If thus construed, the enjoyment or possession being expressly postponed to the death of the first taker, the implication would arise that there was no such intention as to the vesting of the title.

The authorities cited by appellant are dissimilar to this case in their facts, and are not controlling herein.

Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, involved the interpretation of a deed containing this language:

"Give, grant, alien, and confirm unto the party of the second part and to his heirs * * * all those certain lots * * * to have and to hold, all and singular, the said premises * * * unto the said party of the second part * * * for and during his natural life, and to the issue and heirs of the body of the said party of the second part."

The contention of the immediate grantee was that thereby was conveyed to him the fee, but the Supreme Court rightly held that, taking into consideration the whole of the instrument, it was the intention of the grantor "that the habendum should operate as a proviso or limitation to the granting clause, and control it to the extent of limiting the estate conveyed to the plaintiff to a life estate, with a remainder to the issue and heirs of his body." It is true the court said no present estate would pass to the "heirs." That necessarily followed from the consideration that at the time of the creation of the estate there was no ascertained person in whom the right to the enjoyment of the remainder could vest. *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415.

In *Hall v. Wright*, 17 Cal. App. 502, 120 Pac. 429, a similar deed was involved, and it was held that the remainder was a contingent interest, the person or persons in whom it was to vest being uncertain, and not ascertainable until the death of the first taker. Herein the conveyance of the remainder was not to the "heirs" of Lydia J. Sperry, as in the above citations, but to two designated persons who were then in being and capable of taking the interest immediately upon the death of the life tenant.

Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306, involved the question whether a conveyance in trust created a dry, naked trust which was terminable upon the option of the trustor, and it was held that, since there was no power of revocation reserved by the trustor in the instrument creating the trust, a court of equity would not, in the absence of the beneficiaries, decree a termination of the trust. It is well to note, however, that, after declaring that it was immaterial whether the remainders thereby created were vested or contingent, the court said:

"But in truth these remainders are to be regarded as vested remainders, subject to divestiture only upon the exercise of the power of nomination by will reserved to the trustor."

It is to be observed that the remaindermen were not named in the declaration of trust, but they were designated as "her heirs at law," subject to be displaced by nomination in the will of the trustor.

The Supreme Court approved and followed the decision of the New York court in *Crackanthorpe v. Sickles*, 156 App. Div. 753, 141 N. Y. Supp. 370, wherein the plaintiff, an unmarried woman, conveyed property to a trustee to invest and manage and pay the net income thereof to her during her life, and at her death to distribute it to such persons as she might designate by her will, or, should she die intestate, then to divide the property among her lawful issue which she might leave surviving. Therein it was said:

"It is a well-established rule, both of the common law and by statute, in this state that estates in remainder which are limited to take effect upon default in the exercise of a power of appointment are not prevented from vesting by the existence of the power, but take effect in the same manner as if no power existed, subject, however, to be divested by an exercise of the power."

It might well be doubted whether either of said courts was right in saying that there was a vested remainder, since the designation of "heirs at law" does not indicate definitely a person in being at the time of the creation of the estate. At any rate, the *Gray* Case affords no comfort to appellant.

In *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462, the provisions of a deed to the grantee named therein for and during her natural life, with the reversion at her death to the grantor, or to his heirs or devisees, were involved. Prior to the death of the life tenant, the grantor died intestate, leaving sons and daughters as his heirs. It was properly held by this court that, at the time of the death of the grantor, the interests of the heirs became vested remainders, although before that time they were contingent remainders. When the grantor died, the parties were in esse who had the right "to the

immediate possession of the property upon the ceasing of the intermediate estate." Section 694, Civ. Code. But such condition did not exist until the death of the grantor. But here, as we have seen, the remaindermen were in esse at the time of, and they were designated in the decree of, distribution.

Also, in the *Washburn* Case, supra, the devise was to a class, the members of which were to be living at the time of the death of the life tenant, a situation entirely different from this.

In *Thomson v. Ludington*, 104 Mass. 193, the remainder was devised "to such of my children as shall then be living" at the death or marriage of the widow of the testator. Necessarily this was a contingent remainder, since the remainderman continued uncertain till the death or marriage of the widow.

In *Compton v. Rixey's Ex'rs*, 124 Va. 548, 98 S. E. 651, 5 A. L. R. 465, also, the testator designated his children as the remaindermen "to take upon the death or remarriage of his wife." It was properly held to be a contingent remainder, as "no one can tell until the happening of the event which is to terminate the [wife's life] estate, which of the children will answer the description of being 'then living.'"

[3] Appellant declares that the estate in remainder would not vest until the death of the life tenant by reason of the rule prescribed in section 780 of the Civil Code as follows:

"When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years."

If said section is to be construed as claimed by appellant, it would manifestly have the effect of nullifying section 694 of the same Code, providing:

"A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest."

However, the phrase, "to take effect," as used in said section 780, means to become operative or executed; it implies not only a vested interest in the property, but a present right of enjoyment. Manifestly, in that sense the remainder would not "take effect" until the death of the life tenant.

While we do not find any decision construing said section 780, it is clear that appellant's contention cannot be reconciled with the numerous decisions in this state relating to vested remainders or with the decisions in New York, in which state section 238 of the Field draft of the Civil Code (section 55 of Real Property Law [Consol. Laws, c. 50]) contains the same language as said section 780.

Indeed, as directly supporting respondents'

position that the estate of Harriet A. Miller was a vested estate, and not a contingent remainder, we may cite the following New York decisions: *Byrnes v. Stilwell*, 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 760; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008; *Matter of Seebeck*, 140 N. Y. 241, 35 N. E. 429; *Stokes v. Weston*, 142 N. Y. 433, 37 N. E. 515; *Miller v. Gilbert*, 144 N. Y. 68, 38 N. E. 979; *Vanderpoel v. Burke*, 63 Misc. Rep. 545, 118 N. Y. Supp. 548.

It is sufficient to quote from the last of these the following:

"When testator gave all his estate to his wife for life, on her death to be divided * * * among his children, the children living at the time of the testator's death took 'vested remainders.'"

It was further held therein that the use of the words, "after her death," in connection with the remainders, "must be regarded as defining the time of enjoyment simply, and not of the vesting of title."

[4] If the said Harriet A. Miller at the time of her death owned an interest in said property, the title thereto immediately vested in her heirs, subject, of course, to the right of the administrator to possession of it for purposes of administration. *Estate of Woodworth*, 31 Cal. 595.

[5] The administrator's title and possession is not adverse to the heir, but the latter, subject to said right of the administrator, can maintain an action to quiet his title and recover possession as against any one but the administrator even while the estate remains undistributed. *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738.

[6] The object of an action to quiet title is to finally settle and determine as between the parties all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled thereto. *Peterson v. Gibbs*, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107.

Plaintiff, however, claims as heir of his mother, and he cannot therefore maintain this action against her administrator. Section 1452 of the Code of Civil Procedure provides:

"The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator."

We conclude that the trial court was right in sustaining the demurrer of J. E. Oliver, as administrator, to the complaint. The court, however, dismissed the action as to all the defendants. It is not claimed in the complaint that said Frank Sperry claimed any interest adverse to plaintiff. Hence it was proper to dismiss the action as to him,

but a cause of action was stated against T. F. Emerson, as administrator of the estate of Charles Sperry, deceased. Plaintiff was entitled, therefore, to have the controversy between him and said administrator adjudicated.

The judgment is reversed as to Emerson as administrator, and affirmed as to Frank Sperry and J. E. Oliver, as administrator of the estate of Harriet A. Oliver, deceased.

We concur: FINCH, P. J.; HART, J.

54 Cal. App. 505

MILLER v. OLIVER et al. (Civ. 2271.)

(District Court of Appeal, Third District, California. Oct. 7, 1921. Hearing Denied by Supreme Court Dec. 5, 1921.)

Appeal and error $\S$ 151(2)—**Pleading** $\S$ 120 (1)—Denial which was merely conclusion of law, contrary to admitted facts, raised no issue; defendant without interest in action not aggrieved by dismissal.

In action against administrator, where he admitted the facts alleged in the complaint, which showed as a matter of law that plaintiff had a vested half interest in certain property devised by defendant's decedent, but denied such half interest vested in plaintiff, and alleged that said half interest reverted to and became a part of decedent's estate, his answer, being based upon his conclusion from the facts that a contingent and not a vested remainder was distributed to plaintiff's mother, raised no material issue to be tried, so that judgment dismissing the action was not error as to him; nor, since it was apparent from the complaint and answer that defendant had no interest in the property, was he aggrieved by the dismissal.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Charles Elmer Miller against J. E. Oliver, T. F. Emerson, and others. From judgment dismissing the action, defendant Emerson appeals. Appeal dismissed.

S. K. King, of Escalon, for appellant.

George F. McNoble, of Stockton, *amicus curiæ*.

A. H. Carpenter and Thomas S. Louttit, both of Stockton, for respondent.

BURNETT, J. This is an appeal by T. F. Emerson, as administrator of the estate of Charles Sperry, deceased, from a judgment dismissing said action. The facts are sufficiently set forth in the opinion filed herewith in the same cause, No. 2270, 202 Pac. 168, on the appeal of plaintiff. Defendant Emerson claims that his answer presented an issue of fact that should be tried.

His answer was as follows:

(202 P.)

"Now comes T. F. Emerson, as administrator with the will annexed of the estate of Charles Sperry, deceased, and, answering the plaintiff's complaint on file herein, admits, alleges, and denies as follows, viz.: Admits all the allegations in the said complaint contained, save and except that he denies that upon the death of the said Harriet A. Oliver an undivided half of the said property in controversy, vested in the plaintiff herein; and in that behalf alleges that such undivided half reverted to and became a part of the estate of the said Charles Sperry, deceased, subject only to the life estate of the surviving widow of the said Charles Sperry, deceased; and save and except also the several respective claims to said property of the plaintiff and the defendant J. E. Oliver as administrator of the estate of the said Harriet A. Oliver, deceased."

Appellant's denial is the denial of a conclusion of law, since he admits the facts alleged in the complaint, which show as a matter of law that plaintiff has a vested interest in the property. His claim that said undivided half became a part of the estate of Charles Sperry, deceased, is based upon his conclusion from the facts that a contingent, and not a vested, remainder was distributed to the said Harriet A. Oliver.

Taking the complaint and answer, therefore, it appears that said Emerson, as administrator, has no interest whatever in the property, and hence he has not been aggrieved by the judgment of dismissal. However, as upon plaintiff's appeal we have reversed the judgment as to Emerson, the latter may have an opportunity to amend his answer so as to tender, if possible, some material issue of fact if he is so advised.

The appeal of Emerson is dismissed.

We concur: FINCH, P. J.; HART, J.

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ROTTMAN v. HEVENER. (Civ. 3386.)

(District Court of Appeal, Second District, Division 2, California. Oct. 7, 1921.)

1. Evidence ⚡444(6)—Trial ⚡105(5)—Parol evidence inadmissible to show note was not to be paid until demand; specific objection to parol evidence unnecessary.

Oral agreement, entered into at the time of or prior to the execution of a note, that it should not become payable until demand, was not admissible to vary express written promise in the note to pay "one day after date, without grace," in the absence of fraud, accident, or mistake, under Civ. Code, § 1625, and such rule is not one merely of evidence, but of substantive law, and it is immaterial that some evidence relating to the oral understanding was not specifically objected to.

2. Bills and notes ⚡137(1)—Contracts ⚡242—Time of payment not extended by unexecuted oral agreement.

The time of payment as fixed by a written contract, such as a promissory note, may not be suspended or extended by a subsequent unexecuted oral agreement, in view of Civ. Code, § 1698.

3. Estoppel ⚡85—Payee of note not estopped by oral agreement to deny note due.

An oral agreement that a note should not be payable until demand, made prior to the execution of the written instrument, which was payable "one day after date, without grace," could not estop payee from claiming that the note was due and payable one day after date, so as to prevent recovery of attorney's fees in an action without demand, the doctrine of estoppel having no application when representation relates to rights depending on contracts yet to be made, and the same is true as to an oral statement made after the execution of the note, in the absence of consideration, notwithstanding Civ. Code § 1511, subd. 3, in view of sections 1625, 1698.

4. Bills and notes ⚡394—Demand for payment unnecessary before action.

Both at common law and under Civ. Code, § 3151, as amended by St. 1917, p. 1543, holder of a note may maintain an action against the maker to recover the principal, without demand or presentment at the bank where made payable; the ability and willingness of the maker to pay it at maturity at the place named being a matter of defense that must be pleaded and proved by him, if he would establish the equivalent of a tender, and thus prevent the holder from recovering further interest and costs of suit.

5. Interest ⚡50—Tender ⚡19(1)—Does not extinguish debt, but may stop interest.

A tender of payment of note does not pay the debt, but, at most, only stops the running of interest and deprives holder of his right to recover costs and stipulated attorney's fees, under Civ. Code, § 1504; Code Civ. Proc. § 1030.

6. Tender —25—Must be deposited in bank in name of creditor.

To constitute a tender to holder of note, a deposit in a bank under Civ. Code, § 1500, must be in the name of the creditor.

7. Tender —25—Money deposited after action brought must cover costs and attorney's fees.

Money deposited in a bank under Code Civ. Proc. § 1030, after action brought by holder of note, which provides for attorney's fees, would not extinguish the debt, where it did not include attorney's fees, and could not preclude plaintiff from recovering his costs and attorney's fees.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Ignatius Rottman against Frank D. Hevener. Judgment for defendant, and plaintiff appeals. Reversed.

M. C. Atchison, of Calexico, for appellant. Alfred Blaisdell and Louis Lamy, both of Calexico, for respondent.

FINLAYSON, P. J. This is an action upon a promissory note. From a judgment that he take nothing by the action and that defendant recover costs, plaintiff appeals.

On May 31, 1919, at Calexico, for value received, defendant signed and delivered to plaintiff his promissory note, whereby he promised to pay to plaintiff, or order, "one day after date, without grace, * * * at International Bank of Calexico, California," the sum of \$2,522.57, with interest at the rate of 10 per cent. per annum until paid, together with attorney's fees equal to 10 per cent. on the amount unpaid, plus \$20 if suit should be commenced or other proceedings taken to enforce payment. The note expressly provides that "demand, diligence, protest and notice" are waived. On December 10, 1919, no part of the principal or interest having been paid, plaintiff commenced this action to recover the principal of the note, interest to the date of the commencement of the action, and attorney's fees as provided for by the instrument.

The answer attempts to set forth facts showing, in substance, that prior and likewise subsequent to the execution of the note plaintiff, through his agent, orally represented to defendant that the instrument should not become payable until such time as payment should be demanded—and this notwithstanding that, by the express terms of his written promise, defendant agreed to make payment "one day after date, without grace," and notwithstanding the further fact that, by the specific terms of his written contract, he expressly waived "demand." We speak advisedly when we say the answer "attempts" to allege these facts, for that pleading is such a jumble of inarticulated matters that we are somewhat uncertain as

to what were the precise ideas in the mind of the pleader.

It seems that when the note was executed, May 31, 1919, it was the intention of the parties that defendant should deposit with the International Bank of Calexico, as collateral security, 50 shares of the capital stock of a certain Mexican corporation. The corporation never issued the stock, and hence the contemplated security never became available. Defendant, testifying as a witness on his own behalf, was asked concerning the alleged understanding at the time of the execution of the note as to the date when it should be paid. His answer was that it was not the intention that the note should become due one day after date, June 1, 1919, which came on a Sunday, but that it was stated to him by plaintiff's agent, and agreed to, that the note would run until such time as plaintiff should demand payment—that it was not to be paid until plaintiff should ask for its payment; also that in these oral conversations the parties did not fix any definite time for payment. He also testified that it was agreed that the stock of the Mexican corporation, when issued, would be delivered to plaintiff as collateral security for the note. He further testified that a similar conversation was had between himself and plaintiff's agent subsequent to the delivery of the note.

No demand for the payment of the note was made prior to the commencement of the action on December 10, 1919. Two days thereafter defendant's property was attached, and then, so he testified, he learned for the first time that plaintiff was seeking payment of the note. Thereupon, namely, on December 12, 1919, defendant deposited with the International Bank of Calexico the sum of \$2,654.17. This amount equalled the principal of the note and accrued interest, but did not include the attorney's fees provided for in the event that suit should be commenced to enforce payment. Immediately after depositing said sum with the bank, defendant caused a registered letter, signed by the bank's vice president, to be mailed at Calexico, addressed to plaintiff at his Los Angeles residence, advising the latter that the money had been so deposited. At the same time defendant caused a similar letter, addressed to plaintiff at Calexico, to be deposited in the United States mail. There is no evidence that the sum deposited with the bank was deposited in plaintiff's name, as required by section 1500 of the Civil Code when it is sought to extinguish an obligation for the payment of money as there provided. On this particular feature of the case defendant's testimony is as follows:

"Q. What, if anything, did you do toward the satisfaction of the obligation after you became aware that they were seeking to recover the

money from the note? A. I deposited the full amount of principal and interest due at that time two hours after the attachment had been made."

Upon substantially this state of facts the trial court found that all the sums due to plaintiff by defendant were paid on December 12, 1919, at the International Bank of Calxico, and gave judgment for defendant accordingly.

[1] We are at a loss to understand upon what theory judgment was awarded the defendant. The oral agreement which it is claimed was entered into at the time of or prior to the execution of the note, to the effect that that instrument should not become payable until such time as plaintiff should see fit to demand payment, was not admissible to vary defendant's express written promise to pay the note "one day after date, without grace." It is not claimed that by reason of fraud, accident, or mistake there was any failure to cause the written instrument to express the intention of either of the parties. There is no allegation or proof that defendant was induced by fraud or mistake to agree to the insertion of the clause making the note payable one day after date. That instrument was written by the defendant himself. What he did he did with his eyes open. And he is charged with knowledge that under the law of this state (Civil Code, § 1625) a written contract supercedes all preceding or accompanying oral negotiations or stipulations. In the absence of fraud or mistake, the time of payment as fixed by the written terms of the note cannot be varied by any contemporaneous oral agreement. The rule that a writing which purports to be the complete contract of the parties is deemed in law to be the full repository of the agreement or contract, that the whole contract is expressed by it, and that evidence of oral stipulations is not admissible to incorporate other elements in it or to alter or enlarge its terms, is applicable to negotiable as well as to nonnegotiable instruments. *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 341, 109 Pac. 499; See, also, *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; *Pierce v. Avakian*, 167 Cal. 330, 139 Pac. 799; *Kinsel v. Ballou*, 151 Cal. 755, 91 Pac. 620; *Aud v. Magruder*, 10 Cal. 282; *San Jose Savings Bank v. Stone*, 59 Cal. 183; *Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 767, 118 Pac. 92; *Consolidated L. Co. v. Frew*, 32 Cal. App. 118, 162 Pac. 430; *Foley v. Emerald, etc., Brewing Co.*, 61 N. J. Law, 428, 39 Atl. 650; *Commercial Nat. Bank v. Hutchinson Box, etc. Co.*, 98 Kan. 350, 158 Pac. 44; *Cherokee County v. Meroney*, 173 N. C. 653, 92 S. E. 616; *Hall v. First National Bank*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255; and *Getto v. Binkert*, 55 Kan. 617, 40 Pac. 925. The fact that some of the evidence relating to the

alleged oral understanding was not specifically objected to by plaintiff cannot affect the latter's right to insist upon the agreement as written—as evidenced by the promissory note. According to the modern view, and the one which obtains in this state, the so-called "parol evidence" rule—the rule which denies effect to an oral agreement that varies a written contract entered into at the time or earlier—is not merely one of evidence but of substantive law. The accepted theory is, not merely that the writing is the best evidence of the agreement, but that what is embodied in the writing is the actual contract of the parties, unless affected by fraud or mutual mistake. And, therefore, the failure to object to the admission of evidence of such an oral agreement does not alter the legal rights of the parties, but its incompetency to vary the writing may be considered as a matter of law. See *Dollar v. International Banking Corp.*, supra. The authorities bearing on this question are collected in *Thompson Co. v. Foster*, 101 Kan. 14, 165 Pac. 841.

[2] Equally unavailing as a defense is the fact, if it be a fact, that subsequently to the execution of the promissory note plaintiff's agent again told defendant that the instrument would not become payable until payment should be demanded. Under the statute of this state (Civil Code, § 1698) a contract in writing may be altered by a contract in writing or by an executed oral agreement, but not otherwise. Therefore, whatever may be the rule in jurisdictions where there is no such statutory provision, it is the established rule in this state that the time of payment as fixed by the written contract may not be suspended or extended by a subsequent unexecuted oral agreement. *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88; See, also, *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986.

[3] It cannot successfully be contended that plaintiff is estopped to claim that the note is payable according to defendant's express written promise to pay "one day after date, without grace." No oral agreement made prior to the execution of the written instrument, in conflict with defendant's written promise, can work such estoppel. It is the general rule that, to work an estoppel, a statement or representation made during the negotiations that terminate in a written contract must relate to an existing fact, and not to a mere promise of future performance. The only exception to this rule is where the representation relates to the intended abandonment of an existing right. The doctrine of estoppel, therefore, has no place for application when the representation relates to rights depending upon contracts yet to be made to which the person complaining is yet to be a party. He has it in his power in such

case to guard in advance against any consequences of a subsequent change of intention or conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their contracts when reduced to writing. *Union Mutual L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Langdon v. Doud*, 10 Allen (Mass.) 433; *Thomson v. Langton*, 187 Pac. 970. The rule is stated in *Corpus Juris* (vol. 21, p. 1142) as follows:

"The doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts."

Nor can estoppel be predicated of the oral statement alleged to have been made subsequently to the execution of the note, to the effect that that obligation would not become due until payment should be demanded. Aside from the fact that, by the express terms of his written contract, defendant specifically waived demand, the alleged representation was only of a present intention or purpose; and the rule is that the doctrine of estoppel will not arise simply from a breach of promise as to future conduct or from a mere disappointment of expectations. There was no consideration for any extension of the time of payment as fixed by the terms of the written contract. Nor did defendant alter his position by any affirmative action on his part. Having the right to pay the note at any time after the day when it was delivered, he chose rather to remain inactive and to allow the interest to accrue. The statement of plaintiff's agent subsequent to the execution of the note, to the effect that payment would not become due until demand should be made, was not the statement of an existing objective fact or of a state of things actually existing on which a party might reasonably rely as fixed and certain, so as to be induced thereby to change his position, but was the statement of a present intention respecting a future course that was subject to change at any moment. Plaintiff, at any time, might conclude that he wanted his money and bring suit accordingly. The intent of a party, however positive and fixed, concerning his future conduct with respect to such a matter, is necessarily uncertain as to its fulfillment, and must depend upon contingencies and be subject to change and modification by subsequent events and circumstances. See *Travis v. Davis*, 15 S. W. 525, 12 Ky. Law Rep. 825, and *Langdon v. Doud*, *supra*. In this latter case, the Massachusetts court says:

"The reason [of the doctrine of estoppel] wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form

a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action."

In taking leave of this question, it may indeed be said that if the doctrine of estoppel were extended to cover a situation such as we have here, it would subvert the salutary rule that a written contract must prevail over previous verbal arrangements, as well as the rule that a written contract can be altered only by a contract in writing or by an executed oral agreement, and would open wide the door to all the evils which these two rules were intended to prevent.

We are referred to subdivision 3 of section 1511 of the Civil Code, which, with the introductory portion of the enactment, reads:

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: * * * 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

The oral statements by plaintiff's agent, to the effect that the note need not be paid until after a demand, could not excuse a "want of performance" of defendant's obligation to pay his debt. The debt remains until extinguished by payment. The extreme claim that could be advanced by the most plausible argument is that, under these provisions of section 1511, the oral statements made by plaintiff's agent at the time of and subsequent to the execution of the note excused defendant's "delay" in the performance of his obligation to pay. But this claim, if tenable, would have the effect of permitting a party to a written contract to alter by parol his most solemnly executed written obligation, and thus violate the express inhibitions of sections 1625 and 1698, and this notwithstanding neither party had been prevented by fraud or mistake from causing the writing to express his real intentions. We do not think that any such result was contemplated by the framers of section 1511. That section refers to "any act" of the creditor. It would seem that the Legislature must have had in mind such an act as, being done in and about some matter not covered by the terms of the agreement, and entirely separate and apart from its terms, would operate to induce the debtor to delay performance of his obligation. It does not seem possible that the Legislature intended to change, so far as the question of the maturity of an obligation is concerned, the rule of law forbidding the alteration of a written contract by parol. Here, according to the debtor's claim, there was an attempted oral agreement between the parties, which, if allowed to operate, would indub-

itably have the effect of varying the terms of the written obligation as to time of payment. If subdivision 3 of section 1511 applies to such a situation, the Legislature has, in effect, declared that, as to one of the terms of practically every written agreement, that fixing the date of maturity, the writing may be varied by parol. It is inconceivable that such could have been the legislative intent. If the rule forbidding the alteration of written contracts by parol can be so readily circumvented, then a written instrument, however emphatically it may purport to be the embodiment of the entire agreement between the parties, will afford no obstacle to its facile and convenient overthrow by any debtor who may be able to adduce an amount of parol evidence sufficient to induce a credulous jury to believe that the time fixed by the writing for the maturity of the obligation is not that which the parties contemplated. We decline to give to section 1511 a construction that leads to a result so at variance with the "parol evidence" rule.

[4] No demand was necessary before the suit was commenced; nor was it necessary to make presentment of the note at the bank where it was made payable. It is settled in this state, both at common law and now by statute, and by the weight of authority in the other states of this country, contrary to the law in England, that where a note is payable at a particular time and place neither demand nor presentment at the place named is necessary in order to entitle the holder to maintain an action against the maker to recover the principal. The failure to make presentment at the place named would not discharge the debt. At most it could be pleaded only as a defense to the recovery of costs or interest, and then only if the maker were ready and willing to pay his note at maturity at the place fixed for payment. See *Montgomery v. Tutt*, 11 Cal. 307, where the court, on page 327, says:

"The undertaking of the parties and the legal effect of such contracts is this: That if ready at the time and place with the funds, the obligor has so far satisfied the contract that he cannot be responsible for any future damages, either as costs of suit or interest for delay; not that he is thereby discharged of the debt."

Section 3151 of the Civil Code (Negotiable Instruments Law, Stats. 1917, p. 1543) reads:

"Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

The maker of a note is "the person primarily liable" (*Jones v. Nicholl*, 82 Cal. 32,

22 Pac. 878; *Nichols v. Asbeck*, 179 Cal. 695, 178 Pac. 705), and by the express terms of the statute presentment is not necessary to charge "the person primarily liable," even though the instrument be payable at a special place.

[5] The ability and willingness of the maker of a note to pay it at maturity at the place named therein is a matter of defense that must be pleaded and proved by him, if he would establish the equivalent of a tender and thus prevent the holder from recovering further interest and costs of suit. See *Florence Oil, etc., Co. v. First National Bank*, 38 Colo. 119, 88 Pac. 182, *Greeley v. Whitehead*, 35 Fla. 523, 17 South. 643, 28 L. R. A. 286, 48 Am. St. Rep. 258, and *Nichols v. Asbeck*, supra. Here defendant made no attempt to show that he was able and willing to pay the note at the time when, according to its terms, it was due and payable. On the contrary, his claim throughout was that he was not to make payment at that time. But even if he had been able and willing to pay at the date of maturity fixed by the terms of the note, so as to constitute such ability and willingness the equivalent of a tender, that would not extinguish plaintiff's right to the principal of the note, nor deprive him of the right to a judgment therefor. A tender does not pay the debt. At most such tender, if made, would only stop the running of interest and deprive plaintiff of his right to recover costs, and, possibly, his right to the stipulated attorney's fees. Civ. Code, § 1504; Code Civ. Proc., § 1030; *Himmelman v. Fitzpatrick*, 50 Cal. 650.

Our conclusion is that nothing that transpired prior to the commencement of the action was a defense thereto. It only remains to consider the effect of the deposit in the bank after the action was brought.

[6, 7] Respondent's claim that his obligation to pay the debt for which plaintiff has sued him was extinguished by his depositing in the bank a sum of money equal to the principal and accrued interest—a sum deposited two days after the action was brought—is evidently based on section 1500 of the Civil Code, which reads:

"An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

There is no evidence that the money was deposited with the bank in the name of plaintiff. To effect the extinguishment of an obligation under this Code section there must be a full compliance therewith; and a failure to deposit the money in the name of the creditor is fatal to any claim of extinguishment. *Segno v. Segno*, 175 Cal. 743, 167 Pac. 285. Moreover, the money was not deposited with the bank until after the com-

mencement of the action; and, since it did not include the attorney's fees to which plaintiff became entitled when he sued, it was for an amount less than the sum to which, when plaintiff brought his action, he was entitled. For these reasons alone the deposit with the bank not only could not extinguish the debt, but it could not preclude plaintiff from recovering his costs and attorney's fees. Code Civ. Proc. § 1030; *Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

54 Cal. App. 485

ROTTMAN v. HEVENER. (Civ. 3385.)

(District Court of Appeal, Second District, Division 2. California. Oct. 7, 1921.)

1. Bills and notes  147—Paper not negotiable unless payable to order or bearer.

An instrument, wherein maker agrees to pay certain money to another person on demand, is not negotiable under Civ. Code, § 3082, subd. 4, as amended by St. 1917, p. 1532, where not payable to order or bearer.

2. Bills and notes  129(3)—Note held due immediately on delivery.

A note promising to pay "on demand, after date, without grace," is due immediately on delivery.

3. Bills and notes  394—Demand for payment unnecessary before suit.

No demand or presentment is necessary before bringing suit on a note payable on demand under Civ. Code, § 3151, as amended by St. 1917, p. 1543, and this is true though the paper is nonnegotiable because not made payable to order or bearer, as provided in section 3082, subd. 4, as amended by St. 1917, p. 1532, especially where the note expressly declares that "the makers and indorsers of this note hereby waive demand, diligence, protest and notice."

4. Bills and notes  534 — Maker on demand note held liable for attorney's fees.

Maker of a note payable on demand, and providing for attorney's fees, is liable for costs and stipulated attorney's fees in action brought without demand, where note recited that demand was waived.

5. Evidence  444(6)—Oral agreement that note should not be due until demand inadmissible.

An oral agreement that note was not to be paid until demand could not be shown in an action on the note, where it recited that it was payable on demand, and that demand was waived, in the absence of fraud or mistake.

6. Customs and usages  11—Custom proved to interpret, but not to establish contract.

Custom may be proved to interpret, but not to establish, a contract, and in an action on a note without demand, court erred in permitting

defendant to introduce evidence of a custom among bankers to demand payment on demand notes before bringing suit; the note in question being payable on demand, and demand being waived, under Code Civ. Proc. § 1870, subd. 12.

7. Tender  11—Willingness to pay on demand not sufficient tender.

An ability and willingness to pay a note upon presentment or exhibit or demand cannot be deemed the equivalent of a tender of the amount due on a note under which neither presentment nor demand is necessary.

8. Costs  42(1, 2)—Tender  9—Deposit in bank after suit brought not available as defense, nor to save costs, but offer of judgment might relieve of future costs.

The deposit in bank of principal and interest after suit brought on note was neither available as a defense nor operative to deprive plaintiff of his right to costs under Civ. Code, § 1500, but the defendant might at such time serve an offer on plaintiff to allow judgment to be taken against him for principal and interest and attorney's fees and costs incurred to date, and relieve himself from liability for further costs under Code Civ. Proc. § 997.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Sam E. Rottman, trustee, against Frank D. Hevener. Judgment for defendant, and plaintiff appeals. Reversed.

M. C. Atchison, of Calexico, for appellant.
Alfred Blaisdell and Louis Lamy, both of Calexico, for respondent.

FINLAYSON, P. J. On March 15, 1919, defendant signed and delivered to plaintiff an instrument as follows:

"\$1100.00 Calexico Cal. 3-15 1919. On demand, after date, without grace, for value received I promise to pay to Sam E. Rottman, trustee, at the International Bank of Calexico, California, at its banking house in Calexico, the sum of eleven hundred dollars, with interest, from date, payable quarterly, at the rate of 10 per cent. per annum, until paid, and attorney's fees of 10 per cent. on the amount then unpaid, and twenty dollars if suit be commenced or other proceedings taken to enforce the payment of this note. Should the interest be not paid when due, it shall be compounded every ninety days thereafter and bear the same rate of interest as the principal. Principal and interest payable in gold coin of the United States of America of the present standard. The makers and indorsers of this note hereby waive demand, diligence, protest and notice. Frank D. Hevener."

This action was brought on December 10, 1919, to recover the principal and accrued interest and the attorney's fees provided for by the foregoing writing. The trial court gave a judgment that plaintiff take nothing, and that defendant recover his costs. From that judgment plaintiff appeals.

[1] The paper in controversy is not made

payable either to order or to bearer. "The instrument to be negotiable must be made payable to order or to bearer." Civ. Code, § 3082, subd. 4, as amended by St. 1917, p. 1532. Under the construction that has uniformly been placed upon this section of the Negotiable Instrument Law, the paper in question is nonnegotiable. *Johnson v. Lasiter*, 155 N. C. 47, 71 S. E. 23; *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424.

In many respects the facts of this case are similar to those presented in *Rottman v. Hevener*, No. 3386, 202 Pac. 329, this day decided. The defenses interposed by defendant's answer and found by the court in his favor are: (1) Contemporaneously with its execution, plaintiff orally represented to defendant that before the note should become due or payable demand for payment would be made, but no presentment or demand was made before the action was brought; (2) at all times since he made the note defendant has been able, ready, and willing to pay it, *upon its being presented to him for payment*; and (3) on December 12, 1919, upon learning that the action had been commenced, defendant deposited with the International Bank of Calexico, to plaintiff's credit, an amount equal to the principal and accrued interest of the note, and caused notice thereof to be given plaintiff.

[2] It seems proper, in dealing with this controversy, first to consider the effect of the writing irrespective of the alleged oral agreement. By the express terms of the instrument it is payable "on demand, after date, without grace." Moreover, the writing expressly declares that "demand" is waived. The words "on demand," when used with reference to the time for payment under an ordinary obligation to pay money, have a plain, distinct, clearly defined, legal, and popular signification, well known to the courts and to the people. When an obligation for the payment of money under a contract such as we have here contains a provision that it is payable "on demand," or "on call" (which is the same thing), the debt is payable presently, that is, it is due immediately; and if not immediately paid the debtor breaches his contract to pay, and the statute of limitations at once begins running in his favor. *Omohundro's Ex'r v. Omohundro*, 21 Grat. (Va.) 626; *Bowman v. McChesney*, 22 Grat. (Va.) 609; *Bacon v. Bacon*, 94 Va. 687, 27 S. E. 576; *Cotton v. Reavill*, 2 Bibb (Ky.) 99. "On demand after date," particularly when, as here, the interest is payable "from date," has been defined as equivalent to "on demand," rendering a note so payable due immediately after its delivery. *Hitchings v. Edmands*, 132 Mass. 338, 339; *O'Neill v. Magner*, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88. It follows, therefore, that if we look only to the terms of defendant's written contract, it must be held that his debt to plaintiff became due and

payable immediately upon the delivery of the instrument.

[3] If defendant's contract be that which is evidenced by his written promise, no previous presentment or demand was necessary. It is well settled that in an action by the payee against the maker of a negotiable promissory note, payable on demand, no actual demand or presentment is necessary before bringing suit. *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *O'Neill v. Magner*, supra; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878; *Negotiable Instruments Law*, Civ. Code, § 3151, as amended in 1917, p. 1543. The same rule obtains where the paper is nonnegotiable. That is, under the well-settled principle that an obligation for the payment of money on demand is due immediately, no actual demand is necessary, irrespective of whether the obligation to pay is evidenced by a negotiable or a nonnegotiable instrument. *Cotton v. Reavill*, supra; *Board of County Com. v. Sloan*, 5 Colo. 38; *Knight v. Braswell*, 70 N. C. 709. Moreover, defendant's written contract expressly declares that—

"The makers and indorsers of this note hereby waive demand, diligence, protest and notice."

This express waiver is equivalent to a contract that the debt shall be payable without any previous demand.

[4] There seems to be authority for the proposition that because attorney's fees, when provided for in a promissory note, are "special damages," they are payable only in case of default, and that, therefore, to warrant a recovery of such "special damages," a previous demand for payment of the principal and accrued interest must be made, even though the note be a demand note. See *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755. Without questioning the correctness of this proposition, we are of the opinion that it is not applicable to the facts of this case. Here the maker of the note expressly waived demand. This waiver applied to every sum that defendant promised to pay—to attorney's fees as well as to the principal and interest of the note. The liability to pay attorney's fees arose, therefore, coincidentally with the right to bring action on the note, which was at any time after its execution; and a prior demand or notice was no more essential with respect to counsel fees than it was with respect to the collection of the principal. See *Wienke v. Smith*, 179 Cal. 227, 176 Pac. 42.

[5] Turning now to a consideration of the oral agreement alleged to have been made at the time when the note was executed: We think it clear that defendant's obligation to pay must be measured solely by the terms of his written contract, unaffected by the contemporaneous oral agreement. The paper seems to have been prepared by the defendant himself, and to have been brought

by him to plaintiff and then delivered to the latter. There is no allegation or proof that the words of the instrument, to the effect that the note is payable on demand, i. e., immediately, and that demand is waived, were inserted in the paper through fraud or mistake; there is no averment that the alleged oral agreement was omitted from the writing through fraud or mistake; the bald proposition is that defendant should be permitted to show that his contract is not that which is evidenced by the instrument that he himself worded and prepared, but one radically different. Defendant, during the course of his cross-examination, on being asked what was said by himself and plaintiff at the time when the paper was delivered, testified:

"My best recollection is that the substance of the conversation was, 'I will make this a demand note; any time you want this money, make a demand and I will pay.'"

His testimony does not disclose whether plaintiff acceded to this suggestion or not. However, assuming that plaintiff did acquiesce in defendant's suggestion that payment should be made only after a demand therefor, nevertheless, for the reasons stated in *Rottman v. Hevener*, No. 3386, 202 Pac. 329, this day decided, the oral agreement was ineffective to alter the legal effect of the written contract, or to excuse defendant's failure to make payment before suit brought.

[6] The lower court permitted defendant, over plaintiff's objection, to introduce evidence of a custom among bankers to demand payment on demand notes before bringing suit. This was error. Custom may be proved to interpret, but not to establish, a contract. Where the terms of the contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage. Code Civ. Proc. § 1870, subd. 12; *Withers v. Moore*, 140 Cal. 591, 597, 74 Pac. 159. Custom may be of aid in many instances where it is apparent that something needs explanation, but custom cannot be invoked to the point of permitting evidence of it to vary the express terms of a written contract. Here the writing is certain in all its terms. It contains an express waiver of demand. There is no room for interpretation or construction. The instrument speaks for itself in no uncertain voice.

[7] The court found that at all times since the execution of the note "defendant has

been able, ready, and willing to pay said note and any and all accrued interest, upon the said presentment or exhibit or demand for the payment thereof." This is tantamount to a finding that only upon presentment or demand was defendant willing to pay the note. But, as neither presentment nor demand was necessary, an ability and willingness to pay, conditioned upon such unnecessary acts, cannot be deemed the equivalent of a tender, even if we should assume that mere ability, readiness, and willingness, without more, may be tantamount to a tender. If, before the commencement of the action, defendant had actually tendered to plaintiff the full amount of principal and accrued interest, and if, availing himself of the privilege afforded by section 1030 of the Code of Civil Procedure, he had alleged in his answer the making of such tender, and had deposited in court for plaintiff the amount so tendered, he would have defeated plaintiff's right to recover costs. But none of these acts did he do.

[8] Had the deposit in the bank to plaintiff's credit been made, and notice thereof given, *before* plaintiff had commenced his action, such deposit and notice could have been pleaded as payment and an extinguishment of defendant's obligation. Civ. Code, § 1500. But the deposit in bank of the principal and accrued interest *after* suit brought was neither available as a defense nor operative to deprive plaintiff of his right to costs. When plaintiff commenced his suit he had a good cause of action, and therefore was entitled to recover attorney's fees and costs, as well as the principal and interest due on the note. The deposit in the bank and notice thereof could not defeat his right to such recovery. See *Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229. Had defendant, before the trial or judgment, served upon plaintiff an offer to allow judgment to be taken against him for the principal and interest of the note, attorney's fees, and the costs incurred by plaintiff to the date of such offer, he might have defeated plaintiff's right to recover costs, and have been entitled to his own costs from the date of such offer. Section 997, Code Civ. Proc. But this defendant did not do; and his deposit in the bank after suit commenced was ineffective for any purpose.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

54 Cal. App. 540

SECURITY INV. CO. OF SAN BERNARDINO v. BARTRAM et ux. (Civ. 3388.)

(District Court of Appeal, Second District, Division 2, California. Oct. 14, 1921.)

1. Vendor and purchaser ⇨301—Vendor may sue for installments of purchase price as they become due.

A vendor of land has a right to sue for each unpaid installment of the purchase price as it becomes due, and is not limited to a suit for specific performance or an action for damages, under Civ. Code, § 3307.

2. Vendor and purchaser ⇨301—Vendor suing for unpaid installments need not allege damages.

A vendor's action for unpaid installments on the purchase price of land is not *ex delicto*, but *ex contractu*, and hence damages need not be alleged.

3. Trial ⇨163—Motion for nonsuit for failure of proof held insufficient.

A motion for a nonsuit on the ground "that plaintiff has wholly failed to prove his case" is insufficient, as it does not call attention to the particular matters relied on.

4. Appeal and error ⇨1078(5)—Findings accepted as supported by evidence when specifications as to insufficiency had been abandoned.

Where appellants had abandoned the specifications of insufficiency of the evidence contained in the bill of exceptions by failing to present any supporting argument in the opening brief, the findings must be accepted as supported by the evidence.

5. Vendor and purchaser ⇨39—Contract not void because referring to unrecorded map.

A contract for the sale of land was not void because referring to an unrecorded map where the land was described by lot, tract, etc., and the only purpose in mentioning the map was to make provision that it should be on record not later than the date when the purchaser should be entitled to a conveyance.

6. Evidence ⇨460(4) — Parol evidence held admissible to identify lot on the ground.

Where both the vendor and the vendee of land identified the property on the ground, and understood that the description in contract by lot, tract, etc., was a description of the land thus identified, parol evidence was admissible to apply the description in the contract to the land identified on the ground.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by the Security Investment Company of San Bernardino against George R. Bartram and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Allison & Dickson, of San Bernardino, for appellants.

Ralph E. Swing, of San Bernardino, for respondent.

CRAIG, J. The plaintiff, a corporation, brought this action to secure a judgment for installments alleged to be due and unpaid upon a contract for the purchase of land. The complaint was attacked by a general demurrer, which was overruled. While a partial transcript of the testimony is before us, the points presented for decision are upon the judgment roll alone.

[1, 2] 1. It is the contention of the appellant that plaintiff's only remedy is for damages as provided in section 3307, Civil Code, or for the specific performance of the contract. In this he is mistaken. The plaintiff has the right to sue to collect each unpaid installment as it becomes due. *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; *Glock v. Howard & Wilson Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. The action is not *ex delicto*, but *ex contractu*, and therefore damages need not be alleged.

[3] 2. Respondent insists that the alleged error of the trial court in denying the motion for nonsuit cannot be considered on this appeal, because the ground of the motion is not stated. The only ground mentioned is "that plaintiff has wholly failed to prove his case." This statement in no way attracts the attention of counsel and the court to the particular matters relied upon, and is insufficient. *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195, and *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; *Durfee v. Seale*, 139 Cal. 603, 73 Pac. 435.

[4] 3. Appellants have seen fit to abandon the specifications of insufficiency of the evidence contained in its bill of exceptions by failing to present any argument to support them in the opening brief. The findings, therefore, must be accepted as supported by the evidence.

[5] 4. If we understand appellants' contention, it is further argued that, assuming the facts found by the court to be true, the contract is void because it refers to an unrecorded map. The contract is sufficient even if the map be entirely omitted from consideration. The finding in this regard is:

"That at the time of the entering into said contract for the sale of said lot 5, there was no map of said block C of Polytechnic Square subdivision of record in the office of the county recorder of San Bernardino county, but defendants well knew such fact, at the time of so entering into said contract, and said defendants agreed to purchase said lot and entered into said contract with the full understanding that said map had not then been so recorded. That on the 19th day of August, 1919, said map of said block C of said Polytechnic Square subdivision was recorded in the office of the county recorder of San Bernardino county, and is now of record therein."

From this it is clear that the only purpose of the parties in mentioning a map in

the contract was to make provision for one to be on record not later than at the date when the purchasers should be entitled to a conveyance. It was not intended that the map should be relied upon for a description of the lot. Indeed this was unnecessary. The parties located the property purchased on the ground, and the contract described it by lot, tract, etc. Upon trial, it only remained to establish by parol that this description was of the parcel thus identified upon the ground. It is urged that such evidence was inadmissible.

[6] Of the cases cited by appellants in support of this contention, the one most nearly in point is *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853. But this action is clearly distinguishable from the one now before us for decision. In the former case, the opinion states that the land was not "in any mode designated on the ground." The only means of identifying the particular land attempted to be sold was by map. The court said:

"Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground."

Such evidence was introduced and relied upon by the court in the instant case, with the result that, after first finding that the land described as lot 5 is the same as that shown upon the map agreed to be later recorded, and which was recorded, the court further found:

"The same lot, piece, and parcel of land agreed to be sold by plaintiff to defendants in and by said contract hereinbefore referred to is the identical lot and piece of property which said defendants understood they were buying and agreed to buy in and by said contract."

This finding must be accepted as true. On the face of the written agreement there is no uncertainty in the description of the land. Both the vendor and the vendee identified the property on the ground, and the evidence shows that they both understood that the description in the contract was of the piece of land thus identified. Evidence may always be used to apply the description given in the contract or deed to the subject-matter. *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885; *Towle v. Carmelo Land & Coal Co.*, 99 Cal. 397, 33 Pac. 1126; *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386. And if the contract, read in the light of such extrinsic evidence, clearly designates what land the parties intended, the description is sufficiently certain. *Towle v. Carmelo Land & Coal Co.*, supra. Other authorities cited by appellants upon this point are *Hines v. Copeland*, 23 Cal. App. 36, 136 Pac. 728; *Willmon v. Peck*, 5 Cal. App. 665, 91 Pac. 164. In the latter case a complete description was

contained in the contract, and the court merely held that parol evidence could not be admitted to change it and show that the contract was intended to describe a different parcel. In *Hines v. Copeland*, supra, the contract made no attempt at describing the property. Neither of these are in point.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

CULVER v. MILLER et al. 54 Cal. App. 545 (Civ. 3549.)

(District Court of Appeal, Second District, Division 2, California. Oct. 14, 1921.)

1. Pleading $\S$ 205(5) — Omissions held to merely result in uncertainties not ground for general demurrer.

In a lessee's action for the lessor's breach of his agreement to furnish stock in a water company for irrigation purposes, the failure of the complaint to allege of what stock such company consisted, the quantity of water to which plaintiff would be entitled to use, how many acres it would have irrigated, how many acres plaintiff prepared for irrigation, and the source of the company's water supply, merely resulted in uncertainties which could not be taken advantage of by general demurrer.

2. Landlord and tenant $\S$ 124(1)—Agreement to furnish stock in water company for irrigation held not uncertain as to time for delivery.

A lessor's agreement to furnish stock in a water company for irrigation of the land during the term meant that the stock was to be placed in the hands of the lessee at the beginning of the term and remain in his hands during its entire period and was not uncertain as to the time for delivery.

3. Landlord and tenant $\S$ 48(1) — Complaint for failure to furnish irrigation stock held sufficient to show demand.

In a lessee's action for the lessor's breach of his agreement to furnish stock in a water company, an allegation that defendant had failed and refused to furnish the stock or any part thereof sufficiently showed a demand for the stock.

4. Landlord and tenant $\S$ 48(1)—Complaint for failure to furnish irrigation stock not defective for failure to allege land susceptible to irrigation, etc.

In a lessee's action for the lessor's breach of an agreement to furnish stock in a water company for irrigation, the failure of the complaint to allege that the land was susceptible of irrigation and would be worthless without irrigation did not render it subject to general demurrer, as such matters could only be considered on the question of damage.

5. Pleading $\S$ 205(1)—Essentials of complaint as against general demurrer stated.

The complaint is sufficient against general demurrer if it states facts which show the

jurisdiction of the court, that defendant was under a certain duty to plaintiff and the facts from which the duty arose, that there was a breach thereof, and that as a result of the breach plaintiff was damaged, and it need not negative defenses that may be anticipated.

6. Landlord and tenant — 48(1) — Complaint for failure to furnish irrigation stock not defective because not alleging company had water.

In a lessee's action for the lessor's breach of an agreement to furnish water in a water corporation for irrigation, the failure of the complaint to allege that the water company had water and could have supplied plaintiff therewith did not render it defective.

7. Landlord and tenant — 48(1) — Finding as to lessor's breach of agreement and lessee's damage held sufficient.

In a lessee's action for the lessor's breach of an agreement to furnish stock in a water company for irrigation, where the court found the ultimate facts as to defendant's breach of the contract and the resulting damage to plaintiff, the findings were not insufficient, though there was no finding on the allegations that the land was good agricultural land and in good condition to be farmed, etc.; these being only probative facts.

8. Appeal and error — 1071(6) — Judgment not reversed because conclusions of law did not direct judgment as to costs.

Where the court's conclusions of law were that plaintiff was entitled to have judgment against defendants for \$600 as damages and that defendants were not entitled to recover anything on the cross-complaint, the judgment will not be reversed because of the failure of the conclusions of law to direct a judgment for costs; plaintiff being clearly entitled to costs.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by F. L. Culver against Oren N. Miller and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Hill & Lee, of El Centro, for appellants.

Conkling & Brown, of El Centro, for respondent.

CRAIG, J. This is an action for damages for the breach of a written contract by which plaintiff alleged that he leased 170 acres of land from the defendants; that by the lease it was agreed that plaintiff should receive from defendants 312 shares of capital stock of the Imperial Water Company No. 1; that they furnished only a part of said stock; and that the plaintiff was thereby damaged in the sum of \$2,000. Defendants interposed a general demurrer which was overruled. They thereupon filed an answer and counterclaim for \$3,000 damages. After trial, the court rendered judgment in favor of the plaintiff for \$600. Defendant moved for a

new trial and the motion was overruled. This appeal is from the order overruling the motion for a new trial and judgment for \$600.

[1] The first ground urged for a reversal is that the complaint does not state facts sufficient to constitute a cause of action. In this behalf it is said that the complaint should have stated of what the capital stock of the Imperial Water Company No. 1 consists and the quantity of water in inches and feet that plaintiff would be entitled to as the possessor of 312 shares; how many acres it would have irrigated; how many acres plaintiff prepared for irrigation; the source of the water supply of the water company. These omissions and several others which appellant claims should have been contained in the complaint, if subject to any criticism, merely result in uncertainties which cannot be taken advantage of by a general demurrer.

[2] It is said that the complaint should have alleged a demand for the stock on the part of the plaintiff, and in this connection it is claimed that the lease did not specify any definite time when the shares of stock were to be furnished. The language of the lease is "will furnish for irrigation of said land during said term, 312 shares, etc." We think this provision clearly means that the water stock was intended to be placed in the hands of the lessee at the beginning of the term and to remain in his hands during its entire period. If this is so, it cannot be said that the time for delivery is uncertain.

[3] However, the complaint alleged that the defendants "failed and refused to furnish said water stock or any part thereof." This is sufficient, since, unless a request was made, no refusal could have taken place. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254; *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370; *Brossard v. Williams*, 114 Wis. 89, 89 N. W. 832.

[4, 5] It is insisted that the complaint is defective in that it fails to state that the land was susceptible of irrigation and that without irrigation it would be valueless; that is a matter which could properly be considered by the trial court only as affecting the amount of damage. If the land was not susceptible of irrigation, this fact might be of value to the defendant; but the complaint is sufficient against a general demurrer if it states facts which show jurisdiction of the court, that the defendant was under a certain duty to the plaintiff and the facts from which the duty arose, that there was a breach thereof, and that as a result of the breach the plaintiff was damaged. *North Augusta Electric & Improvement Co. v. Martin*, 118 Ga. 622, 45 S. E. 455. The complaint in the case at bar contains these allegations.

It is not required to negative defenses that may be anticipated. *Nickel v. State*, 179 Cal. 126, 175 Pac. 641; *Canfield v. Tobias*, 21 Cal. 349.

[6] It is next asserted that the complaint is defective in that it fails to state that the Imperial Water Company No. 1 had the water and could have supplied the plaintiff with the same had he received the stock from the defendants. *Merrill v. Southside Irrigation Co.*, 112 Cal. 431, 44 Pac. 720, is relied upon by appellants to sustain this proposition. This was a mandamus suit and is clearly distinguishable from the instant case because in such a proceeding, if the court were to give judgment for the plaintiff, the order would be for the delivery of a specific quantity of water, and courts do not make useless orders and those which are impossible of performance.

[7] Another ground relied upon by appellants is that the findings are insufficient to support the judgment. It is said that there is no finding upon the following allegation contained in the complaint:

"That all of the said lands was at all times herein mentioned, and is, good agricultural land and was at all times herein mentioned in good condition to be farmed to a crop of corn and that by reason of the failure and neglect of the defendant to furnish any water stock for said lots 2 in sec. 3, and lots 1-4 and 5, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 14, of said township, and range, plaintiff was damaged in the sum of two thousand dollars."

There can be no doubt that the law requires that findings be made upon all material issues presented by the pleadings. We have examined the cases cited by appellant in this behalf beginning with *Harlan v. Ely*, 55 Cal. 344, and find nothing in them that does more than announce this well-recognized rule. It is unnecessary that findings be made upon any other than ultimate facts. If findings are made upon probative facts, even though they may be inconsistent with the general findings upon the ultimate fact in question, no new trial will result unless an examination of the evidence shows that it does not sustain the general findings. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740. In the instant case, the appellants have not seen fit to present the evidence for this court's examination. The trial court found the ultimate facts, which, upon this phase of the case, were the breach of the contract by the defendant, and resulting damage to the plaintiff. It was not necessary to make a finding upon the probative facts upon which these general findings are based. Whether or not the land was good agricultural land and in good condition to produce a crop of corn, etc., would be probative facts.

[8] Another ground relied upon for rever-

sal is that the conclusions of law are erroneous. The court's conclusions of law were as follows:

"That the plaintiff is entitled to have judgment against the defendants in the sum of \$600 as damages, and that the defendants are not entitled to recover anything from the plaintiff on their said cross-complaint."

This conclusion is substantially the same as one which was upheld as sufficient in *Butler v. Beech*, 55 Cal. 28. In *Swift v. Occidental Mining Co.*, 141 Cal. 166, 74 Pac. 700, cited by appellant, the criticism was that the court had not found upon material issues, and not that the conclusions of law were erroneous.

It is true that the conclusions of law did not direct a judgment for costs; however, the plaintiff was clearly entitled to his costs, and a judgment which is lawful will not be reversed because of the fact that the conclusions of law were incomplete.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

54 Cal. App. 516

KANE et al. v. WEDELL, City Marshal, et al.
(Civ. 3923.)

(District Court of Appeal, First District, Division 1, California. Oct. 13, 1921. Hearing Denied by Supreme Court Dec. 12, 1921.)

1. Municipal corporations $\S$ 271 — City of sixth class empowered under Public Utilities Act of 1913 to purchase established water supply system.

Under the Municipal Incorporation Act, $\S$ 862, subd. 3, as amended by St. 1901, p. 19, permitting cities of the sixth class to acquire and construct water supply systems, and notwithstanding subdivision 9, as amended by St. 1917, p. 1529, prohibiting levying and collecting of property tax in excess of one dollar on each hundred without the assent of two-thirds of the electors, and section 865, prohibiting trustees from accruing a liability in excess of the available money in the treasury legally apportioned and appropriated therefor, a city of the sixth class could purchase and establish a water supply system under the Public Utilities Act of 1913, and levy an assessment upon the property of property owners within city to procure purchase money.

2. Municipal corporations $\S$ 450(2) — City authorized to create assessment district could make district coterminous with boundaries of city itself.

Under Public Utilities Act of 1913, empowering board of trustees of a city to create an assessment district for the purpose of proposed improvement, a city, for purpose of levying assessment, could create assessment district coterminous with the boundaries of the city

itself if proposed improvement was for the benefit of all its inhabitants.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Patrick Kane and others against William Wedell, City Marshal, and ex officio Tax Collector of the City of San Bruno, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. P. Black, of San Francisco, for appellants.

John F. Davis, of South San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants, who are the governing officials of the city of San Bruno, in an action brought by the plaintiffs as citizens, residents, and taxpayers of said city, to restrain said defendants as such officials from proceeding with the levy and collection of certain assessments upon the property of said plaintiffs and other property owners within said city for the purpose of procuring money with which to consummate the purchase and acquisition of "the San Bruno water system" from its owners and its operation thereafter as a municipal water system. The trial court refused to grant such injunction, and from its judgment to that effect this appeal has been taken.

The facts of the case are practically undisputed. The city of San Bruno is a municipal corporation of the sixth class, organized and existing under the general municipal incorporations act. For some years prior to the 26th day of May, 1920, there had been installed and in operation within said city a privately owned and so-called "San Bruno water system," with proper mains and other facilities for supplying its inhabitants with water. On May 26, 1920, the board of trustees of the city of San Bruno, acting through a majority of their number, undertook to pass and adopt a resolution of intention to acquire said San Bruno water system for the purpose of its operation thereafter as a municipal water system, for the purchase price of \$37,500, and thereafter, and on September 8, 1920, proceeded to establish an assessment district coterminous with the corporate limits of said municipality, and to levy an assessment upon the property of its taxpayers within said assessment district for the purpose of consummating the purchase of said water system. The foregoing proceedings were undertaken under and pursuant to the provisions of the so-called Public Utilities Act of the state Legislature approved June 6, 1913 (St. 1913, p. 421), and subsequent acts of said board of trustees looking toward the collection of said assessment have been done under and in accordance with the provisions of said act. The plaintiffs and appellants upon this appeal assail the validity of these pro-

ceedings on the part of the officials of said city upon several grounds.

[1] The appellants' first contention is that, under the provisions of the Municipal Incorporation Act (St. 1883, p. 93), under which the city of San Bruno was organized and is operating as a city of the sixth class, the trustees of said city have no power to create any indebtedness or liability in excess of the available money in the treasury to meet the same, or to levy or collect any property tax in excess of \$1 on each \$100 of taxable property, without the assent of two-thirds of the qualified electors of said city expressed in and at a special election. The particular sections of said Municipal Incorporation Act upon which the appellants rely in making this contention are the following:

Section 862, subdivision 3, as amended by St. 1901, p. 19, reading as follows:

"3. To contract for supplying the city or town with water for municipal purposes, or to acquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of such city or the inhabitants, or for irrigating purposes therein."

Section 865, reading in part as follows:

"The board of trustees shall not create, audit, allow or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purposes. * * *"

Subdivision 9 of section 862 of said act, as amended in 1917 (St. 1917, p. 1529), reading as follows:

"9. To levy and collect annually a property tax, which shall not, without the assent of two-thirds of the qualified electors of such city or town voting at an election to be held for that purpose exceed one dollar on each one hundred. * * *"

It is appellants' contention that the foregoing sections and subdivisions of the Municipal Incorporation Act furnish the only procedure by which the property of the citizens of the city of San Bruno can be assessed for the purpose of the acquisition of a municipal water system. In making this contention, however, counsel for the appellants concedes that, for the purpose of making such local improvements as opening and paving streets, putting in sidewalks, sewers, and the like, the statute of 1913 does furnish a mode of procedure applicable to cities of the sixth class, notwithstanding the inhibitions of the act under which they were created with relation to the limits and conditions of general property taxation. The distinction was in fact early recognized in this state between general property taxes for the current expenses and ordinary outlays of municipalities, and special assessments for particular forms of civic improvement (*Emery v. San Francisco Gas Co.*, 28 Cal. 367; *Taylor v.*

Palmer, 31 Cal. 241; *Chambers v. Satterlee*, 40 Cal. 514). While conceding that the effect of these early decisions was to set municipalities free from the limitations of their charters as to property taxation in so far as the carrying forward of public improvements upon the assessment plan was concerned, the appellants herein undertake to argue that the purchase of an already established water system is not such a public improvement as to take the case out of the limitations expressed in the above-quoted sections of the Municipal Incorporations Act and bring it within the provisions of the Public Utilities Act. We are unable to follow the appellants in this course of reasoning. The Municipal Incorporations Act relating to cities of the sixth class, in section 862, subdivision 3, thereof, permits such cities to acquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary and proper for supplying water for the use of such cities and the inhabitants thereof, or for irrigating purposes therein. Clearly the original construction of the reservoirs, aqueducts, mains, and other works and appliances requisite to the creation of a municipal water system would be such a public improvement as to come within the terms of the Public Utilities Act of 1913; and there can be no real distinction between the original construction of such a system by a municipality and its acquisition after its construction by private parties in so far as the nature of the work as a public improvement is concerned, since the same effect is accomplished in either case, namely, that of providing the municipality with a publicly owned improvement which they did not possess before. The title to the Public Utilities Act would seem to indicate that no such distinction as appellants contend for was recognized by the Legislature, since it purports to be:

"An act to provide for the acquisition, installation, construction, reconstruction, extension, repair and maintenance by municipalities of waterworks," etc. Stats. 1913, p. 421.

We are therefore of the opinion that the city of San Bruno was not limited by the terms of the act under which it was incorporated from adopting the procedure prescribed by the Public Utilities Act for the acquisition of the so-called San Bruno water system, and that the contention of the appellants in that regard is without merit.

The case of *Hopping v. City of Richmond*, 170 Cal. 605, 150 Pac. 977, upon which the appellants rely to support their above contention, arose under the particular provisions of the charter of that city with respect to the right of referendum over the legislative acts of the council of that city, and has no application to the facts of the case at bar.

[2] The appellants' next contention is that the power of the board of trustees of the

city of San Bruno to create an assessment district for the purpose of the proposed improvement, conceding them to have possessed such power, was exceeded when they created such a district coterminous with the boundaries of the city itself.

The argument in support of this contention turns upon a too narrow interpretation of the term "district" as contemplating a smaller area within the larger boundaries of the municipality. But this narrow meaning has not been given to the word "district" by our lawmakers. In the Street Opening Act of 1889 (St. 1889, p. 70), it was expressly provided that the boundaries of a district created for the purposes of street improvement might include the whole city. It is true that the Public Utilities Act of 1913 does not contain this express provision as to the size of the district to be created under its terms; but, since it contemplates public improvements such as the creation of water and lighting works and systems, which are usually intended for the use and convenience of all the inhabitants of a municipality, it would seem entirely irrational to give to the term "district" as employed in said act the narrow meaning for which the appellants contend. This is the view that has been taken as to the meaning of this term in other jurisdictions where improvement statutes have been subjected to judicial interpretation. In the case of *Minnesota Land Co. v. Billings*, 111 Fed. 972, 50 C. C. A. 70, the Circuit Court of Appeals, in passing upon the provision of a district improvement act of the state of Montana, said:

"This provision should be construed with reference to the object which was intended to be accomplished. It is contended by the appellant that because the word 'districts' is used in the plural, and authority is given to create special improvement districts 'within the city,' and to designate the same by number, the statute can only be complied with by creating at least two districts, and that the inclusion of the whole city in a single district is absolutely without authority of law. We think the statute should not be thus narrowed in its construction. It was intended to confer the broad power of creating special improvement districts, commensurate with the improvement which was required to be made therein. The word 'special' qualifies the improvement, not the district. The improvement in this instance affected the whole city. If it had affected but three-fourths of the city, it is not disputed that all the area so affected might have been included in an improvement district. It is but to pursue the same course of reasoning to reach the conclusion that by leaving out one block all the remainder of the city might be included in one improvement district. The statute undoubtedly was intended to authorize the city council to make whatever special improvement, * * * might be deemed necessary for the welfare of the city, or any part thereof. It was to be a continuous power, to be exercised as occasion might arise, and to

be adequate to the necessities of the case—a power to include the whole city in one district, if necessary for an improvement which affected the whole, or to divide the city into smaller districts for other special improvements which might affect only the particular sections so included.”

We think the foregoing correctly expresses the more liberal construction to be given to the Public Utilities Act as applicable to the case at bar. The board of trustees of the city of San Bruno, having power, as we have decided, under the said act to acquire by either construction or purchase a municipal water system, had also power to create an assessment district coterminous with the boundaries of said city if the proposed public improvement was to be for the benefit of all of its inhabitants.

The foregoing discussion covers, we think, all of the points urged by the appellants upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 587

SUGRU v. SUGRU. (Civ. 2365.)

(District Court of Appeal, Third District, California. Oct. 17, 1921.)

Pleading  192(2)—Complaint held demurrable for uncertainty.

Complaint alleging that plaintiff was the owner, on a certain date, of a horse, harness, and a cow, that defendant was at that time in the wrongful possession of such property, and refused plaintiff's demand therefor, that plaintiff was awarded the right of possession when sued in the justice court, that defendant willfully, maliciously, and intentionally, by an appeal to the superior court, forced upon plaintiff great expenditure of money, loss of valuable time, and annoyance, that superior court gave judgment for plaintiff for return of the property, or for value thereof in a specified sum, that defendant failed to comply with the judgment, and turned horse out to wander away, that the horse, when found by the plaintiff, had suffered for want of food and water, and because of exposure, to the extent that it was only worth \$10, and that plaintiff could only find a part of the balance of the property, without alleging damages or amount thereof, held subject to demurrer, as uncertain, ambiguous, and unintelligible.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Susie Sorahan Sugru against James Sugru. Judgment of dismissal, and plaintiff appeals. Affirmed.

William Henion, of Susanville, and Fred J. Harris, of Sacramento, for appellant.

N. J. Barry, of Susanville, for respondent.

FINCH, P. J. The defendant's demurrer to the complaint was sustained, and, on plaintiff's failure to amend, the action was dismissed. From the judgment of dismissal, the plaintiff appeals.

The complaint alleges:

That the plaintiff was the owner, on a certain date, of a horse, harness, bridle, halter, buggy robe, whip, and a cow; that the defendant was at that time in the wrongful possession of said property; that plaintiff demanded the return thereof, but that defendant refused; that plaintiff then sued the defendant in the justice's court, and was "awarded the right of possession"; that defendant took an appeal to the superior court, and thus "willfully and maliciously and intentionally forced upon the plaintiff a great expenditure of money, loss of valuable time, annoyance, and distress of mind"; that the superior court gave judgment in favor of plaintiff for the return of the property, or the value thereof, in the sum of \$224; that the defendant failed to comply with the judgment, "but, on the contrary, turned the dark brown saddle horse out to wander away, starve, and die of thirst among the hills. * * * The dark brown saddle horse being a pet of the plaintiff, for which she had that affection for incident to most humanity, she, in person, and at great expense, at last located the same, which when so found was poor, and had so suffered for want of food and water and its exposure to the elements that it was only of the value of \$10 and could only find a part of the balance of the personal property aforesaid, which she took into her possession, the value of which is five dollars. Wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars."

The defendant demurred on the grounds of insufficient facts, and that the complaint is uncertain, ambiguous, and unintelligible. The demurrer is well taken on all the grounds stated. There is no allegation of damages or the amount thereof. That the complaint is subject to demurrer for uncertainty is so apparent that citation of authorities seems unnecessary. However, the following are in point: *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56; *Foerst v. Kelso*, 131 Cal. 376, 63 Pac. 681; *Lapique v. Ruef*, 30 Cal. App. 391, 158 Pac. 339.

The judgment is affirmed.

We concur: PREWETT, Justice pro tem.; BURNETT, J.

54 Cal. App. 531

PEOPLE v. COLLINS et al. (Cr. 566.)

(District Court of Appeal, Third District, California. Oct. 13, 1921. Hearing Denied by Supreme Court Dec. 12, 1921.)

1. Intoxicating liquors §132—Wylie Act not rendered inoperative by the National Prohibition Act.

The Wylie Act, prohibiting sale of intoxicating liquor in no-license territory, was not superseded and rendered inoperative by the National Prohibition Act.

2. Criminal law §564(1)—Evidence held sufficient to show venue in prosecution for unlawful sale.

In prosecution for selling alcoholic liquor in no-license territory in violation of the Wylie Act, evidence held sufficient to show the venue.

3. Criminal law §829(1)—Refusal of instructions covered by given instructions not error.

Refusal of instructions entirely covered by those given held not error.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Brad Collins and others were convicted of selling alcoholic liquor in no-license territory and from judgment of conviction and order denying new trial they appeal. Affirmed.

Chas. H. Braynard, of Redding, and Jas. T. Matlock, of Red Bluff, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] Appellant Collins was convicted of selling alcoholic liquor in no-license territory in supervisorial district No. 5, county of Tehama, and he appeals from the judgment and the order denying his motion for a new trial. His prosecution was under what is known as the Wylie Act (Stats. 1911, p. 599), and one of his main contentions is that this statute was superseded and rendered inoperative by the National Prohibition Act known as the Volstead Act (Act Cong. Oct. 28, 1919, c. 85, 41 Stat. 305), and therefore the conviction was void. In answer to this claim it is sufficient to refer to *In re Volpi*, 199 Pac. 1090, and *Ex parte Crookshank*, (D. C.) 269 Fed. 980.

[2] There is no merit in the claim that the venue was not shown. Mr. Walker testified that the liquor was obtained of the defendant at his place of business in Gerber, and appellant testified that Gerber is in Tehama county. Mr. Ballard, the sheriff, testified that Gerber is in the Fifth supervisorial district of said county. In fact, there is no doubt upon this point, and we understand that no serious contention is made that the evidence fails to support the verdict.

[3] Appellant complains that the court erred in refusing to give certain instructions

proposed by him. We have examined them, and we find that, as far as they were exact and relevant, they were entirely covered by instructions which were given by the court.

As we view it there is nothing in the case to require extended consideration.

We find no error in the record, and the judgment and order are affirmed.

We concur: **FINCH, P. J.; PREWETT**, Justice pro tem.

54 Cal. App. 606

RICCOMINI v. PIERUCCI. (Civ. 3399.)

(District Court of Appeal, Second District, Division 2, California. Oct. 18, 1921.)

1. Arbitration and award §1, 82(1) — Held common-law and not statutory; general award not impeached on ground of honest mistake of judgment by evidence aliunde.

Where parties to an action for an accounting entered into a stipulation when the case was called for trial whereby it was agreed that each should appoint an arbitrator, that a third should be chosen by the two so appointed, or in the event of inability to agree, by the court, and that the court should enter its judgment upon the award of any two of the arbitrators, the arbitration was a common-law arbitration and not the statutory arbitration provided for by Code Civ. Proc. § 1281 et seq., and a general award, with no mistake of law or of fact appearing on its face, could not be impeached on the ground of honest mistake of judgment by evidence aliunde.

2. Appeal and error §1022(1)—Decision of trial court overruling exceptions to award not reviewable as to matters of fact.

The decision of the trial court overruling exceptions to an award of arbitrators is not subject to review by appellate court as to matters of fact.

3. Arbitration and award §27—Third arbitrator not disqualified because client of attorney for one of the parties in another matter.

A third arbitrator was not disqualified as matter of law merely because the attorney for one of the parties was the attorney of such arbitrator in another matter, in the absence of any evidence of partiality.

4. Arbitration and award §82(2) — General award not set aside in absence of partiality or corruption.

To justify setting aside a general award of arbitrators, there must be partiality or corruption on their part.

5. Arbitration and award §31 — Award not vitiated by momentary presence of attorney at hearing of evidence.

The momentary presence of the counsel for one of the parties in the room where the arbitrators were hearing the evidence held not to vitiate the award.

6. Arbitration and award ⚖️84—**Court rendering judgment on award not required to make findings upon issues.**

Where the parties to an action agreed to submit the controversy to arbitrators by stipulation expressly providing that the court should enter its judgment on the award, the court, in rendering judgment on the award, was not required to make express findings on the issues presented by the complaint and the answer, the award, and not findings, constituting the basis for the judgment.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by P. Riccomini against P. Pierucci. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Emmons, Glenn D. Aldrich, and Franklin Heck, all of Bakersfield, for appellant.

E. A. Klein, of Bakersfield, for respondent.

FINLAYSON, P. J. Defendant appeals from a judgment entered upon the award of three arbitrators appointed by the parties pursuant to a stipulation made by them in open court.

Following the dissolution, by mutual consent, of a copartnership that had existed between plaintiff and defendant, this action was brought for an accounting. Plaintiff and defendant had married sisters. For the purpose of avoiding such additional intensification of family discord as might be engendered by a continuation of their litigation in court, the parties, when the case was called for trial, entered into a stipulation whereby they agreed that each should appoint an arbitrator; that the two arbitrators so chosen should appoint a third; that, in the event that the two to be selected by the parties should not be able to agree upon the third arbitrator, he should be appointed by the court; that any two of the arbitrators might make the award; and that, when the award should be made, the court should enter its judgment thereon. Pursuant to this stipulation, plaintiff selected an arbitrator, defendant selected one, and these two appointed the third, E. Toschi. Thereafter the three arbitrators met, informed the parties of the time and place of meeting, listened to the respective contentions and explanations of the parties, examined the partnership books of account, and, after deliberating for some time unanimously decided that plaintiff was entitled to recover of the defendant the sum of \$1,328.06, together with his costs of action, and make their award accordingly. Thereupon the award was filed in the office of the county clerk. Thereafter defendant filed exceptions to the award, and moved that it be vacated. The grounds of

exception, though somewhat numerous, may be grouped under three heads; namely, errors of judgment, bias, and fraud. The court heard the evidence of the respective parties upon defendant's exceptions to the award, and, after due deliberation thereon, overruled the exceptions, and entered judgment in accordance with the award, adjudging that plaintiff recover of defendant said sum of \$1,328.06 and costs of suit.

[1] This is a case of a common-law arbitration, and not the statutory arbitration provided for by sections 1281 et seq. of our Code of Civil Procedure. The award is general, not special. No mistake of law or of fact appears upon its face. Such being the case, the court may not inquire into mere mistake or errors of judgment. A general award may not be impeached on the ground of honest mistake of judgment by evidence aliunde. Such errors are among the contingencies which the parties assume when they select such tribunals. *Tyson v. Wells*, 2 Cal. 122.

[2-5] It is claimed that Toschi, the third arbitrator, was disqualified because, although defendant did not know it until after the award, the attorney for plaintiff in this action was likewise acting as attorney for Toschi in another matter—a matter having no connection whatever with any of the issues of law or of fact presented by this litigation. It is not contended that this fact was intentionally concealed from defendant or his counsel. The decision of the trial court overruling the exceptions to the award is not subject to review by this court as to matters of fact. And, in the absence of any evidence of partiality, we may not hold, as a matter of law, that an arbitrator is disqualified simply because the attorney for one of the parties is likewise his attorney in another matter. It is a well-settled rule that, to justify setting aside a general award of arbitrators, there must be partiality or corruption upon their part. The relation of attorney and client is not such that it is conclusive evidence of partiality when the client acts as arbitrator in a matter in which his attorney happens to appear as counsel for one of the parties. On this point the reasoning in the following cases is applicable: *Cheney v. Martin*, 127 Mass. 304; *Goodrich v. Hulbert*, 123 Mass. 190, 25 Am. Rep. 60; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Fisher v. Towner*, 14 Conn. 26. Equally destitute of merit is the claim that the momentary presence of plaintiff's counsel in the room where the arbitrators were hearing the evidence vitiates the award. *Blodgett v. Prince*, 109 Mass. 44.

By overruling the exceptions to the award the court impliedly found against all charges of corruption. This implied finding is amply

supported by the evidence, and may not be reviewed here.

[6] It was not necessary that the court should make express findings upon the issues presented by the complaint and answer. The stipulation of the parties for the submission of the controversy to arbitrators expressly provided that the court should enter its judgment upon the award as made. In the absence of fraud or other sufficient ground for setting aside the decision of the arbitrators, it was the duty of the court, pursuing the procedure stipulated for by the parties, to enter a judgment upon the award. Under the stipulation, the award, and not findings, constituted the basis for the judgment.

There are no other points that require special mention. We are satisfied that the judgment should be affirmed, and it is so ordered.

We concur: WORKS, J.; CRAIG, J.



54 Cal. App. 533

YOKOHAMA SPECIE BANK, Limited, v. TRANS-OCEANIC CO. (Civ. 3945.)

(District Court of Appeal, First District, Division 1, California. Oct. 14, 1921. Hearing Denied by Supreme Court Dec. 12, 1921.)

1. Appeal and error ⇨1001(1)—Jury's finding conclusive when supported by uncontroverted evidence.

Where there was ample testimony on the part of plaintiff to support its position and defendant offered no evidence in rebuttal, the jury's finding for plaintiff is conclusive.

2. Appeal and error ⇨1003 — Probability or possibility of facts claimed to exist was for jury.

The probability or possibility of the situation claimed by plaintiff to exist were matters addressed to the consideration of the jurors, and the appellate court is not called upon to pass thereon.

3. Pledges ⇨25—Form of note held without significance on question whether pledgee consented to delivery to carrier.

Where a bank advanced money to a trading company with which to pay for steel rails and received the bills of lading therefor and later the warehouse receipts as collateral security, the fact that the final collateral note recited that it was secured by rails covered by defendant's receipts was without significance on the question whether plaintiff consented to the withdrawal of the rails from the warehouse and their delivery to defendant, a carrier.

4. Replevin ⇨8(5)—Delivery of bills of lading and warehouse receipts as collateral security held sufficient delivery to support replevin.

Where plaintiff, a bank, had advanced large sums of money to a trading company, the delivery by the company to the bank of bills of lading and nonnegotiable warehouse receipts covering steel rails as evidence of security

for the loans was a sufficient delivery to constitute a valid and binding pledge and vest plaintiff with a special property enabling it to maintain replevin.

5. Pledges ⇨25—Rights not destroyed after symbolic delivery by surreptitious taking by third person.

Where a trading company which had borrowed large sums of money from a bank delivered bills of lading and nonnegotiable warehouse receipts covering steel rails as security for the loans, the bank's rights were not destroyed by the surreptitious taking of the rails from the warehouse and their delivery to a carrier by a third person.

6. Carriers ⇨197(6)—Lien waived when not asserted when pledgee demanded property and brought replevin.

A carrier waived its lien, if it ever had any, on rails delivered to it, where, on demand for the rails by a pledgee, it failed to set up any lien, and when sued in replevin set up no claim of a lien.

7. Pleading ⇨122—Denial of foreign corporation's right to do business on information and belief, insufficient.

Defendant's denial on information and belief that plaintiff, a foreign corporation, was authorized to do business in California, was insufficient to raise any issue, as the fact could be ascertained from an examination of the public records.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Yokohama Specie Bank, Limited, against the Trans-Oceanic Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Nathan H. Frank and Irving H. Frank, both of San Francisco, for appellant.

Earl H. Webb, Bert Schlesinger, and S. C. Wright, all of San Francisco, for respondent.

WASTE, P. J. Plaintiff and respondent brought this action to recover from the defendant and appellant possession of 920 tons of steel rails and accessories, or \$75,000, the value thereof. The jury returned a verdict in favor of the plaintiff and against the defendant for possession of the property, and for costs. From the judgment entered thereon the defendant has appealed.

The quantity of steel rails in question was pledged by the Sakura Trading Company, a partnership, its owner, to the respondent as security for loans aggregating \$100,000, evidenced by a note for that amount. The money was advanced to enable the partnership to pay for the rails, which were manufactured in Chicago for shipment to Japan. Bills of lading covering the rails were presented to the bank, and drafts representing the purchase price were paid by it. When the rails arrived in San Francisco, these bills of lading were delivered by respondent

to the Sakura Trading Company to enable it to obtain delivery. The Sakura Trading Company delivered the bills of lading to W. J. Ahern, operating as the Independent Trading Company, who obtained the rails from the carrier and stored them in a warehouse. Nonnegotiable warehouse receipts were issued in the name of the Independent Trading Company. Ahern indorsed and delivered these receipts to the Sakura Trading Company, which, in turn, delivered them to the bank. The receipts were then returned by the bank to the Sakura Trading Company in order that they might be changed to negotiable receipts, to be redelivered to the bank. Ahern withdrew the rails from the warehouse and delivered them to appellant's wharf, taking from the appellant four receipts, which appear to have been returned to the respondent. Contending that the action of Ahern in withdrawing the property from the warehouse and delivering it to the appellant was without its knowledge or consent, the bank notified the defendant that it was entitled to possession of the steel rails; that neither the shipper nor the bank had consented to the shipment of the property to Japan by the defendant. Defendant refused to surrender the property. The present action in replevin was then brought by the bank. The rails were taken from the possession of the defendant by preliminary statutory proceedings and the giving of a bond.

[1-3] It was the contention of the appellant that the warehouse receipts were delivered by the respondent to Ahern for the purpose of enabling the rails to be withdrawn from storage and delivered to it, to be transported to Japan, pursuant to arrangements theretofore made by Ahern on behalf of the Sakura Trading Company. The position taken by the respondent was that the withdrawal of the rails from the warehouse by Ahern and their delivery to the appellant was surreptitious, without its knowledge, and in fraud of its rights. On the issue thus presented there was ample testimony on the part of the respondent to support its position. The appellant offered no evidence in rebuttal. Consequently the finding of the jury is conclusive of the controversy on that point. The probability, or the possibility, of the situation claimed by the respondent to exist, were matters addressed to the consideration of the jurors in the court below. This court is not called upon to pass upon those questions on appeal. The fact that the final collateral note, the one for \$100,000, given to the bank by R. Sadanaga for the Sakura Trading Company, by its terms recited that it was secured by "26,860 pieces of steel rails, covered Trans-Oceanic Company's receipts (No. 11, No. 18, No. 33 and No. 40)," is without significance in view of the real nature of the entire transaction.

[4, 5] The respondent had advanced large

sums of money to the Sakura Trading Company. The delivery by that company to the bank of the various bills of lading and the nonnegotiable warehouse receipts, as evidence of security for the loans, was a sufficient delivery to constitute a valid and binding pledge, and was a symbolical delivery of the rails which vested a special property in the respondent sufficient to enable it to maintain replevin against the appellant. *Callahan v. Marshall*, 163 Cal. 552, 558, 126 Pac. 358; 21 R. C. L. 644. In addition, there were the various promissory notes (several were executed as the shipments arrived from the east), each carrying an express pledge of the rails by apt words and description, as security for the specified advances. The surreptitious taking by Ahern, and the delivery of the rails to the appellant, did not operate to destroy respondent's rights in the premises.

[6] For another reason the judgment should be affirmed. Appellant in its answer to the replevin suit admitted the possession of the rails, and its refusal after demand to deliver the same. No claim is asserted in the answer that the appellant is a creditor of the Sakura Trading Company, the real owner of the property, nor was there any claim that the appellant has any interest in the property in controversy, nor any lien in good faith for value, or otherwise. Appellant therefore waived a lien, if it ever had any, by its failure to set it up upon demand being made for the delivery of the property. *Williams v. Ashe*, 111 Cal. 180, 184, 43 Pac. 595; *Lee v. De la Motte et al.*, 189 Pac. 1034.

[7] The respondent, which is a corporation organized under the laws of the empire of Japan, alleged that it was authorized to do business in the state of California. The appellant denied the allegation on information and belief, which was insufficient to raise an issue as to the fact, which could be ascertained from an examination of the public records of the state. *Mullally v. Townsend*, 119 Cal. 47, 54, 50 Pac. 1066; *Mulcahy v. Buckley*, 100 Cal. 484, 489, 35 Pac. 144. Notwithstanding the impotency of the denial, appellant now contends that the parties tried the case upon the theory that the answer raised an issue in the court below, and that the proof was insufficient to sustain the allegation. Appellant is mistaken. Both the trial court and the respondent took the view that no issue was raised by the answer, and the trial proceeded on that theory.

Certain errors, alleged to have been committed by the trial court as to rulings on evidence, and in the matter of instructions to the jury, are called to our attention. From our examination of the record we are satisfied there is no merit in the points thus made.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 469

PEOPLE v. MORRISON. (Cr. 800.)

(District Court of Appeal, Second District, Division 2, California. Oct. 7, 1921.)

1. Criminal law — § 1159(5) — Verdict against defense of alibi not reviewable.

A verdict, showing that the jury did not believe the testimony offered by defendant as to his alibi, *held* not reviewable; there being a conflict in the evidence.

2. Indictment and information — § 176—Instruction as to date of offense not erroneous.

In prosecution, under Pen. Code, § 270, for failure to provide for minor child, an instruction that it was wholly immaterial on what day or night the offense charged in the information was committed, provided it was committed within three years prior to the filing of the information, was proper, under section 800; the crime referred to by the instruction being the failure to provide, not the illicit intercourse resulting in birth of the child, although it was necessary for the people to prove the child's paternity.

3. Indictment and information — § 176 — When variance in proof of date of offense is fatal, stated.

Where evidence of the commission by accused of more than one offense similar in nature to the one charged has been submitted to the jury, and the date of the commission of the offense proved is different from that alleged in the information, although within the period of three years prior to the information, the variance is fatal, if a verdict of guilty might be rendered although only a part of the jury believe the defendant guilty of each separate offense, or if the jurors might not believe the accused guilty of any single offense but find him guilty because of the general evidence of continuous crime, or if accused could not know as to what particular offense, out of many that were testified to, he was placed on trial.

4. Parent and child — § 17(6)—Evidence held to show deserted child dependent on charity.

In prosecution, under Pen. Code, § 270, for failure to provide for minor child, evidence *held* to show that accused's child was dependent upon charity for its food, clothing, and shelter.

5. Parent and child — § 17(6)—Evidence held to show accused's ability to support child.

In prosecution, under Pen. Code, § 270, for failure to provide for minor child, evidence that, during the period of alleged failure to provide, accused was able-bodied and in the government employment as chief machinist's mate, was sufficient to raise the inference of accused's ability to maintain his offspring.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Joseph Daniel Morrison was convicted of failing to provide for his minor child, and from the judgment and sentence thereafter pronounced he appeals. Affirmed.

F. F. Grant, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CRAIG, J. In this case the defendant is charged with having failed to provide for his minor child under section 270 of the Penal Code of California. He was found guilty, and from the judgment and sentence thereafter pronounced he appeals.

The first ground relied upon for reversal is alibi and certain alleged erroneous instructions given by the court concerning the date upon which appellant maintains the prosecution must prove that the child was conceived.

[1] The prosecutrix, Marie L. Mooney, testified that she had sexual intercourse with the defendant in San Diego on the 20th day of January, 1920, between the hours of 2 and 3 in the morning; that conception took place as a result of which the child was born. The defendant testified that at the time mentioned he was on the high seas and not in San Diego. Evidence both oral and documentary was introduced which corroborated the defendant in this regard. It must be clear that the record thus presents a direct and irreconcilable conflict in the evidence. Apparently the jury did not believe the testimony offered in support of the defendant's alibi. They had the right to accept the statements of the prosecutrix as true. Their verdict shows that they did this, and an appellate court cannot review their decision upon the credit to be given the witnesses or the weight of the testimony. *People v. Hoosier*, 24 Cal. App. 752, 142 Pac. 514; *People v. Vukojevich*, 25 Cal. App. 460, 143 Pac. 1058; *People v. Sears*, 119 Cal. 267, 51 Pac. 325.

[2, 3] Appellant insists that the jury would not have rendered a verdict of guilty had it not been for certain alleged erroneous instructions given it by the court. We will consider these instructions, the first of which is as follows:

"The court instructs you that it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed and that the same was committed within three years prior to the filing of the information in this case."

This is but a statement of the law as provided in section 800 of our Penal Code. In *People v. Williams*, 133 Cal. 165, 65 Pac. 323, our Supreme Court said concerning this provision of the Code:

"But, it is said, time is not material, further than it must appear that the crime was committed before the indictment was found, and within the period of limitations. The statement is not strictly accurate. The proof of an offense on a different date is a variance, but, in general, not a fatal variance."

In this case and in *People v. Elgar*, 36 Cal. App. 114, 171 Pac. 697, as well as others in which the variance was held fatal because the date of the commission of the offense

proved was different from that alleged in the information but within the period of three years prior to the filing of the information, evidence of the commission by the defendant of more than one offense similar in nature to the one charged had been submitted to the jury. Where the state is allowed such exceptional latitude in making its proof and avails itself of this privilege, a verdict of guilty might be rendered although only a part of the jury believe the defendant guilty of each separate offense, or under such circumstances the jurors might not believe the defendant guilty of any single offense but find him guilty because of the general evidence of continuous crime; also, in such a case, the defendant could not know as to what particular offense, out of many that were testified to, he was placed upon trial. When one of these conditions exist the variance is fatal. *People v. Williams*, supra. These reasons do not apply to the instant case. The instruction criticized is a correct statement of the law, but appellant has misconstrued its application. The offense charged and of which the defendant was convicted is failure to provide for his minor child, etc. It is true that the paternity of the child must be established, but he is not accused of any crime because of having had sexual intercourse with the prosecutrix. The cases relied upon by appellant all involve a fatal variance between the information or indictment and the proof. In this case the date of conception is not mentioned, nor should it be in the information. In the inquiry as to the paternity of the child, Miss Mooney testified that the intercourse which resulted in its conception occurred on the 20th day of January, 1920. However, the jury, in the exercise of its undoubted function to weigh the testimony, may have concluded, in view of all of the evidence, including that of the date of the child's birth, that the act resulting in its conception occurred upon another date than that stated by her.

But it is said that the court gave another instruction on the same subject which informed the jury that the date of the act of sexual intercourse need not be proved to have been even within the period of three years before filing of the information. Assuming that the instruction could be so construed, it would be a correct statement of the law. In cases where the child for whose criminal neglect the parent is being prosecuted is more than three years old, for example ten years, of course, sexual relation must have occurred more than three years prior to the filing of the information.

[4] 2. Appellant next contends that it is

only when a child becomes dependent upon the charity of strangers or is likely to be a public charge that the parent's neglect is criminal under 270, Penal Code. *People v. Clark*, 201 Pac. 465, is cited to sustain this proposition and further to the effect that unless the state is shown to have been compelled to intervene and furnish food and clothing and shelter to the child, the father is immune from prosecution. The evidence in the instant case shows that the child of the defendant was dependent upon charity for its food, clothing, and shelter. The mother and child were inmates of the Door of Hope Home for Girls, a charitable institution, financed in part by the city of San Diego, in part by private contributions and in part by the state of California. It is true that the prosecutrix secured \$15 a month as a loan from a Mrs. Dick which she paid to the home, but by uncontradicted evidence it was fully established that this was a very small part of the actual expense of the mother and child's maintenance, and that this sum was applied to the mother's support also, which in itself cost the institution \$45 a month. Hence, even *People v. Clark*, supra, does not assist appellant's claim in this regard.

[5] 3. Finally, it is insisted that no evidence was introduced sufficient to prove that the defendant had the ability to provide for his child. The evidence of the defendant himself, as well as of the people showed that during the period in question defendant was able-bodied and in the employ of the United States government in the capacity of chief machinist's mate. This evidence was sufficient from which the jury might properly draw the inference that the defendant possessed the ability to maintain his offspring. Upon such an affirmative showing and a total absence of evidence to meet it, this court cannot say that the verdict was not supported by the evidence in so far as this element of the offense charged is concerned. *People v. Turner*, 29 Cal. App. 195, 156 Pac. 381. In the case of *People v. Smith*, 38 Cal. App. 175, 175 Pac. 696, cited by appellant, the fact appeared affirmatively and without contradiction that the defendant was financially unable to support his minor child. The same is true of the case of *People v. Forester*, 29 Cal. App. 460, 155 Pac. 1022.

In the case at bar, the jury's verdict is sufficiently supported upon every material element of the charge. We find no error in the court's instructions.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

54 Cal. App. 550

STEINHOFFER et al. v. GEORGESON.
(Civ. 2325.)

(District Court of Appeal, Third District, California, Oct. 15, 1921.)

1. Executors and administrators ⇨221(5) — Evidence held to support finding that services were not covered by agreement for board and lodgings and to justify amount recovered.

In an action to recover for board, lodging, and services in caring for defendant's intestate, evidence held sufficient to warrant findings that an agreement for board and lodgings did not include plaintiff's services as a nurse, that the decedent's agent promised to pay additional compensation therefor, and that \$1,920 was the reasonable value of such services for almost 21 months.

2. Executors and administrators ⇨221(5) — Proof of service sufficient to warrant recovery.

In an action for the reasonable value of services, proof of the services was sufficient to entitle plaintiff to recover any balance due her; the burden of proving payment being on defendant.

3. Executors and administrators ⇨221(3) — Evidence that there was no agreement for care when agreement for board and lodgings made not incompetent and irrelevant.

In an action to recover for board, lodging, and services in caring for defendant's intestate, in which defendant claimed that there was an agreement to pay \$25 a month for all of such items, while plaintiff claimed that the agreement covered only board and lodgings, evidence that in the conversations between plaintiff and decedent's agent there was no agreement made about care was not inadmissible as incompetent, irrelevant, and immaterial.

4. Executors and administrators ⇨221(3) — Testimony that decedent's agent promised to pay for services held admissible.

In an action for board, lodging, and services in caring for defendant's intestate involving a dispute as to whether an agreement for board and lodgings also covered care, testimony that the decedent's agent repeatedly stated that he desired plaintiff to care for decedent, and that she would be paid therefor was competent.

5. Appeal and error ⇨1051(1) — Admission of conclusion harmless where there was sufficient competent testimony to same effect.

In an action to recover for board, lodging, and services in caring for defendant's intestate, testimony that in conversations relative to board and lodging there was no agreement about care, if a conclusion, was harmless, where there was sufficient competent testimony that there was no agreement fixing the compensation for the care.

6. Evidence ⇨471(28) — Testimony that there was no stipulated compensation for services not a conclusion.

In an action for board, lodging and services in caring for defendant's intestate, testi-

mony that in conversations concerning board and lodging there was no agreement made about care, if meaning that no stipulated compensation was agreed upon for plaintiff's services as a nurse, involved merely the statement of a fact and was properly admitted.

7. Witnesses ⇨255(2) — Can only use writing to refresh recollection about fact of which witness had knowledge.

Code Civ. Proc. § 2047, allowing a witness to refresh his memory respecting a fact by anything written by himself, etc., refers to a fact of which the witness derived knowledge through his own perceptions, and could therefore testify to under section 1845, and not a fact coming to his knowledge through the statement or declaration of another, unless such statement is itself the fact to be proved.

8. Witnesses ⇨255(2) — Testimony held to show that information of witness making memorandum was obtained from another.

The testimony of a witness refreshing her recollection by reference to a memorandum made by her of purchases of goods by her mother for defendant's intestate held to show that, with the exception of a few articles, she obtained her information respecting the purchases from her mother, and hence could not testify thereto.

9. Witnesses ⇨167 — Cannot testify to facts occurring before decedent's death, where information derived from incompetent witness.

Under Code Civ. Proc. § 1880, making parties to actions against executors or administrators incompetent as to any matter occurring before the decedent's death, plaintiff's daughter cannot testify concerning the purchase of goods for the decedent by plaintiff of which she kept a memorandum, where her information concerning the purchases was obtained from her mother.

10. Witnesses ⇨183½, New, vol. 9 Key-No. Series — Where testimony did not separate items about which witness knew from others, it would not support recovery.

Where a witness testifying concerning the purchase of goods by plaintiff for defendant's intestate obtained her information as to some of the purchases from plaintiff, and did not point out the particular articles or the number thereof which she personally procured, and it was reasonably inferable that those procured by herself were very few, her testimony would not support a recovery in any amount.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Bertha Steinhoffer and husband against F. W. Georgeson as executor of Alice M. Carroll, sometimes called Alice M. Perry, deceased. From a judgment for plaintiffs, defendant appeals. Affirmed on condition that plaintiffs remit part of the amount recovered.

L. F. Puter, of Eureka, for appellant.
W. Ernest Dickson, of Eureka, for respondents.

HART, J. The action is to recover the sum of \$2,059.43, alleged to be a balance due the plaintiffs for personal services rendered and moneys expended for the appellant's testate during her lifetime.

The plaintiff, Bertha Steinhofner, is the real or actual plaintiff in the case, her husband, Herman M. Steinhofner being but a nominal party plaintiff, he having been joined with his wife as plaintiff because the moneys alleged to be due her from the defendant constitute community property.

The cause was tried before a jury, and a verdict returned in favor of the plaintiffs for the sum of \$2,024.43. Thereupon judgment was entered for the plaintiffs in said sum. Thereafter a motion for a new trial was made by the defendant and denied by the court.

The defendant prosecutes this appeal from the judgment.

The complaint is in four counts. In the first it is alleged that the deceased, in her lifetime, became indebted to the plaintiff Bertha Steinhofner in the sum of \$525 for board and room furnished deceased by said plaintiff for 21 months, at the agreed price of \$25 per month. The second count is upon a quantum meruit and a quantum valebat, and therein it is alleged that the deceased became indebted to plaintiff for services rendered and goods furnished by plaintiffs for deceased for her use and benefit and at her special instance and request, "as shown by items 2, 3, 4, and 5 of Exhibit A, which is hereby referred to and made a part hereof," the said exhibit being an itemized account of the services and goods alleged to have been so furnished. It is alleged that the services so rendered and the goods so furnished were and are reasonably worth the sum of \$1,920. In the third count it is alleged that the plaintiffs advanced money for goods had and received by deceased during her lifetime and for her use and benefit and at her special instance and request, amounting to the sum of \$69.43, as shown by the itemized list above referred to. The fourth count is upon a quantum meruit for work and labor performed for deceased at her special instance and request by one Otto Steinhofner, son of the plaintiffs; it being alleged that said services were and are reasonably worth the sum of \$35, and that the claim therefor was prior to the institution of this action and for a valuable consideration assigned and transferred to the plaintiffs. As to this last count or cause for action, it may be stated that the same was dismissed during the progress of the trial upon motion of counsel for the plaintiffs.

It is alleged in each count of the amended complaint that the several claims therein set up were duly presented to the defendant as executor of the last will of the deceased, and that the same were rejected by said execu-

tor. The answer of the defendant specifically denies each and every material allegation of the complaint.

The principal question presented here for decision is founded upon the assignment that the evidence was insufficient to justify the verdict. It is also claimed that the court erred to the prejudice of the defendant in certain rulings upon the evidence.

[1] As to the question of the sufficiency of the evidence to support the verdict, the specific contention of the defendant is that an express agreement was entered into between Mr. L. M. Puter, the attorney and agent of the deceased, and Mrs. Bertha Steinhofner, by the terms of which the latter was to furnish board and lodging to the deceased and to take care of her at the rate of \$25 per month. On the other hand, it is contended by the plaintiffs that the original agreement between Mr. Puter and Mrs. Steinhofner was that she was merely to furnish board and lodging to the deceased for the sum of \$25 per month, and that there was no agreement then entered into between them as to taking care of the deceased, who, it appears from the evidence was a woman of some 70 years of age, feeble in health, and who needed constant attention. The plaintiff Mrs. Bertha Steinhofner was, under the terms of section 1880 of the Code of Civil Procedure, precluded from testifying as to the agreement or the terms thereof, and therefore it was necessary for the plaintiffs to establish their case by the testimony of other witnesses. The record, which is brought here under the alternative method, is voluminous so far as the testimony is concerned, but it will not be necessary to enter herein into a detailed or minute review of the testimony for the purpose of showing, as we are persuaded, after an examination of said testimony, is true, that there is a conflict in the evidence upon the character and scope of the agreement between Mr. Puter and the plaintiff Bertha Steinhofner. It will suffice to state the facts as they were established by the evidence in a general way. The agreement between Mr. Puter and Mrs. Steinhofner was not reduced to writing, and consequently the terms thereof must be determined, as they were required to be determined by the jury, upon parol testimony.

Contrary to the usual custom in dealing with the questions of fact in an opinion, we will first advert to the testimony of Mr. Puter, who was a witness for the defendant, for the purpose of showing the circumstances under which the deceased went to the home of the plaintiffs to reside. First it should be explained that the deceased was, at the time she was brought to the home of the plaintiffs, the owner of a ranch situated some distance from the city of Eureka, in Humboldt county, and that she had practically been living alone

on said ranch. It also appears that the deceased was approximately of the age of 70 years and in feeble health, due jointly to her physical ailments and venerable years. The evidence shows without conflict—indeed, it was admitted by Mr. Puter—that Mrs. Carroll was addicted to the excessive use of morphine, cigarettes, and intoxicating liquors, and it is thus reasonable to infer that her enfeebled condition was due to some extent to the use of these stimulants. At any rate, it was conceived that the state of her physical health was such as to make it necessary to surround her by conditions more conducive to her comfort and welfare than those existing on her ranch. In pursuance of this plan, Mr. L. M. Puter, who was her legal adviser and looked after her business interests, acting for her as her agent, made arrangements with the plaintiff Mrs. Bertha Steinhofner whereby the deceased should be taken into the home of the latter and there remain until such time as she might regain her health or until she should pass out of this life. Accordingly the deceased was taken to the home of the plaintiff in the month of December, 1915, and remained there, under the care of Mrs. Bertha Steinhofner, until the time of her death, which occurred on August 23, 1917, a period of 21 months. Mr. Puter positively testified that the understanding or agreement between him and Mrs. Bertha Steinhofner was that the latter should take the deceased into her home and there furnish her with board and lodging and otherwise look after her for the sum of \$25 per month. He likewise declared that this agreement distinctly included whatever attention the deceased might require and also the washing of her clothes. He further testified that he said to Mrs. Steinhofner that she (Mrs. Steinhofner) could purchase at certain stores with which he (Puter) had made arrangements for that purpose such articles as might be required or necessary for the needs and comfort of the deceased. This, he repeatedly asseverated, was the full scope of the agreement between him and Mrs. Steinhofner. Counsel for the defendant insist here that there was no contradiction of the testimony of Mr. Puter with regard to the terms and scope of the agreement as so explained. We are, however, as before stated, not prepared to accept that view.

The daughter of Mrs. Steinhofner, Mrs. Laura Sievert, testified that a short time after the deceased was taken to her mother's home she overheard a conversation between her mother and Mr. Puter in which her mother said to Mr. Puter that she had found that the deceased, was practically helpless, was unable to take care of herself, and required constant attention, and that she therefore could not afford to keep her at her home, furnish her with board, and lodging and give her the care and attention which she required for

the sum of \$25 per month; that Mr. Puter replied that he desired Mrs. Steinhofner to board and lodge and take care of the deceased in a proper way, and that he would pay her well for her services. In fact, this witness testified that she heard similar conversations between Puter and her mother on several different occasions, and that Puter always substantially promised to pay Mrs. Steinhofner additional compensation for her services as a nurse. She further testified that she heard the deceased, Mrs. Carroll, say to her mother on divers occasions that she (Mrs. Carroll) knew that she was "a great care" and required a great amount of attention, and that she desired and intended to compensate Mrs. Steinhofner well for her services. In fact, the witness proceeded, Mrs. Carroll had at several different times drawn her own check for a certain sum on the bank in favor of Mrs. Steinhofner, as in payment for the latter's services and accommodations, but it appeared that all her money was deposited in the bank in the name of Mr. Puter, and that consequently her checks were returned marked, "No funds."

That the physical condition of the deceased was such as to imperatively require the services of a nurse during the period of time that she was at Mrs. Steinhofner's is shown by the testimony of Mrs. Sievert, who positively declared that the deceased had to be helped to the table when meals were served, had to be assisted to her room, and required almost the constant attention of her mother every day, and during the last three months of her illness her mother had to be with and attend the deceased almost every hour of the day and night. She further testified that the deceased was, on account of her not being able to control her intestinal and urinary organs, filthy, and thus her mother was required to change the bedding of the deceased several times a day; that the deceased was an incessant smoker of cigarettes, indulged in beer and whisky every day, and was a user of morphine or some other narcotic; that she had the habit of constantly expectorating; and that after her death the room which had been occupied by her was in a very unsanitary condition, and that the bedding was left in such condition as to necessitate its destruction by fire. The witness testified that her mother was and had been for many years a practical nurse in Eureka, and that during the period of time that the deceased was at her home her mother was unable to take any outside cases. She stated that she was familiar with the compensation ordinarily paid nurses in Eureka, and that such compensation amounted to \$2.50 per day or \$5 per day where the nurse's services were given both day and night. In a word, this witness went into great detail as to the services rendered by her mother for the deceased and gave a vivid description of the deleteri-

ous hygienic conditions which were brought about at the home of her mother by reason of the filthy personal condition of the deceased which followed from the peculiar ailments from which she suffered during the time that she was under the care of the plaintiff.

Mrs. Sievert's testimony was corroborated in many vital particulars by other members of the Steinhofers family, and in a measure by neighbors of the Steinhofers. We see no necessity for presenting herein a résumé of the testimony of these witnesses. We think that the testimony was sufficient, if believed by the jury, as evidently it was, to warrant the conclusion that the agreement between Mr. Puter and Mrs. Bertha Steinhofers, as originally made, did not include services as a nurse and the constant attention which, it was developed after the deceased had been in the home of the Steinhofers for a short period, was absolutely necessary to make her as comfortable as she could be made under the circumstances, and that Mr. Puter, subsequently to the making of the original agreement, promised to pay Mrs. Steinhofers additional compensation for her services as a nurse. Indeed, it is not probable that Mrs. Steinhofers would have agreed to furnish the deceased with board and lodging and give her entire time and attention in nursing her, as the description of her physical condition would show was required, for the sum of \$25 per month. In fact, it can be declared as a matter of common knowledge that \$25 per month, even at the time at which Mrs. Carroll was taken to the home of Mrs. Steinhofers, involved a sum for such accommodation rather below the price at which such accommodations could ordinarily then be obtained. Certainly at the present time no such accommodation could be obtained at that price. These considerations, it seems to us, support the testimony of Mrs. Sievert tending to show that an amended agreement was made between Puter and Mrs. Steinhofers covering the compensation she should receive for services additional to that stipulated in the original agreement whereby she was merely to furnish board and lodging to the deceased.

In addition to the testimony above adverted to, it also appeared that deceased, during her residence at Mrs. Steinhofers's, was attended by three different physicians. One of these, Dr. Walsh, testified that the deceased was afflicted with lung and heart trouble; that she was, on the several occasions he attended her, in a very feeble condition. Dr. Walsh also testified that he was familiar with the compensation ordinarily paid practical nurses in the city of Eureka, and that \$2.50 per day and board constituted the amount usually paid where the services were performed during the daytime, and double that amount where the nurse was required to attend the patient both day and night.

It is very clear from the testimony that the amount claimed by Mrs. Steinhofers and allowed by the jury for the services she rendered as a nurse to the deceased, when measured by the face value of the testimony describing the physical condition and personal habits of the deceased while she was under the charge of Mrs. Steinhofers, involved only a fair and reasonable return for such services.

[2] It was admitted that \$490 had been paid Mrs. Steinhofers on account, which Puter claimed was paid under the agreement as it was originally made. There is no direct testimony that any other sum was paid by Puter to Mrs. Steinhofers. The proof of the services rendered was, however, sufficient to entitle the plaintiff to recover any balance that might be due her; the burden of proving the payment of the account being upon the defendant. *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142.

We now come to the consideration of the rulings respecting certain evidence of which the defendant complains.

[3-6] The witness Mrs. Sievert, in explaining the purport of the several conversations she overheard between her mother and Puter relative to the providing by Mrs. Steinhofers of board and lodging to the deceased, stated that in said conversations "there was no agreement made about her care." To that statement counsel for defendant objected, and moved that it be stricken out and so expunged from the record. The court overruled the objection and denied the motion. The grounds of the objection and the motion were that the testimony was incompetent, irrelevant, and immaterial. If it was objectionable at all, it was on the ground first stated—that is to say, that the statement appears to be the conclusion of the witness. But, from her previous testimony, we conclude that what she thus intended to say was that no stipulated sum, in addition to the sum at which Mrs. Steinhofers agreed to provide the deceased with board and lodging, had been agreed upon between Puter and Mrs. Steinhofers for any services as a nurse which the latter might perform for deceased. The witness repeatedly declared that, in the several conversations between Puter and her mother relative to deceased and to which she was a listener, Puter invariably stated in effect that he desired Mrs. Steinhofers to give the deceased such care as the exigencies of her physical condition might from time to time or at any time require and that "I will pay you well; * * * I will do well by you." This was competent testimony for the purpose of showing that no agreement was made between Puter and Mrs. Steinhofers whereby the latter was to receive for her services as a nurse certain specified compensation; in other words, it tended to show that no agreement as to the amount to be paid to

her for her services was agreed upon. Therefore, if it is to be conceded that the statement complained of involved incompetent testimony, it is, nevertheless, clear that there was sufficient competent testimony to overcome or so neutralize the effect thereof as to justify the conclusion that said statement could not have produced in the trial of the case a baleful influence against the just rights of the defendant. Indeed, if the meaning of the statement referred to is what we assume it to have been intended to be by the witness, to wit, that no stipulated compensation had been agreed upon between Puter and Mrs. Steinhofer for the latter's services as a nurse, then the testimony involved merely the statement of a fact and was perfectly proper.

[7] The next assignment involves a ruling which was obviously erroneous, and, while affecting one only of the counts set out in the complaint, was plainly damaging to the rights of the defendant commensurately with the scope of its application to the issues. The ruling to which we now refer arose under the following circumstances: Mrs. Sievert, addressing her testimony to the third cause of action of the complaint, in which it is alleged that Mrs. Steinhofer advanced and expended the total sum of \$69.43 for goods had and received by the deceased during the latter's lifetime and while she was at the home of Mrs. Steinhofer, stated that she (the witness) kept a written itemized account of the moneys so advanced by her mother, having first put the items down on loose paper and thereafter and on the same occasion transferred all said items to a book. This book was not introduced in evidence as a book account, but the witness Mrs. Sievert, in testifying to the asserted correctness of the items making up the purported account, was permitted to use said book for the purpose of refreshing her memory as to said items. Code Civ. Proc. § 2047. But we are of the opinion that the book was not only incompetent as evidence of the correctness of the alleged account, but also that it did not constitute a proper memorandum from which the witness was authorized to refresh her memory, except in so far as there might be articles itemized in the book as having been procured for the deceased which were procured and purchased by the witness herself. Section 2047 of the Code of Civil Procedure, supra, provides in part:

"A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing."

Manifestly said section refers to a fact of the existence or occurrence of which the witness himself has personal knowledge. In other words, the fact as to which he may refresh his memory must be one which he has

derived knowledge of from or through his own perceptions (Code Civ. Proc. § 1845), and not a fact which has come to his knowledge only through the statement or declaration of some other person, unless such statement or declaration is itself the fact in dispute or to be proved.

[8] The testimony of Mrs. Sievert as to her knowledge of the purchase by her mother of the various articles contained in the account book is in part as follows:

"Q. I will ask you if that is the book in which you kept the accounts (handing witness book)? A. Yes, sir. Q. And those accounts were furnished you by your mother? Mr. Puter: I desire to see this book and desire to object to it as incompetent, irrelevant, and immaterial. Court: Present it to defendant's counsel please. Counsel for Plaintiff: Q. I will ask you if these items were all in your handwriting? A. Yes, sir. * * * Q. Now, Mrs. Sievert, you say she [Mrs. Carroll] was there for a period of 21 months? A. Yes, sir. Q. And you kept the items of book account? A. Yes, sir. Q. During that time? A. Yes, sir. Q. And you also entered in the book items of articles that were furnished by your mother to Mrs. Carroll? A. Yes, sir. Q. I will ask you if these are the items (shows witness)? Mr. Puter: We object until he asks the question; may it please the court we desire to ask the question when these items were made, before he goes into details. Court: Very well. Mr. Puter: I want to ask the witness, this is the book is it that I hold in my hand that you put down the record of the account your mother had with Mrs. Carroll? A. Yes, sir. Q. That is the charge? A. The record I kept track of it all the time; every time she got something I put it down in this book. Q. Every day? A. Yes, sir. Q. In other words, this was your account book when she was first there in 1915 and along, and from that time on every day or two you came there your mother would give you the different items which you wrote down in this book? A. Just what there was. * * * By Counsel for Plaintiff: Q. Now, I wish you to examine this account book and say whether or not you know that these items were furnished, actually furnished, and paid for by your mother and furnished to Mrs. Carroll at Mrs. Carroll's request? Q. Yes, sir. Q. These items you have here? A. Yes, sir. Q. Now, these are the items of account that were furnished you by your mother? A. Yes, sir. Q. The items were furnished you and you entered them in the book day by day? A. Yes, sir. Q. And these were the items that were furnished you at the time? A. Yes, sir. * * * The Court (after objection to the above examination of the witness): Take the first item and ask her if she knows of her own knowledge that her mother got it; it will be all right; but, if she took her mother's word for it, it will be hearsay. The witness: I got some of the things myself. Q. (by counsel for plaintiff): Some of these items you have put down here you bought yourself? A. Yes, sir. Q. And you know Mrs. Carroll got them? A. Yes, sir. Q. As to these items, they were practically all items of whisky and tobacco? A. Yes, sir. Q. Did you

during all the period that she was there know of her having whisky and tobacco furnished her in the house? A. Yes, sir. Q. Now, could you at this time swear to the correctness of each one of the items? A. Yes, sir. Q. Of your own knowledge? A. Yes. I know they were gotten. I know my brother got some, my father got some of the things. I know he had to go down at night at 11 o'clock to get some for her, when she did not have enough whisky at nights. Q. I understand that these things were written from your own knowledge and put down there yourself? A. Yes, sir; I would always write down. If I happened not to be over for a couple of days she [witness' mother] would mark it down. Court: What she knew herself would be all right, not what her mother told her and then wrote down; that would be hearsay. Witness: I know she got the things. Court: You saw the things then? A. Yes, I saw the articles; that is the reason I know. Q. By counsel: You know that the things were furnished and for her in the house? A. Yes, sir. Q. And you know that of your own knowledge? A. Yes, sir."

It is not a far-fetched conclusion from the above testimony that, with the exception of a few articles which she claims to have personally purchased or procured herself, Mrs. Sievert obtained whatever knowledge she possessed of the purchase of the articles enumerated in the book kept by her from information received by her from her mother. Indeed, it will be observed from the above excerpts from her testimony that the witness directly admitted that she inserted the several items of purchase in the book as they were given to her by her mother. She further stated, it will be noted, that when it happened that she did not visit her mother's home for a day or two, she would take the items from a memorandum kept by her mother on those days and transfer them to the book. It is perfectly clear, when considering in its entirety her testimony relative to the alleged book account, that Mrs. Sievert had no personal knowledge of the fact of the purchase of many, if not most, of the articles put down in said book, but, as above stated, obtained such knowledge as she had of such purchases from Mrs. Steinhof. It is true that she asserted, in a positive manner, it seems, that she personally knew that the items in the book were correct, and that the total of the advancements made by her mother as so evidenced was correct. But it is plainly manifest, from her own testimony, that, if she meant thus to say that she personally knew that the articles enumerated in the book, except such of them as she might herself have procured, were actually purchased by her mother, her statement in that respect was wholly incredible. She could have truthfully said that the entries in the book as she inserted them therein were correct, that is to say, that she correctly entered the items as they were furnished by her mother;

but, upon the face of her testimony, it is clear that she could not truthfully state that she knew of her own knowledge or otherwise than from the information received from her mother that the latter actually purchased the same.

[9] The testimony of the witness, with the exception of that part thereof to the effect that she herself had purchased some of the articles, was manifestly incompetent, not alone because it was hearsay (San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999), but also for the reason that its effect, if it were allowed to stand, would necessarily be to permit an evasion of section 1880 of the Code of Civil Procedure, that is to say, the effect of the testimony would be to permit to be done indirectly what said section positively declares cannot be done directly, viz. admitting as in proof of the claim against the estate of a deceased person the testimony of the claimant. It follows that said testimony was wholly insufficient to justify the implied finding of the jury that the third cause of action of the complaint was sustained.

[10] Indeed, we think, that, as to said cause of action, had a motion to that end been submitted, the court below could justly have adopted no other course than to grant a motion for a nonsuit; and this, too, in the face of the fact that Mrs. Sievert testified that she herself procured for her mother certain of the articles set down in the book. While she was, of course, competent to testify as to the articles that she purchased herself, her testimony in that particular was so indefinite and uncertain and unsatisfactory that a definite finding could hardly with justice have been made or deduced therefrom. She failed to point out the particular articles or the number thereof which she personally procured, and thus the difficulty of determining how much the plaintiff would be entitled to for the advancements made by her through the purchases made by Mrs. Sievert is plainly apparent. It is reasonably inferable from her testimony that the witness herself personally procured very few of the articles charged in the book against the deceased. Under all these circumstances, we think that the entire testimony of Mrs. Sievert addressed to the third cause of action should have been disregarded by the jury, and we therefore conclude that it is the duty of this court to make an order in its judgment herein in accordance with this view.

Accordingly the following order or judgment is hereby rendered: That if the plaintiffs, within 30 days from the filing of this opinion, remit in due and proper form the sum of \$69.43 of the amount awarded them by the verdict and judgment in this case, the said judgment shall stand as affirmed, but, if the plaintiffs fail or refuse within said time to remit said sum (\$69.43) from said

judgment, then the judgment appealed from will stand as reversed, and the cause remanded for a new trial.

We concur: FINCH, P. J.; BURNETT, J.

54 Cal. App. 571

WILLIAMS v. SOUTHERN PAC. CO.
(Civ. 2302.)

(District Court of Appeal, Third District, California. Oct. 17, 1921. On Petition for Modification, Nov. 16, 1921. Hearing Denied by Supreme Court Dec. 15, 1921.)

1. Judgment ⚡638—Judgment first rendered in suits in courts of concurrent jurisdiction is res adjudicata.

Where suits over the same subject-matter and with the same parties are pending in courts having concurrent jurisdiction, it is not the final judgment in the first suit, but the first final judgment rendered in either suit, that renders the issues res adjudicata in the other court.

2. Master and servant ⚡416—Compensation award no bar to action under federal Employers' Liability Act by different parties.

An award in a workmen's compensation proceeding instituted by the wife of a deceased employee in her individual capacity is not a bar to the whole cause of action in an action under the federal Employers' Liability Act, brought by her as administratrix for the benefit of herself and an adult daughter; the plaintiffs in the two proceedings not being the same.

3. Master and servant ⚡416—Finding of employment in intrastate commerce conclusive on parties to compensation award.

An award in a workmen's compensation proceeding, based on a finding of the Industrial Commission that the deceased employee was employed in intrastate commerce, is conclusive of such fact as between the same parties or their privies, so long as the judgment remains unmodified.

4. Judgment ⚡670—Conclusive against person appearing individually in one case and in representative capacity in another.

As a general rule, where one appears in a representative capacity in one action, and in an individual capacity in another action involving the same subject-matter, without any change in his relation to the subject-matter, the judgment in the one case is conclusive of his rights in the other.

5. Courts ⚡92—Where appellate court sustains both grounds of decision, neither ruling is obiter.

Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.

6. Master and servant ⚡416—Compensation award conclusive of claimant's individual rights when suing as administratrix.

Where the wife of a deceased employee instituted a compensation proceeding in her individual capacity, and sued as administratrix under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), an award in the compensation proceeding, based on a finding that the employee was employed in intrastate commerce, was conclusive in the action under the federal act as against the administratrix, so far as she represented herself as one of the beneficiaries.

7. Death ⚡18(3)—Adult married daughter held to have no right of action for father's death.

An adult married daughter of a deceased employee, who had received no assistance from her father after her marriage, but was supported by her husband, and, during the time he was in the navy, by a government allowance, held to have no reasonable expectation of any pecuniary benefit from a continuation of the father's life, and hence there could be no recovery for her benefit under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

8. Courts ⚡97(5)—Decisions of federal Supreme Court controlling on right of recovery under federal law.

The question as to the right of recovery under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the benefit of an adult married daughter is a federal question as to which decisions of the United States Supreme Court are controlling.

9. Trial ⚡252(11)—Instruction as to duty of support held inapplicable where child not dependent.

In an action for death of employee, an instruction that it was the duty of the father and mother of any poor person unable to maintain himself by work to maintain such person to the extent of their ability, though correct as an abstract statement of law, was inapplicable so far as recovery was sought for the benefit of an adult daughter who was not dependent.

10. Master and servant ⚡284(1)—Engagement in interstate commerce question of fact.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), the question whether the deceased employee was employed in interstate commerce at the time of his death is one of fact for the determination of the jury.

On Petition for Modification.

11. Judgment ⚡17(1)—Person not generally bound unless he had notice and right to appear and assert interest.

As a general proposition, no one is bound by a judgment unless he had legal notice (though not necessarily actual notice) of the proceeding in which it was rendered, and was entitled to appear and assert his interest in the subject-matter.

12. Master and servant ☞416—Compensation award not conclusive as judgment in rem.

A workmen's compensation award, based on a finding that the deceased employee was employed in intrastate commerce, is not conclusive as against the whole world as a judgment in rem under Code Civ. Proc. § 1908, providing that a judgment or order in respect to the personal, political, or legal condition or relation of a particular person is conclusive on the condition or relation of the person.

13. Master and servant ☞416—Compensation award not binding on one not dependent.

A workmen's compensation award based on a finding that the deceased employee was employed in intrastate commerce is not conclusive on an adult daughter who was not dependent on deceased, and not entitled to participate in the award, but for whose benefit recovery is sought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

Appeal from Superior Court, Sacramento County; Charles Busick, Judge.

Action by Ruth Williams, as administratrix of Harry Williams, deceased, against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

Devlin & Devlin, of Sacramento, for appellant.

Theodore A. Bell, of San Francisco, for respondent.

FINCH, P. J. Plaintiff was given judgment for damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for the death of her husband, Harry Williams, alleged to have been caused by the negligence of the defendant while the deceased was in the discharge of his duties as brakeman on an interstate train of the defendant company.

Appellant does not contest the implied finding of negligence, but earnestly contends that the deceased was not employed in interstate commerce at the time of the injury resulting in his death. This contention is based on two propositions advanced by the defendant: First, that the evidence conclusively establishes that the train on which the deceased was employed was not an interstate train; secondly, that in a proceeding instituted by the plaintiff, in her individual capacity, against the defendant before the Industrial Accident Commission, it was adjudged that at the time of his death the deceased was employed in intrastate commerce, and that such determination is res adjudicata between the parties to this action.

The injury and resulting death of Harry Williams occurred November 25, 1917. The original complaint in this action was filed January 9, 1918. On April 12, 1918, the de-

fendant filed its answer, denying that the deceased was employed in interstate commerce at the time of his death. To avoid the bar of the statute of limitations to a recovery before the Industrial Accident Commission in the event of a decision by the superior court that the deceased was not employed in interstate commerce, the plaintiff, Ruth Williams, in her individual capacity, just prior to the expiration of one year from the time of her husband's death, made application to the Commission for adjustment of her claim for damages, alleging the pendency of the action in the superior court, and that the defendant therein had "answered alleging that deceased was engaged in intrastate commerce at the time of his death," and praying that the proceeding before the Commission "be held in abeyance, after service upon the defendant, until final determination of the said civil action." On December 19, 1918, counsel for Mrs. Williams appeared before the Commission and moved that the proceeding be held in abeyance during the pendency of the action in the superior court. The motion was opposed by counsel for the defendant, and was denied by the Commission. Thereupon counsel for Mrs. Williams applied to the Supreme Court for a writ of prohibition restraining the Commission from proceeding in the matter pending the court's action. The application was denied. The defendant admitted all the facts stated in the application before the Commission, and did not resist the award prayed for. The Commission thereupon awarded Mrs. Williams the sum of \$5,000 as damages, and a certified copy of its findings and award was filed by the defendant in the superior court of Sacramento county, and judgment thereon was duly entered.

The respondent contends that the doctrine of res adjudicata has no application to the findings and award of the Industrial Accident Commission; that, since the superior court first acquired jurisdiction, its determination of any issue before it is conclusive, notwithstanding a prior inconsistent determination of the same issue by the Commission; and that the parties to the two proceedings are not identical, in that the plaintiff sued as an individual in the one and as administratrix in the other.

In *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917E, 390, it is said:

"Where compensation is sought the proceedings are in substance those of a court in an action at law. * * * After hearing by the Commission, it makes and files its findings of fact and its 'award which shall state its determination as to the rights of the parties.' * * * The findings thus made are 'conclusive and final' * * * and the award itself is not reviewable except by a writ of certiorari under which the review is restricted in scope.

* * * Any party in interest may file a certified copy of the findings and award with the clerk of the superior court, and judgment must be entered by the clerk in conformity therewith. * * * We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the Industrial Accident Commission of this state in making awards of compensation are not strictly judicial."

See, also, *Carstens v. Pillsbury*, 172 Cal. 576, 158 Pac. 218; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24; *Gouanillou v. Industrial Accident Commission* (Sup.) 193 Pac. 937; *Massachusetts, etc., Co. v. Industrial Accident Commission*, 176 Cal. 491, 168 Pac. 1050.

The findings of the Industrial Accident Commission are *res adjudicata*. In *re Hunnewell*, 220 Mass. 351, 107 N. E. 934; *Centralia Coal Co. v. Industrial Accident Commission*, 297 Ill. 513, 130 N. E. 727.

[1] It is not claimed that either the action in the superior court or the proceeding before the Commission could have been successfully pleaded in abatement of the prosecution of the other, but respondent cites 15 *Corpus Juris*, 1161, to the effect that—

"Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, 'the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case.'"

At page 1165 of the same volume, however, it is stated that—

"The rule is limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly in personam, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction."

There is some confusion in the decisions because of failure to recognize the limitation just stated. In strictly personal actions the great weight of authority sustains the rule as stated in the case of *Boatmen's Bank v. Fritzlen*, 135 Fed. 667, 68 C. C. A. 288, that—

"It is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, that renders the issues in such a case *res adjudicata* in the other court."

For further authorities to the same effect, see *Insurance Co. v. Harris*, 97 U. S. 331, 24 L. Ed. 959; *Schuler v. Isreal*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; 1 *Freeman on Judgments* (4th Ed.) § 320; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 280; *Davis v. Bedsole*, 69 Ala. 362;

Bourgeois v. Jackobs, 45 La. Ann. 1310, 14 South. 68; *Oxford v. Paris*, 33 Me. 179; *Bank of U. S. v. Merchants' Bank*, 7 Gill (Md.) 415; *Marble v. Keyes*, 9 Gray (Mass.) 221; *Allis v. Davidson*, 23 Minn. 442; *Nave v. Adams*, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766.

[2] The plaintiffs in the two proceedings are not the same, and therefore the award of the Commission is not a bar to the whole cause of action in the superior court. *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586.

"A judgment obtained by one or more of several joint owners or creditors, having claims against a common debtor, is not a bar to a subsequent action by the other claimants, or separate suits by each of them, for the recovery of their claims, although it is *res adjudicata* as to the claims of those who brought the former suit." 15 *Standard Encyc. of Proc.* 514; *Suisun L. Co. v. Fairfield School District*, 19 Cal. App. 594, 127 Pac. 349; *Harris v. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

[3] A material issue in both proceedings was the character of *Williams' employment*; if intrastate, the Commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The Commission determined that the employment was in intrastate commerce, and the fact—

"so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 335; 2 *Black on Judgments* (2d Ed.) § 506.

In *Spokane & Inland Empire R. Co. v. Whitley*, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915F, 736, in construing a statute of Idaho similar to the federal *Employers' Liability Act*, the court said:

"The recovery authorized is not for the benefit of the 'estate' of the decedent; the proceeds of the recovery are not assets of the estate. Where the personal representative is entitled to sue, it is only as trustee for described persons, the 'heirs' of the decedent. * * * They are the sole beneficiaries. * * * It may also be premised that, when suit is duly brought by the trustee under such a statutory trust, it is a necessary and conclusive presump-

tion that the trust will be executed and the rights of the beneficiaries as fixed by the statute which created the obligation will be recognized by all courts before whom the question of distribution may come."

In *Ruiz v. Santa Barbara Gas, etc., Co.*, 164 Cal. 191, 128 Pac. 332, it is said:

"It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, * * * that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs."

In *Corcoran v. Chesapeake & O. Canal Co.*, 94 U. S. 741, 24 L. Ed. 190, the plaintiff brought the suit upon certain bonds and the defendant pleaded a prior judgment as a bar. The court, in sustaining the plea, said:

"It is also argued that in that suit *Corcoran* was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds, * * * and in this latter capacity is not bound by that decree. But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the cestui que trust is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If *Corcoran* owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as a privy to the person who was represented."

In *Estate of Bell*, 153 Cal. 331, 95 Pac. 372, the court arrived at a similar conclusion where the administratrix had proceeded in her representative capacity in one case and in her individual capacity in the other. The court said:

"In both proceedings she was the real party in interest, asserting individual and not representative rights, and is bound by the judgment."

See, also, *In re Parks' Estate*, 166 Iowa, 403, 147 N. W. 850; *Chandler v. White Oak Creek Lumber Co.*, 131 Tenn. 47, 173 S. W. 449.

In 2 *Black on Judgments* (2d Ed.) § 536, it is said:

"If one sues as trustee, and afterwards in his individual capacity, in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust, he was representing himself."

[4] Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one

action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter, a judgment in the one case is conclusive of his rights in the other.

Counsel for respondent contends that the rule as thus stated is in conflict with that laid down in the case of *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586. The judgment pleaded as a bar in that case was given in an action by *Mrs. Troxell* as surviving widow in behalf of herself and children for the death of her husband. The court in that action held that it was brought under the state law.

"In such an action there could be no recovery because of the negligence of the fellow workman of *Troxell*." "The jury was confined to the question of responsibility for failing to provide proper safety appliances."

The plaintiff was given judgment, which was reversed on appeal. The second action was then brought by *Mrs. Troxell*, as administratrix, under the federal act, under which there might be a recovery for the negligence of fellow workmen. In the second action the trial court held that—

"The former case had adjudicated matters as to defects in cars, engines, and rails, [and] submitted to the jury only the question of the negligence of fellow servants."

Judgment was again rendered in favor of the plaintiff, and the Circuit Court of Appeals "reversed the judgment, holding that the first proceeding and judgment was a bar to a recovery in the second action." In overruling the decision of the Circuit Court of appeals, the Supreme Court held that—

"Where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. * * * And the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit."

The court further held that—

"There was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."

[5] Appellant urges that this latter statement by the court is mere dictum, but—

"Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *Union P. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134.

The decision goes no further than to hold that, because there was not identity of parties plaintiff in the two actions, the second was not wholly barred by the judgment in the first. The question whether an issue actually determined in the first was conclusive on the same issue in the second as against a recovery for the benefit of Mrs. Troxell was not before the court. The trial court held that the judgment in the first action was a bar as to all issues actually determined in that suit. The correctness of this holding was not in controversy before the higher court, and was not considered by it. The opinion in the Troxell Case does not warrant the conclusion that the court intended thereby to overrule its prior decision in the Corcoran Case, *supra*, and similar decisions by the highest courts of many of the states.

[6] In the proceeding before the Commission of Mrs. Williams, she appeared in her individual capacity, and in the action in the superior court she represented herself as one of the beneficiaries, and had control of the prosecution of the case.

"Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies." *Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1070.

Having recovered judgment for compensation in the proceeding before the commission by establishing the fact that the deceased was employed in intrastate commerce, and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based.

Not knowing what the determination of the trial court would be as to the character of employment of the deceased, and naturally desirous of avoiding an entire failure of compensation, the plaintiff felt the necessity of making the application to the Commission, even though recovery in that tribunal is limited in amount. In states which provide but one tribunal for the trial of such actions, that tribunal determines in the one action whether the employment was interstate or intrastate, and renders judgment accordingly under the federal act or the state law as the case may warrant, and the predicament in which the plaintiff herein found herself cannot arise.

The judgment was for \$25,000, of which \$5,000 was apportioned to Vivian Peabody, an adult married daughter of the deceased. The complaint alleges that she was not dependent upon the deceased. Not being dependent, she was not entitled to compensation under the state law, and she was not a party to the proceeding before the Commission. It is clear that the award of the Commission is not a bar to a recovery in her behalf under the federal act, nor is any fact

found by the Commission *res adjudicata* as to her.

[7] The complaint alleges that Mrs. Peabody was not dependent upon the deceased. There was no allegation that she had any ground for expecting any pecuniary benefit from a continuance of his life. The evidence shows that Mrs. Peabody is the only child of deceased, and was 21 years old at the time of his death; that she was married in 1915, and her husband was about 32 years old at the time of the trial in February, 1919; that he is a machinist, and in 1918 enlisted in the navy, and went into training as an airplane mechanic, and at the time of the trial was expecting to be discharged at any time; that the only source of income of Mrs. Peabody while her husband was in the service was a government allowance of \$30 a month for herself and \$7.50 for their child, neither she nor her husband having any property. There was no evidence that Mrs. Peabody had received any assistance from her father after her marriage. She lived with and was supported by her parents prior to her marriage. The deceased and his wife were both of the age of 39 years, and had a life expectancy of 28.9 years. The deceased was an experienced brakeman, and was in line for promotion. His last monthly pay check was \$148, though that was somewhat above the average. He and his wife were in good physical health. They had not accumulated any property.

Appellant contends that under the facts shown the case of *Gulf, C. & St. F. R. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, is conclusive against a recovery in behalf of Mrs. Peabody. In that case the administratrix sued under the federal act for the benefit of herself and four children, one of whom was an adult married daughter. Judgment was given for the sum of \$15,000, one-half of which was apportioned equally to the four children. The Court of Civil Appeals affirmed the judgment. 147 S. W. 1188. The Supreme Court of the United States reversed the judgment on the sole ground that, under the pleadings and proofs, the married daughter was not entitled to recover. The court said:

"There was neither allegation nor evidence that Mrs. Saunders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. * * * In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given."

See, also, *Garrett v. Louisville, etc., R. R. Co.*, 235 U. S. 312, 35 Sup. Ct. 32, 59 L. Ed. 242.

[8] There is no distinction in principle between the McGinnis Case and this. In neither case was there any evidence from which to infer that pecuniary benefits would have been received except the bare fact of the relationship of father and daughter. In the McGinnis Case it was held that the issue raised was a federal question and that case is controlling here where the identical question is presented.

[9] The court gave the following instruction:

"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."

While the instruction is correct as an abstract statement of the law, it applies only in cases of dependency, and, as stated, the complaint herein alleges that Mrs. Peabody was not dependent.

[10] Appellant contends that the evidence is not sufficient to support the implied finding that the deceased was employed in interstate commerce at the time of his death. The question is one of fact for the determination of the jury. The trial court correctly instructed the jury as to the law applicable to the question. On a retrial a different state of facts may be shown, and a discussion here of the evidence would serve no useful purpose.

The judgment appealed from is reversed.

We concur: BURNETT, J.; HART, J.

On Petition for Modification.

PER CURIAM. Appellant has filed a petition for the modification of the decision herein by this court, concluding as follows:

"The appellant therefore asks that the opinion heretofore rendered and filed be modified so as to declare that the daughter, Vivian Peabody, is also bound by the finding of the Industrial Accident Commission, to the effect that the decedent was engaged in intrastate employment at the time of his death, and that, if it be necessary for a consideration of this point, a rehearing be granted, limited, however, solely to the one point, namely, the effect of the award of the Industrial Accident Commission as to the right of the administratrix to recover on behalf of the daughter."

In appellant's opening brief the contention is stated as follows:

"The finding of the commission fixing the status of the employment is an adjudication in rem and binds the world."

[11, 12] The proceeding before the Commission has none of the characteristics of an action in rem. It may be stated as a general

proposition that no one is bound by a judgment rendered in a proceeding of which he had no legal notice, though actual notice is not necessary. Freeman on Judgments (4th Ed.) § 606. If the world is to be bound, the world must have notice. Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372. Only those who are entitled to appear and assert their interest in the subject-matter of the suit are bound by the judgment. Freeman on Judgments (4th Ed.) § 617; Gridley v. Boggs, 62 Cal. 202. Appellant relies on the provisions of section 1908 of the Code of Civil Procedure as follows:

"In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

This section was construed in the case of Gridley v. Boggs, supra, which was commenced by George W. Gridley in his lifetime, and the prosecution thereof was continued by his administratrix after his death to obtain a decree setting aside a deed made by him at a time when it was alleged he was incompetent. The deceased had made a will a few months prior to the execution of the deed in question. The will was offered for probate, and rejected by the court on the ground that the deceased was of unsound mind at the date of the execution thereof. In the trial of the case of Gridley v. Boggs the findings and decree in the probate proceeding were offered in evidence, and objection thereto was sustained by the court. It was claimed on appeal that the judgment denying probate of the will was conclusive as to Gridley's mental condition, under the provisions of section 1908 of the Code of Civil Procedure. The court said:

"Certainly all those who might be affected by a judgment that Gridley was insane when the will was executed did not have the right to appear and assert their rights in the proceeding for the probate of the will. The legal notice of that proceeding ran only to those interested in Gridley's estate. And, as to 'the more general ground,' public policy only requires, at most, that a judgment as to the status of a particular person, which shall be conclusive as against those not parties to it, shall be a judgment which simply determines such status in a proceeding whose sole end and aim is to determine it. The judgment of the superior court determined that a certain instrument, purporting to be the last will and testament of George W. Gridley, was not his last will and testament. The proceeding was not a special inquiry to determine his status as to sanity or insanity. The finding of insanity was of a probative fact upon which the

court held the will to be invalid, as it might have held it to be invalid upon proof of duress or undue influence."

Appellant relies on the case of *Northwestern Redwood Co. v. Industrial Accident Commission* (Sup.) 194 Pac. 33, in which it is said that "the proceeding may be characterized as one quasi in rem." It is apparent from the context that this statement had no reference to the ordinary proceeding before the Commission, but was limited to the particular matter under discussion, the right of the wife to subject community property within the jurisdiction of the court to her demands against her husband who was beyond such jurisdiction. The court said:

"It is sufficient to say that the purpose of this proceeding is to enforce the rights of the wife in community property located in this state, and that constructive notice to the husband is therefore sufficient to give jurisdiction to pass upon the questions so involved. The proceeding may be characterized as one quasi in rem. In such proceeding notice by publication is a sufficient compliance with the federal Constitution."

This discussion has proceeded upon the assumption that the terms "condition or relation of a particular person," as used in section 1908 of the Code of Civil Procedure, are broad enough to include the status of one's employment as to its intrastate or interstate character. Such assumption, however, appears to be unwarranted. The right of a mechanic to a lien for his wages may depend upon the character of the work in which he is engaged, yet it would hardly be contended that a judgment establishing the character of such work is in rem, binding upon the whole world. There is no distinction in principle between the two cases. Other similar illustrations may readily be suggested. Appellant's contention finds no support in reason or authority.

[13] For the purposes of the argument, at least, it may be conceded that all persons entitled to share in the award of the Commission are bound by the adjudication of the Commission, not because the award is a judgment in rem, but because they were represented in the proceeding by Mrs. Williams, but Mrs. Peabody, not being dependent upon the deceased, was not entitled to participate in the award, and cannot be said to have been so represented. Having no right to appear in the proceeding or to assert any rights therein, she is not bound by the award. Under the federal law her right of recovery is not based on dependency, but upon her reasonable expectation, if any, of pecuniary benefit from a continuance of her father's life.

The petition is denied.

(54 Cal. App. 592)

DE COE et al. v. JOHNSON et al.
(Civ. 2342.)

(District Court of Appeal, Third District, California. Oct. 18, 1921.)

1. Partnership ⚡244—Surviving partner entitled to exclusive possession of partnership and its affairs until business is completely settled.

Under Code Civ. Proc. § 1585, entitling the surviving partner to continue in the possession of and to settle the partnership business, a surviving partner has the right to continue in the exclusive possession of the partnership and its affairs until the business thereof is completely settled.

2. Executors and administrators ⚡44—Interests of deceased partner not assets of his estate pending settlement of partnership affairs by surviving partner.

Under Code Civ. Proc. § 1585, giving surviving partner exclusive possession of the partnership business for purpose of settlement, the interests of the deceased partner in the partnership business are not assets of his estate until the partner's business is settled or until such times as assets from the partnership business may come into the hands of the surviving partner, and the administrator of his estate or the executor of his last will has no right to interfere in the settlement of the partnership business and affairs.

3. Interpleader ⚡37 — Debtor may deposit amount of debt into court and interplead deceased partner's administratrix.

A debtor of a partnership may, when sued by a surviving partner, on demand of deceased partner's administratrix for deceased partner's share of amount due partnership, pay amount of debt into court and cause administratrix to be substituted as defendant.

4. Executors and administrators ⚡439 — Administratrix of estate of deceased partner could intervene in surviving partner's action against debtor.

In action by alleged surviving partner against alleged partnership debtor, administratrix of estate of alleged deceased partner, who denied existence of partnership and who did not agree with plaintiff as to the portion in which they were to share in amount to be recovered, had the right to intervene in such action.

5. Interpleader ⚡1—Theory of bill stated.

Under Code Civ. Proc. § 386, the theory of a bill of interpleader is that neither the parties against whom the action is brought nor the complainant has title to the subject-matter of the suit, but that title is in the claimants, and the bill must so allege, and must allege that the party against whom action is brought is indifferent between the claimants as to the subject-matter, since he cannot seek relief in the premises against either.

6. Judgment ⚡297 — Under control of court until entered.

A judgment, although filed, is under the control of the court rendering it until it is

entered, and the court may alter or change it or substitute another judgment therefor.

7. Judgment $\S$ 305—May be changed so as to conform to judgment announced notwithstanding erroneous minute order.

Where the judgment, although entered, does not conform to the minute order of the judgment, no finding being necessary or proper and therefore not filed, the court may modify or alter or even set aside the judgment as entered and order a judgment in conformity to the judgment it had announced and of which the erroneous minute order purported to be the evidence, in the absence of a proceeding under Code Civ. Proc. $\S$ 473, since courts of record have the inherent power to correct at any time their record so that they will conform to the facts and speak the truth of the case.

8. Appeal and error $\S$ 662(2)—Statement in order setting aside judgment that minute order was erroneous conclusive on appellate court.

Statement, in order setting aside judgment as not conforming to that actually rendered, that minute order was erroneous, is conclusive on appeal from such order.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Addie De Coe and husband against Anna Johnson, as administratrix of the estate of Edward T. Johnson, deceased, and another. Judgment for defendants, and from order setting aside and vacating the judgment the plaintiffs appeal. Affirmed.

A. H. Hewitt, of Yuba City, for appellants.
Davids & Snyder, of Chico, and Bacigalupi & Elkus, of San Francisco, for respondents.

HART, J. This is an appeal from an order setting aside and vacating a judgment entered upon the pleadings in this action and requiring the plaintiff Addie De Coe "to render an accounting of the partnership affairs, or the business interests of said plaintiff and defendant in the growing of rice during the year 1919, with said Edward T. Johnson, deceased."

The complaint alleges that the plaintiff Addie De Coe, who was a married woman and the wife of the plaintiff C. A. De Coe, was the owner in her separate right and as her separate property of an undivided one-half interest of a certain tract of land situated in Butte county, Cal., which is specifically described in the complaint; that during the year 1918 and also the year 1919 the plaintiff Addie De Coe and one Edward T. Johnson were copartners and were engaged in farming the real property referred to above under a contract of copartnership entered into between said parties; that said copartnership continued to exist until the 26th day of September, 1919, when the said Johnson died, and that the plaintiff Addie De Coe, "has been and still is the sole survivor of

said partnership"; that in the year 1919 a crop of rice was produced on the land described in the complaint and farmed by said copartnership and that on the 8th day of December, 1919, said crop having been harvested by the plaintiff Addie De Coe, said plaintiff, as the survivor of said partnership, sold and delivered to the defendant Rosenberg Bros. & Co., at the town of Biggs, in said county of Butte, 2,513 sacks of rice, weighing 246,628 pounds at an agreed total price of \$16,030.82, at the date of said sale said rice being on storage at the warehouse of the Farmers' Co-operative Union of Butte County, located at said town of Biggs and was represented by warehouse receipt No. 71, issued by said Co-operative Union to said plaintiff, Addie De Coe, on or about the 12th day of November, 1919, and which said warehouse receipt was indorsed by said plaintiff, Addie De Coe, and transferred and delivered to defendant on the date of the sale of said rice; that the defendant has paid to said plaintiff, Addie De Coe, on account of the purchase price of said rice, the sum of \$2,500 only, "and there is now due, owing and unpaid to said plaintiff, Addie De Coe, from said defendant, the remaining portion of said purchase price or the sum of \$13,530.82; that said contract of sale was made and was to be performed at the town of Biggs, county of Butte, state of California." The complaint further alleges that by reason of the refusal and neglect of the defendant Rosenberg Bros. & Co. to pay to the plaintiff the balance of the purchase price of said rice, namely, the sum of \$13,530.82, at the time of the sale thereof as above specified, the plaintiff Addie De Coe has been deprived of the use of said money from the date of said sale to her damage in the sum of \$5,000. The prayer is for judgment for the alleged balance due on the purchase price of the rice, together with the sum of \$5,000 damages and also with interest on said sum at the rate of 7 per cent. per annum from the 8th day of December, 1919, and for costs of suit, etc.

To the complaint the defendant interposed a demurrer which was overruled by the court and the defendant granted 30 days within which to answer. A few days prior to the expiration of the time thus allowed for answering, the defendant applied for and was granted an additional 30 days within which to reply to the complaint.

On the 17th day of May, 1920, the defendant corporation filed and served a notice upon the plaintiff, stating that it would, on the 24th day of May, 1920, make an application to the court for an order substituting Anna Johnson administratrix of the estate of Edward T. Johnson, deceased, as defendant in said action in place of said corporation, upon paying into court the sum of \$13,530.82, the principal of the amount claim-

ed in the complaint herein, less storage charges of \$143. This notice was supported by an affidavit of Abraham Rosenberg, president of the defendant corporation, in which it is recited that after said defendant purchased the rice from the said plaintiff, Addie De Coe, said defendant was notified that said sale was of rice that was jointly owned by said Addie De Coe and Anna Johnson, as administratrix of the estate of Edward T. Johnson, deceased, and that said Addie De Coe and said Edward T. Johnson "were joint adventurers in the production of the rice covered by the contract annexed hereto and are jointly interested in the same and that said Anna Johnson, as the administratrix of the estate of Edward T. Johnson, deceased, claimed a half interest in said rice and demanded from Rosenberg Bros. & Co., the payment thereof; that Rosenberg Bros. & Co. have at all times been ready, willing, and able to make payment of the total amount due for said rice and have offered to make payment thereof to said Addie De Coe and said Anna Johnson, as administratrix of the estate of Edward T. Johnson, deceased, in any manner that may be mutually satisfactory to them, or to make payment of half of said amount to each of said parties; that said Addie De Coe and Anna Johnson * * * have been unable to arrive at a satisfactory agreement under which Rosenberg Bros. & Co. could make payment to them and so release itself from its obligation to both of said parties; that said Addie De Coe insists that there are certain expenses due to her from her handling of said rice and the operation of growing the same and that said Anna Johnson, * * * admits that certain amounts are due and owing for said work but no accounting has been had between said parties, and Addie De Coe has refused to make any such accounting until payment to her of the whole amount to be paid by Rosenberg Bros. & Co. under said contract, and that Anna Johnson * * * has notified Rosenberg Bros. & Co. not to make any such payment without her approval and that she will hold Rosenberg Bros. & Co. liable if they do so." The affidavit proceeds to state that Rosenberg Bros. & Co., long before the institution of this action, made known its position as above set forth to said Addie De Coe and of its desire and intention to make payment to the full extent of its obligation and its willingness to do so upon an agreement by and between said Addie De Coe and Anna Johnson, as to the manner of making said payment; that said Addie De Coe refused to consider said proposition or to make any attempt at arriving at any arrangements by which Rosenberg Bros. & Co. could make its payment and avoid litigation; that thereafter the said plaintiff commenced this action. It is further stated in the affidavit that it is apparent that the respective rights of the plaintiff, Addie De Coe, and Anna Johnson

can only be determined by an accounting between them; that the defendant corporation is in no way interested in the respective rights of the parties or the extent of their interest in the amount to be paid by it, nor is it interested in any way in the controversy between them; that said defendant corporation desires to make its payment of the amount due under its contract for the purchase of said rice, "but desires to do so without peril to itself and without involving itself in litigation." In said affidavit it is further declared: That there is or was no collusion in this matter or in the action taken in the motion for an interpleader herein of Anna Johnson with the defendant corporation in any way, and that "this action is taken by it (defendant corporation) independently and without collusion with any one and that the demand made upon it by said Anna Johnson hereinabove referred to was likewise made upon it without any collusion between it and said Anna Johnson or without any collusion by it with any one." The defendant concludes its affidavit by offering to deposit in court the full amount due upon said contract alleged in said amended complaint and which said sum amounts to the sum of \$13,530.82, less \$143 paid for storage of said rice, and that said defendant "asks that the court make its order joining Anna Johnson as administratrix of the estate of Edward T. Johnson, deceased, and dismiss Rosenberg Bros. & Co. therefrom so that it may be released from the litigation in which it is not interested and that the parties interested may have an accounting and settle their rights without involving Rosenberg Bros. & Co." The above motion came on for hearing and was heard on the 24th day of May, 1920, and upon the conclusion of the hearing the court ordered that, upon payment into court by the defendant corporation of the sum of \$13,830.21, said sum being the balance due on the purchase price of said rice and accrued interest, amounting to \$432.39, and costs in the sum of \$10, Anna Johnson, as administratrix of the estate of Edward T. Johnson, deceased, be substituted as defendant in the place of said corporation. On June 3, 1920, said sum of \$13,830.21 was paid into court by said Rosenberg Bros. & Co., said act being accompanied by a petition addressed to the court in which it was stated:

"Said Rosenberg Bros. & Co. further respectfully submit that said deposit in court was and is as to the sum of \$442.39, alleged costs and alleged interest, made under protest, since said defendant believes and alleges that said interest and costs constitute no proper claim against said defendant and were not properly included as a part of the payment to be made under said order of interpleader."

The corporation in said petition, besides asking for the substitution of Anna Johnson as defendant in its place, declared that it

reserves to itself the right to appear in said action at any subsequent hearings or trials to show cause why said sum of \$442.39 alleged interest and alleged costs should be repaid and refunded by the clerk of the court to said defendant corporation. Thereupon the defendant corporation was retired from the case.

On September 3, 1920, said substituted defendant appeared in the action by her attorneys and demurred to the complaint. The demurrer was, on the 7th day of said month, overruled, and she was granted ten days within which to answer the complaint. On the 17th day of September said defendant filed her answer to the complaint, in which, after specifically denying each and every averment of that pleading, she, for a second answer thereto, proceeds to recite the several steps taken in the action down to the date of the filing of her answer, as those steps are above explained, including a reference to the allegations of plaintiffs' complaint as to the partnership existing between said plaintiff Addie De Coe and her intestate, Edward T. Johnson, and the sale of the rice by said plaintiff to Rosenberg Bros. & Co., then alleges:

"That a part of said sum of \$13,830.21, now on deposit with the clerk of this court, is the property of this defendant's intestate, said Edward T. Johnson, deceased, but this defendant has no exact knowledge of the exact proportion of said money properly belonging to her said intestate; that defendant has, through her attorneys, on frequent occasions, endeavored to obtain from plaintiff Addie De Coe an exact statement of the business dealings had between her and this defendant's intestate, and to obtain from said Addie De Coe an accounting and settlement of the moneys due this defendant's intestate from said business affairs, but plaintiff Addie De Coe has at all times refused to account to defendant for moneys due defendant's intestate."

The prayer of the answer is for an order directing plaintiff Addie De Coe to make a full accounting of her business dealings with the defendant's intestate, that the court appoint a commissioner to examine the said account, and make a report thereon to the court, and that thereupon an order be made directing the said plaintiff, Addie De Coe, to pay the defendant out of the sum deposited with the clerk of the court by the defendant corporation under the order of interpleader of such part or portion of such money as is properly and justly due the defendant's intestate.

On September 25th the plaintiff noticed a motion for the 4th day of October to strike from the answer of the defendant Anna Johnson all that portion thereof constituting the second answer of said defendant to the complaint, on the ground that the averments involved sham, irrelevant, and redundant matter, and also that she would at the same time ask the court to render judgment in

favor of plaintiff upon the pleadings. These motions were heard on the 24th day of October, 1920, plaintiff in open court stating that she waived all claim to damages in the sum of \$5,000 mentioned in her complaint. The decision on said motions was rendered on the 1st day of November, 1920. In the meantime, however, and on the 4th day of October, 1920, the date when the last above-mentioned motions were heard, the original defendant, Rosenberg Bros. & Co. made application to the court to intervene. Permission was thereupon granted to said defendant to appear in said cause, and on the 13th day of October it filed its answer to the complaint. After reciting a history of the litigation and the origin thereof as the same is hereinabove given, including the fact of the deposit in court by said defendant of the sum of money heretofore mentioned, the said defendant sets up the claim that it is entitled to a refund out of the sum so deposited in the sum of \$442.39, representing the amount claimed by plaintiff Addie De Coe as interest and costs, etc., alleging that said sum was deposited in court by it under protest based upon the alleged claim that said plaintiff, Addie De Coe, was not entitled to said sum as interest and costs or at all. The prayer of said answer was for an order directing the payment to the said defendant corporation out of the moneys deposited under the order of interpleader of the sum of \$442.39, and interest thereon from May 24, 1920, the date of the deposit.

On November 1, 1920, the defendant administratrix filed a petition for an order directing the plaintiff Addie De Coe to render an account of her alleged partnership affairs with Edward T. Johnson deceased. On that day, after said application had been made, the court made an order granting the application of the plaintiff for judgment in her favor upon the pleadings. The motion therefor, as seen, was made on October 4, 1920, and the clerk thereupon made the following minutes of the court proceedings:

"The motion of the defendant Anna Johnson, as administratrix of the estate of Edward T. Johnson, deceased, for an order directing the plaintiff Addie De Coe to render an account of the partnership transaction between her and said Edward T. Johnson, deceased, was denied.

"The order of October 18, 1920, setting a date for the time (sic—trial?) of said cause was vacated and set aside.

"The motion of plaintiff Addie De Coe for judgment on the pleadings, said plaintiff in open court waiving all claims to damages in the sum of five thousand dollars mentioned in the complaint, was granted, and judgment ordered entered accordingly."

The court thereafter filed a written judgment: First, denying the motion of the defendant Anna Johnson, administratrix, etc., for an order directing the plaintiff Addie De Coe to render an account of the alleged part-

nership affairs of said Edward T. Johnson, deceased; second, vacating and setting aside the order, made on the 18th day of October, 1920, fixing the 14th day of January, 1921, as the time for the trial of said cause and for the hearing of the motion of plaintiffs for judgment on the pleadings; third, granting the motion of the plaintiffs asking that all the portion of the answer of the said defendant, Anna Johnson, constituting her second answer to the complaint, be stricken out; fourth, granting the motion of the plaintiff Addie De Coe for judgment upon the pleadings; fifth decreeing that the plaintiff Addie De Coe do have and recover from the defendants the sum of \$13,830.21, said sum being the amount deposited with the clerk of the court by the defendant Rosenberg Bros. & Co.; and, sixth, ordering the clerk of the court forthwith to pay to the plaintiff Addie De Coe the said sum of \$13,830.21 and thereupon enter a satisfaction of the judgment in the proper records.

On November 13, 1920, the defendant administratrix filed a notice that she would on the 22d day of November, 1920, apply to the court for an order setting aside the minute order of the court made on November 1, 1920, and all subsequent proceedings, including the judgment given and entered in the action and last above referred to. Said motion came on for hearing on said 22d day of November, 1920, and the same was opposed by the plaintiff Addie De Coe, who supported the opposition by an affidavit by herself in which the history of the transaction between herself and Rosenberg Bros. & Co. and correspondence which passed between them were set forth in detail. The motion having been submitted on said day, the court on the 6th day of December, 1920, made an order in which it was recited that, of its own motion and in furtherance of justice, and because of inadvertence in the rendition of the judgment, and that the minute order upon which said judgment was predicated was erroneous, setting aside the said judgment upon the pleadings, made and entered by the court on the 1st day of November, 1920, in favor of plaintiff and against the defendants.

The appeal is from the last-mentioned order.

It is obvious that the action by plaintiffs is founded upon the theory that the plaintiff Addie De Coe was in the lifetime of Edward T. Johnson the latter's partner in the cultivation and growing of the rice in question on the land described in the complaint, and that she, in instituting the action proceeded under section 1585 of the Code of Civil Procedure, which authorizes, upon the death of a partner, the surviving partner to settle the business of the partnership. Said section reads:

"When a partnership exists between the decedent, at the time of his death, and any other

person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. * * *"

[1, 2] The above section, as must readily be perceived upon reading it, vests the surviving partner with the right to continue in the exclusive possession of the partnership and its affairs until the business thereof is completely settled. It is thus very clear that, until the partnership business is settled or at least until such times as assets from the partnership business may come into the hands of the surviving partner, the interests of the deceased in such business are not assets of his estate, and it is equally clear, therefore, that the administrator of his estate or the executor of his last will has no right or authority to interfere or intermeddle in the settlement of the partnership business and affairs. *Tompkins v. Weeks*, 26 Cal. 51, 66; *Andrade v. Superior Court*, 75 Cal. 459, 462, 17 Pac. 531; *Raisch v. Warren*, 18 Cal. App. 655, 665, 124 Pac. 95; *Miller v. Lux*, 100 Cal. 609, 614, 35 Pac. 345, 639.

[3-5] In this case we think, assuming that the complaint states the truth as to the partnership between said plaintiff and the deceased the orderly course (and, we may add, by far the less expensive to the litigants here) would have been to permit the plaintiff Addie De Coe to collect, by judgment, the sum sued for and thereupon pay over to the administratrix of the estate of the deceased the portion thereof to which her intestate would have been entitled. But, while all this is true, we are unable to perceive, from anything which appears upon the face of the record, any legal objection to the defendant corporation and the administratrix defendant to proceeding in the case as they did. Certainly, if the administratrix defendant notified the defendant corporation that she as such administratrix was interested in the claim declared upon by plaintiff, not stating how that interest arose, and demanded of such corporation the payment to her of such proportion of such demand as belonged to the estate, the said defendant corporation, then having no other evidence than the complaint itself of the particular character of the contractual relation between the plaintiff Addie De Coe, and the deceased, out of which said claim developed, was entitled to demand that the matter should be determined either amicably or by suit between said plaintiff and said administratrix before it should be required to pay said debt, which it admitted existed against it. And it is equally correct to say that the administratrix of the estate

of the deceased had the legal right either to intervene in the case, or, having been substituted for the defendant corporation, answer the complaint and have the matter of the respective rights of the plaintiff Addie De Coe and said administratrix properly litigated. As we have seen, the defendant administratrix did answer the complaint denying that there was a partnership existing between Addie De Coe and her intestate during the latter's lifetime in the business out of which arose the indebtedness declared upon and further affirmatively alleged in her said answer that the estate of which she was administratrix was interested in the claim, not stating, however, the circumstances under which that interest attached. There was therefore a proper issue joined upon the demand sued for, and, while we do not regard it essential to the decision in this case to pass upon those questions, still we are not reluctant to say that when the court made its order striking from the answer the affirmative allegations thereof, or the second answer to the complaint, and awarding plaintiff judgment upon the pleadings, error was committed. Moreover, when the defendant corporation was again permitted to become a party defendant in the action, and thereupon interpose an answer contesting the right of the plaintiff to that portion of the moneys deposited covering interest and costs claimed by the plaintiffs, there was no longer an interpleader, but an issue tendered by the defendant corporation as to said portion of the moneys deposited in court. The whole theory of a bill of interpleader is that the party against whom the action is brought or the complainant has no title to the subject-matter of the suit, but that title thereto is in the claimants and he must so aver, and also that he is indifferent between the claimants as to the subject-matter of the action. He cannot seek relief in the premises against either. Code Civ. Proc. § 386; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246. The situation here is that all the parties are claiming a portion of the moneys involved in the suit and which the defendant corporation deposited in court and, as stated, clearly this cannot, in a strict sense, be deemed an interpleader. But, however this all may be, the single question presented here is whether or not the court was authorized to set aside the judgment in favor of the plaintiff upon the pleadings.

Although the judgment which was set aside contained a number of orders disposing of the several motions which had previously been made, which orders amounted to no more than minute orders as to said motions, yet the gist of the judgment or the vital part thereof was in the granting to the plaintiffs the relief prayed for in their complaint.

It is pointed out by the appellants that there are, under the Code, but three instances in which a judgment may be vacated,

and they are those provided for by section 663 of the Code of Civil Procedure, where there are incorrect or erroneous conclusions of law not consistent with or not supported by the findings, or where the judgment or decree is not consistent with or supported by the special verdict, and by section 473 of the same Code, where a judgment has been taken against a party or his legal representative through his mistake, inadvertence, surprise, or excusable neglect. It is contended that the case here does not come within any of the provisions of the Code thus referred to, and that the court was therefore without legal authority to vacate and set aside the judgment herein rendered.

[6, 7] While counsel on both sides, in their briefs, refer to the judgment as having been entered, the record shows that it was merely filed and the trial court, in the order appealed from, also refers to the judgment as having been filed and not as entered. A judgment, although filed, is under the control of the court rendering it until it is entered, and, until entered, may by the court be altered or changed or another judgment substituted therefor. No citation of authorities is necessary to verify this proposition. If therefore the judgment here was merely filed and not entered at the time the order vacating it was made, no legal objection could be made to said order. But, while the rule is different where the judgment has been entered, particularly where findings have been filed, yet it cannot be doubted that where the judgment, although entered, does not conform to the minute order of the judgment, no findings being necessary or proper, and therefore not filed, the court may modify or alter or even set aside the judgment as entered and order a judgment in conformity to the judgment it had announced and of which the erroneous minute order purported to be the evidence. The court, where the situation is the same as that presented here, may do this in the absence of a proceeding looking to that end inaugurated under section 473 of the Code of Civil Procedure; for all courts of record have the inherent power to correct at any time their records so that they will conform to the facts and speak the truth of the case. *Crim v. Kessing*, 89 Cal. 478, 486, 26 Pac. 1074, 23 Am. St. Rep. 491; *Toy v. Haskell*, 128 Cal. 558, 561, 61 Pac. 89, 79 Am. St. Rep. 70; *Warner v. F. Thomas Parisian, etc., Works*, 105 Cal. 409, 412, 38 Pac. 960; *People v. Southern*, 118 Cal. 359, 50 Pac. 545.

In this case, therefore, in view of the recitals of the order vacating the judgment, it is a matter of no consequence whether the judgment was or was not entered. The order complained of states that—

"Said judgment is based upon an incorrect and erroneous purported minute order; * * * that the said minute order was not the minute order rendered by the judge of the superior court; * * * that the court upon

its own motion and in the furtherance of justice sets aside the alleged minute order of judgment in the said above-entitled cause, whereby judgment was given in favor of plaintiffs and against the defendants named herein, for the reason that said minute order was not the minute order of the above entitled court but was, in fact, a document drawn up and filed by counsel for plaintiffs herein and designated by said counsel as 'the minute order of said court.' "

The minute order purporting to record the decision of the court as it was announced from the bench is presented in full herein-above.

[8] There is nothing in the record showing that the statement in the order appealed from that the above minute order was erroneous and does not set forth the judgment or decision actually rendered by the court is not true. That said statement in said order is, therefore, conclusive upon us, there can be no manner of doubt. Surely, the court itself knew better than any one else what was in its mind and what it intended its judgment should be and what it actually was as it announced the same from the bench, and if the clerk of the court, as appears conclusively from this record to be true, misunderstood or misapprehended the decision actually rendered and so made an incorrect minute order thereof in conformity to such misunderstanding or misapprehension, then it was within the province and, indeed, the duty of the court not only to correct the order, but to alter or modify the written judgment following said order or to substitute the judgment actually announced for the erroneous one originally filed and entered if, indeed, it was entered.

The order appealed from is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

187 Cal. 420

SECRET VALLEY LAND CO. v. PERRY et al.
(Sac. 3024.)

(Supreme Court of California. Nov. 17, 1921.)

1. Taxation ⚡5—Sale for taxes by state of lieu lands while title was still in United States void.

Sale for taxes levied by the state on lieu lands while the title was still in the United States, the land not having then been listed to the state, and the person to whom a certificate of purchase had been issued from the state land office not even being in possession, was void; the land not being subject to taxation by the state.

2. Adverse possession ⚡88—Taxation ⚡805 (1)—Claim of defendant held not barred by laches or statute where taxes paid by plaintiff without taking possession.

Where plaintiff's claim was based on a certificate of sale issued to it by the state after a void tax sale, subsequent to the issuance by the state of certificate of sale to defendant's intestate, and neither party had at any time been in possession or made any claim or demand on the other prior to plaintiff's action to quiet title, and plaintiff had merely paid the taxes for the 9 years between the issuance of the certificate to it and its action, defendant's claim, based on the certificate to his intestate, was not barred by laches or by Code Civ. Proc. § 343, providing a 4-years limitation for actions "not hereinbefore provided for"; there being no necessity of defendant's acting until plaintiff took adverse possession.

3. Equity ⚡75—Not laches to omit to attack claim not of character to ripen into legal title.

A defendant holding the legal title, or a paramount claim to the legal title, is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title.

4. Quieting title ⚡29—Delay in suing adverse claimant not in possession is not laches.

An outstanding adverse claim, which amounts only to a cloud upon title, is a continuing cause of action, and so long as it lies dormant and inactive the owner of the superior title is not chargeable with laches if he allows it to stand indefinitely, as each day's assertion of such adverse claim gives a renewed cause of action to quiet title until such action is brought.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by the Secret Valley Land Company against William F. Perry and others. Judgment for plaintiff, and defendant Mary J. Thompson, administratrix of Frank Robert Thompson, deceased, appeals. Reversed.

Harrison S. Robinson and Harry L. Price, both of Oakland (James S. Moore, Jr., of San Francisco, and R. W. Macdonald, of Oakland, of counsel), for appellant.

R. M. Rankin, of Orland, for respondent.

SLOANE, J. This appeal involves the question of priority of right between the plaintiff and the defendant Thompson, under conflicting certificates of purchase of land from the state of California. The appellant's certificate is prior in time, and, unless avoided or forfeited, establishes an interest superior to that claimed by respondent. The action was brought to quiet title, and the judgment was for plaintiff. The findings of the trial court upon which this judgment rests are to the effect:

"That the right, title, and interest of said defendant and her predecessors in interest is barred by her laches and unreasonable delay in asserting their claim to the property affected by this action," and "that the claim of this defendant is barred by section 343 of the Code of Civil Procedure of the State of California."

If, as contended by appellant, these findings are unsupported by the evidence, judgment should have been for the defendant. The facts affecting the title to this land, accepting the summarized statement in respondent's brief, are as follows:

"On September 18, 1895, said land was vacant government land of the United States, and on said date Frank Robert Thompson filed in the office of the surveyor general of the state of California an application to purchase said land from the state. March 17, 1896, the surveyor general approved said application of Frank Robert Thompson to purchase the land. May 18, 1896, certificate of purchase No. 13625 issued from the register of the state land office to said applicant. February 21, 1898, the land in question was clear listed to the state of California by the United States government, and included in clear list No. 8, Susanville land district. For the fiscal year 1897, and for five years subsequent thereto, said land was assessed for taxation as the property of Frank Robert Thompson by the County of Lassen. On June 27, 1898, as provided by statute, the land was sold for nonpayment of taxes levied in 1897, and a certificate of sale therefor issued to the state. On June 28, 1903, a tax deed was made by the tax collector of said county to the state as provided by law, and a certified copy thereof filed in the office of said surveyor general of said state. On April 26, 1909, Jessie R. McKay, pursuant to the provisions of section 3788 of the Political Code, redeemed said land from such tax sale, and filed a certificate of redemption thereof, together with her application to purchase the same, in the office of the surveyor general on May 7, 1909. Her application was thereafter approved, and on December 15, 1909, certificate of purchase No. 17,076 issued to her.

"Prior to the commencement of this action all the principal due the state of California for the purchase of said land under said certificate had been paid, and all the interest thereon, except the sum of \$30.88, which was paid on the 29th day of June, 1918, prior to the trial of this action. Each year after the date of said certificate of purchase No. 17076 said lands were assessed to the owner and holder of said certifi-

cate, and the taxes thereon paid as they fell due by said Jessie R. McKay or her grantees. This action was commenced July 12, 1917, by the plaintiff, who was then the owner of the said certificate issued to Jessie R. McKay. Appellant's answer and cross-complaint was filed December 6, 1918.

"Neither Frank Robert Thompson nor his heirs or representatives made any claim to said land or to said certificate of purchase issued to said Thompson prior to 1918, nor did they make any payment to the state of California on account of the principal or interest after the issuance of said certificate of purchase to said Thompson, prior to the 31st day of December, 1918.

"Frank Robert Thompson died March 12, 1913, and on January 11, 1918, Mary J. Thompson was appointed administratrix of his estate. Prior to her appointment as such administratrix she gave notice to the Surveyor General required by chapter 602 of the Statutes of 1917, and on December 31, 1918, she paid the balance of the purchase money, interest, and penalties accrued on the said Thompson certificate of purchase during the period of 22 years."

It is not seriously disputed that the clear listing of this property to the state of California as lieu land subsequent to Thompson's application to purchase, and the issuance to him of a certificate of purchase May 18, 1896, by the register of the state land office, validated and established a preferential right to this property which entitled him to a patent from the state upon his meeting the subsequent payments according to law.

[1] The subsequent tax sale for taxes levied upon the land in 1897, while title was still in the government of the United States, was void; the land not being subject to taxation by the state. *Slade v. County of Butte*, 14 Cal. App. 453, 112 Pac. 485; *Roberts v. Gebhart*, 104 Cal. 67, 37 Pac. 782; *Allen v. Pedro*, 136 Cal. 1, 68 Pac. 99. The land had not at that time been listed to the state, and Thompson was not even in possession.

The state in due time took a tax deed from the tax collector under this void sale, and thereafter in 1898 respondent's predecessor in interest redeeming the land under this sale, applied for and received a certificate of purchase from the state. If the tax sale had been effective in annulling Thompson's prior certificate of purchase, it may be conceded that respondent's claim of title would be established. But the proceedings under such tax sale were void, and were entirely ineffectual to foreclose the rights of Thompson or to reinvest the state with any power to further dispose of the land.

Neither Thompson nor his personal representative after his death took any further steps to complete title under his certificate of purchase until the year 1918. Neither was any action taken by the state to foreclose his rights for failure to make interest or other payments required by law. In December, 1918, however, in compliance with the requirements of chapter 602 of the

statutes of 1917, Mary J. Thompson, the appellant, as administratrix, paid the balance due on the purchase money, interest, and penalties accrued under such original certificate of purchase. In the meantime the respondent and its predecessors in interest paid taxes on the property and made interest and installment payments under their certificate of purchase, and at the time this suit was commenced had paid all the purchase money, interest, etc., excepting the sum of \$30.88 which was paid before the trial. It is to be noted that neither of the claimants was at any time in possession of the land, and prior to the bringing of this suit to quiet title neither had made any claim or demand upon the other.

[2] Under this state of the case it is the finding of the trial court and the contention of the respondent that the Thompson claim represented by appellant is barred by laches and under the provisions of section 343 of the Code of Civil Procedure. It is not shown, and is not even claimed that there has been any forfeiture of the Thompson rights as against the state of California by the delay in making payments of the interest, penalties, and balance of the purchase price under his certificate of purchase. Long as the period of delinquency was, it worked no forfeiture under the law in the absence of a foreclosure until after the enactment of chapter 602 of the Statutes of 1917; and the final payments above referred to were made in compliance with that statute.

The laches and lapse of time complained of is in failing to protest or take action against the claim to the property evidenced under respondent's certificate of purchase, and in permitting the payment of taxes and other expenditure of money by the respondent and its predecessors. We are unable to see where any duty rested upon the defendant in this matter. No attack was made upon the Thompson title until this action was begun. There was no adverse possession. There was not even a notice of hostile claim other than might arise from constructive notice of the issuance of the second certificate of purchase, if the facts show such constructive notice. *Karns v. Olney*, 80 Cal. 90, 22 Pac. 57, 13 Am. St. Rep. 101; *Crouse-Prouty v. Rogers*, 33 Cal. App. 250, 164 Pac. 101. The Thompsons had a right to rest on the sufficiency of their own claim. If it was good, the other was a nullity, in the absence of an adverse possession. In any event, there seems to have been no substantial difference in the time during which defendants slept on their rights than characterized the acts of the plaintiff. Neither made any move until this suit to quiet title was filed by plaintiff, and it was met by the answer of defendants. Defendants' claim was first in time. Plaintiff was logically the attacking party, and so

long as it took no steps to jeopardize defendants' legal rights, there was no need for defendants to act. This is not a case where one party stands secretly by and allows another to expend money upon the other's land with knowledge that it is being done under a mistake of facts. Plaintiff had the same knowledge of the state of this title that defendants had. It should have made investigation or taken legal action earlier, if it wanted assurance against loss. The parties were at arm's length holding hostile claims of title upon the same land.

The rule as to laches applicable to this case is well stated in *Kypadel Coal & Lumber Co. v. Millard*, 165 Ky. 432, 177 S. W. 270, cited in appellant's opening brief, where it is said:

"Both parties are claiming under a record title from a common source, and the only question is superiority. Limitation or lapse of time does not perfect a defective record title in the absence of possession. If the situation of these parties had continued 10, 15, or 20 years longer, and the question should then arise, as now, as to which title of record is superior, a plea of limitation would not avail for either party against the other. Appellants show that they have regularly paid the taxes on the land. * * * One cannot acquire title to the land of another by paying the taxes on it, nor will a claim of title under a void deed, although recorded, ripen into a fee by lapse of time, nor will limitations run against the owner of record in favor of a claimant not in possession, nor is it incumbent upon the owner to sue for cancellation of a void deed, or to take steps to remove a cloud upon his title. * * * If he desires to have the cloud removed the law affords a remedy, but he is not compelled to go to that expense, and his failure to do so cannot be considered laches, nor will it operate as an estoppel against him. A mere claim of title, even of record, unaccompanied by adverse holding, will not start the statute." *Liebrand v. Otto*, 56 Cal. 248; *Sanborn v. South Florida Naval Stores Co.*, 75 Fla. 145, 78 So. 428.

[3] A defendant holding the legal title, or a paramount claim to the legal title, is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title. *Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co.*, 126 Fed. 46, 60 C. C. A. 588; *Hays v. Marsh*, 123 Iowa, 81, 98 N. W. 604.

It would be strange application of the doctrine of laches to hold in this instance that the plaintiff could maintain its attack upon the validity of defendants' claim of title, but that the defendants might not defend by showing the invalidity of plaintiff's claim. Defendants' right of action is no more stale than that of plaintiff. Both arose at the same time. When plaintiff redeemed from the tax sale and obtained a certificate of purchase from the state, a right of action arose in favor of each claimant against the

other, where neither had a right of action before.

The same argument applies to the plea of the statute of limitations. Plaintiff commences this action 9 years after its right of action accrued, and interposes the plea of the statute of limitations against an affirmative defense which arose at the same time.

[4] In any event, this is not a case where the statute of limitations has run against either of the parties. An outstanding adverse claim, which amounts only to a cloud upon the title, is a continuing cause of action, and is not barred by lapse of time, until the hostile claim is asserted in some manner to jeopardize the superior title. So long as the adverse claim lies dormant and inactive the owner of the superior title may not be incommoded by it, and has the privilege of allowing it to stand indefinitely. Each day's assertion of such adverse claim gives a renewed cause of action to quiet title until such action is brought. *People v. Center*, 66 Cal. 551, 565, 5 Pac. 263; 6 Pac. 481; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380; *Kypadel Coal & Lumber Co. v. Millard*, supra.

If respondent's contention could be maintained, the plaintiff here would be permitted to establish title to this land by reliance upon a 4-years' statute of limitations under mere color of title and payment of taxes, whereas, it requires 5 years under such a claim, with actual, open, and continuous adverse possession to obtain title by prescription.

The decisions in *Hynes v. M. J. and M. M. Consolidated Co.*, 168 Cal. 651, 144 Pac. 144, and *Aikins v. Kingsbury*, 170 Cal. 675, 151 Pac. 145, relied upon to sustain the plea of laches, do not apply to the facts of this case.

In both of the cases cited the application of the doctrine was sought against the plaintiffs for their delay in bringing suit. In the *Hynes* Case the defendants were in actual possession of the premises, and had, with the knowledge of plaintiff, expended a large sum of money in the successful development of oil wells on the property. In the case of *Aikins v. Kingsbury* the proceeding was by mandamus to compel the issuance by the state of a patent to school lands under a certificate of purchase to one Brackett. There had been a judgment of foreclosure against the defendant for default in his payments, and an alleged termination of his rights under an act of the Legislature declaring such rights forfeited. As is stated in the opinion:

"For more than 38 years no attention was paid to the obligation to pay interest in advance each year to the state. Meanwhile the state had at least attempted foreclosure proceedings, and in 1889 had constructively notified all persons interested in the matter of the intention to disregard any asserted rights to the land aris-

ing under the Brackett purchase unless the arrears should be paid, yet nothing was done by the holder of the certificate which had been issued to Brackett until after the completion of the sale to Phillips."

The above was an action to compel specific performance, and in such cases it is incumbent upon the plaintiff to have acted with all the diligence the nature of the case will permit. *Henderson v. Hicks*, 58 Cal. 364; *Hicks v. Lovell*, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679; *Fowler v. Sutherland*, 68 Cal. 418, 9 Pac. 674.

The findings of the trial court barring the defense in this action for laches and under the statute of limitations are not supported by the evidence.

The judgment is reversed.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; LAWLOR, J.; SHURTLIFF, J.

54 Cal. App. 656

JENSEN v. CARLENZOLI et al. (Civ. 3901.)

(District Court of Appeal, First District, Division 1, California. Oct. 25, 1921.)

1. Interpleader — 28 — Defendants placed against each other in determining nature of action.

Where purchaser of a dairy business paid part of the price to agent of sellers, and agent, on repudiation of contract by purchaser, sued in intervention to determine right to deposit, payment to agent will be considered payment to sellers, and cause would proceed as an action by purchaser against the sellers to recover the deposit.

2. Sales — 391(9) — Sellers of dairy business held entitled to stand on contract and retain deposit.

Where purchaser of a dairy business paid down part of price, and was to pay balance when consent to assignment of lease had been obtained, and purchaser went into possession, and the consent was obtained and lease assigned to purchaser, but he thereafter repudiated the transaction, because he could not procure a loan to pay the balance, sellers were entitled to stand on their contract and retain the deposit, and were not relegated to an action for damages for the breach of the contract.

3. Sales — 65 — Where passing of title and payment are concurrent, neither party can put other in default, except by tendering performance.

The obligations of the parties to an agreement for the sale and purchase of property are mutual; and where the passing of title and payment for the property are intended to be concurrent, neither party can put the other in default, except by tendering performance on

his part, unless the other party waives the tender or by his conduct renders it unnecessary.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Suit in intervention by Jorgen Jensen against Joe Carlenzoli and others. From the judgment rendered, Pete Matteri appeals. Affirmed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellant.

Jos. K. Hawkins, of San Rafael, for respondent intervenor.

F. A. Meyer and Frank J. Burke, both of Petaluma, for other respondents.

KERRIGAN, J. This was a suit in intervention, brought by the plaintiff against the defendants, to compel them to interplead and litigate their several claims to the sum of \$1,250, which had been deposited by defendant and appellant Pete Matteri with the plaintiff as a payment on account of the purchase price of certain personal property sold to him by defendants and respondents Joe Carlenzoli and Frank Cavallero. Answers and cross-complaints were filed by the respective claimants, and the cause went to trial, and resulted in judgment that the amount of said deposit be paid over to the above-named respondents. Pete Matteri appeals from said judgment.

On or about the 28th day of July, 1920, Pete Matteri agreed to buy from Carlenzoli and Cavallero their dairy business, located in Marin county, together with the unexpired term of their lease on the ranch upon which the business was conducted, for the price of \$12,500. Of that amount \$1,250 was paid to the plaintiff, as the agent of the respondents, on account of the agreed price, of which the balance was to be paid when the lessor or the said premises should consent to the assignment of its unexpired term from the respondents to the appellant. On August 1st Matteri, with the permission of the respondents, took possession of the personal property and premises. On the following day the respondents, having obtained their lessor's consent, duly assigned said lease to Matteri, who thereupon applied to a bank for a loan, the purpose of which was to enable him to complete the purchase of said property. The bank declined to make the requested loan, unless Matteri should secure a five years' extension of said lease. Accordingly Matteri negotiated for and secured such extension upon what he concluded were satisfactory terms, although at a slight increase in rental therefor. Subsequently, and about a week after Matteri had taken possession of the dairy, he repudiated the transaction, abandoned the premises, and demand-

ed the return of the \$1,250. For the purpose of protecting and preserving the property, the respondents took possession of the dairy, and claim that since that time they have conducted it for and on account of Matteri. At all times since the making of their agreement with Matteri they have been and are now ready and willing to make and deliver to him a good and sufficient bill of sale of said personal property.

In the trial court the appellant's main, if not sole, contention was that one of the conditions of the sale was that the lessor would consent to accept him as a tenant for an extension of the lease for five years at the same rental as paid by the respondents. The preponderance of the evidence, however, was to the contrary, and the court so found. This is practically all there is to the case.

[1] The \$1,250 having been paid to the plaintiff as the agent of the respondents, it was, of course, in effect paid to them. The case, then, should be considered as an action by the appellant against the respondents to recover the amount of his first payment on the contract. The findings—which are supported by the evidence—disclose that respondents agreed to sell the dairy for the sum of \$12,500, accepting \$1,250 on account of such purchase price; that they were to obtain the consent of the lessor to an assignment to appellant of the unexpired term of the lease, which they did; that appellant went into possession of the property and was duly tendered a bill of sale for the same.

[2, 3] Under these circumstances, the respondents were entitled to regard the title to the property as having vested in the appellant (*Cuthill v. Peabody*, 19 Cal. App. 305, 125 Pac. 926; *Bement v. Smith*, 15 Wend. [N. Y.] 493, and were not, therefore, required to resort for relief to an action for damages for breach of the contract, but could, as they did, stand upon the contract and retain the amount paid on account of the purchase price. The respondents having performed all the conditions of the contract undertaken by them, and the defendant Matteri having defaulted in the performance of his obligations thereunder, the latter may not recover his deposit. The obligations of the parties to an agreement for the sale and purchase of property are mutual; and where the passing of title and payment for the property are intended to be concurrent, neither party can put the other in default except by tendering performance on his part, unless the other party waives the tender or by his conduct renders it unnecessary. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(54 Cal. App. 307)

HARRIS et al. v. BISSELL et al.
(Civ. 2245; Sac. 3152.)

(District Court of Appeal, Third District, California, Sept. 23, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Landlord and tenant ⇨136—Lease held not to permit lessee to farm lands.

A lease whereby lessees agreed to use the premises "for sheep pasture purposes only" could not be interpreted to permit farming and as forbidding only the pasturing of heavy-footed animals, or any animals except sheep.

2. Evidence ⇨441(4)—Negotiations prior to execution of lease held inadmissible.

In unlawful detainer to recover land for breach of a covenant that lessees would "use said premises for sheep pasture purposes only," court properly refused to permit defendants to introduce evidence of negotiations leading up to the execution of the lease for the purpose of showing that it was the understanding between the parties that the defendants might farm the land, not having alleged that the lease failed to express the true intention of the parties, and reformation not being asked.

3. Landlord and tenant ⇨134(2)—Court may not change terms of lease.

Owners leasing land to others may in the lease impose any restrictions upon the use to be made of the land, and it is not for the court to decide that some other use would serve the purposes of the owner equally well.

4. Landlord and tenant ⇨291(1)—Demand for performance of covenant held unnecessary before notice to quit.

Where lessees broke a covenant, to use the land for sheep pasturage only, by planting a crop, a notice to quit, given at the time the crop was matured, was not required to demand performance of the covenant; performance thereof being impossible, in view of Code Civ. Proc. § 1161.

5. Landlord and tenant ⇨291(14)—No recovery of both rent and damages in unlawful detainer.

In unlawful detainer to recover possession of land because lessees broke covenant, to use land for sheep pasturage purposes only, by raising a crop of grain thereon, it was error to give plaintiff judgment for both the value of the crop and the agreed cash rental, assuming that agreed rent may be recovered in such action.

6. Landlord and tenant ⇨291(14) — When agreed rent is evidence of rental value.

Ordinarily it may be said that the agreed rent is evidence of the rental value of the land in an unlawful detainer suit, but that is not true where part of the premises have been used for the benefit of the lessors in a matter not contemplated by the parties at the time of the execution of the lease.

7. Landlord and tenant ⇨291(14)—Nature of action and amount of recovery.

An unlawful detainer, founded upon breach of a covenant to use land for sheep pasturage

purposes only, is not an action upon contract, but for recovery of possession, and incidentally for the damages occasioned by the unlawful detainer, and the rental value during the unlawful detainer may be greater or less than the rent provided for in the lease.

8. Landlord and tenant ⚡291(14)—Defendants not entitled to reimbursement for expenditures after notice of forfeiture.

In landlord's action of unlawful detainer, lessees are not entitled to reimbursement for expenditures incurred in the preparation and seeding of the land after notice of forfeiture for breach of a covenant.

9. Landlord and tenant ⚡112(3)—Claiming rent in unlawful detainer held not "waiver" of breach of covenant.

In unlawful detainer, recovery of possession is the main object, and recovery of rent a mere incident, and in action to recover land for a breach of a covenant, it cannot be inferred that by asking for judgment for rent due prior to the notice of forfeiture, but covering a period of time largely after notice of the breach that plaintiff intended to waive the breach; waiver being the intentional relinquishment of a known right after knowledge of the facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

10. Landlord and tenant ⚡291(14)—Damages and rent recovered only under statute.

In the absence of some statutory provision expressly authorizing it, damages and rent cannot be recovered in unlawful detainer, but damages or rent accruing prior to the forfeiture may, of course, be recovered in an independent action.

On Hearing in Supreme Court.

1. Landlord and tenant ⚡291(12)—Evidence admissible to show that planting land was usual method of preparing it for pasturage of sheep.

In unlawful detainer to recover possession of land for breach of covenant, to use land for sheep pasturage purposes only, by raising grain thereon, court should have permitted introduction of any competent evidence tending to show that planting the land or a part thereof in barley was a reasonable or usual method of preparing it for the pasturage of sheep, or that the growing of barley was intended in good faith to be used, or was used, for sheep pasture, and not to produce grain, or that the planting and growing of the barley was an appropriate method of preparing the land for the sowing of white clover thereon, and that it was done in good faith for that purpose.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Emma C. Harris and another against H. L. Bissell and others, copartners, doing business under the firm name and style of Capay Valley Stock Company, and others. Judgment for plaintiffs and defendants appeal. Reversed in the District Court

of Appeal, and hearing denied in Supreme Court.

Joseph M. Raines, of Fairfield (Marcel E. Cerf, of San Francisco, of counsel), for appellants.

Arthur C. Huston and Harry L. Huston, both of Woodland, for respondents.

FINCH, P. J. This is an action of unlawful detainer after breach by the defendants of a covenant of the lease under which they held certain lands. Plaintiffs were given judgment declaring the lease forfeited and awarding them damages and also the amount of rent stipulated in the lease. The defendants appeal.

[1] By the terms of the lease the defendants expressly covenanted and agreed:

"That they will use said premises for sheep pasture purposes only," and that "if default shall be made in any of the covenants herein contained, on the part or behalf of the said parties of the second part, * * * then and from thenceforth it may be lawful for the said parties of the first part * * * into and upon the said premises, and every part thereof, wholly to re-enter, and the same to have again, repossess and enjoy as in their first and former estate * * * and that on the last day of said term or other sooner determination of the estate hereby granted, the said parties of the second part * * * shall and will, peaceably and quietly leave, surrender and yield up unto said parties of the first part * * * all and singular of the said premises."

The breach of which complaint is made consisted of raising a crop of grain on half of the land. Appellants contend that their covenant to "use said premises for sheep pasture purposes only" should be interpreted to mean "that they could not pasture on the land any heavy-hoofed animals or any animals except sheep" and "that the lease permitted them to farm the land." The language of the lease, however, is too plain to admit of any other interpretation than that given it by the trial court.

[2] The defendants attempted to introduce evidence of the negotiations leading up to the execution of the lease with the evident purpose of showing that it was the understanding between the parties that the defendants might farm the land. In their answer the defendants did not allege that the lease failed to express the true intention of the parties, or ask to have it reformed, and, since the terms of the lease are clear, the proffered evidence was properly excluded.

[3] The defendants sought to prove that the land was benefited for pasturage purposes by being farmed. The plaintiffs were interested in the condition in which the land would be returned to them. It is a common belief that it is beneficial to lands to cease farming them for a time and to use them exclusively for pasturing live stock thereon.

However this may be, owners leasing lands to others may, in the lease, impose any restrictions upon the use to be made of the lands, and it is not for a court to decide that some other use would serve the purposes of the owner equally well.

It is urged that the plaintiffs consented to the farming of the land and that by their acts and acquiescence they are estopped from claiming a forfeiture. The defendants did not plead facts sufficient to constitute an estoppel. The court found, on conflicting evidence, that the plaintiffs did not consent to the farming of the land by defendants.

[4] Appellants contend that "the notice to quit did not require performance of the covenant" broken, and was therefore insufficient. At the time the notice was given the crop was matured, and, the land having been used for a purpose not authorized by the lease, something which could not be undone, performance of the covenant thereafter was impossible, and under the express provisions of section 1161 of the Code of Civil Procedure no demand for the performance of the covenant was required. *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449; *Zucco v. Farullo*, 37 Cal. App. 562, 174 Pac. 929; *Matthews v. Digges*, 188 Pac. 283; *Pfitzer v. Candeias*, 200 Pac. 839.

The seeding of the land was completed early in February, 1918. Notice of forfeiture demanding possession of the premises was served on the defendants in June, and thereafter this action was commenced, June 25. After the action was commenced the defendants harvested the crop of barley raised on the premises and remained in possession until the time of trial. Judgment was entered August 12, 1919. By the judgment the plaintiffs were given the full value of the harvested crop, less the cost of harvesting and marketing the same, or the net sum of \$4,746.09, as damages and, in addition thereto, the sum of \$2,400, "as and for rental, according to the terms of said lease, being the amount of rent due as follows: \$800 on May 20, 1918; \$800 on November 1, 1918; and \$800 on May 20, 1919." The lease was for the term of three years from the 20th day of May, 1917. Prior to suit the defendants had paid the first year's rent. The lease provided for a rental of \$1,600 a year for the second and third years of the term, \$800 to be paid on the 20th day of May, and \$800 on the 1st day of November of each year. Prior to notice of forfeiture the defendants tendered payment of the installment of \$800 due May 20, 1918, but the plaintiffs declined to accept it at that time. There is no claim that there was any default in the payment of rent. Plaintiffs' notice claiming forfeiture of the lease is dated June 6, 1918, and, as stated, suit was commenced June 25, 1918. It thus appears that the forfeiture was declared a few days after the beginning of the second year of the term.

[5-7] Appellants contend that it was error to give judgment for both the value of the crop and the agreed rent. This contention must be sustained. In *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631, where a similar question was under consideration, the court said:

"It is clear * * * that it [plaintiff] is not * * * entitled to recover both the value of the use and occupation and the crop or damages equalling its value. It is hardly necessary to call attention to the extraordinary results which would follow a holding that it might do so. The result, however, would be that the defendant would be paying the plaintiff for the privilege of furnishing the seed, all the labor, and machinery necessary to sow and harvest the crop, and at the same time giving plaintiff the entire crop raised by his industry. In other words, defendant would be paying rent to the plaintiff for the privilege of raising a crop for plaintiff."

During part of the time for which the agreed rent was allowed the defendants had the use of but half of the land, the other half being devoted to raising a crop of grain for the exclusive benefit, as it turned out of the plaintiffs. Under such circumstances, the plaintiffs were not entitled to the full rent agreed upon, even if it be conceded that rent may be recovered in this action. There was no evidence produced to show, and the court did not find, the rental value of the land. Ordinarily it might be said that the agreed rent is evidence of the rental value, but that is not true where part of the premises have been used for the benefit of the lessors in a manner not contemplated by the parties at the time of the execution of the lease. Under the plaintiffs' allegation of damages they were entitled to recover, as an element thereof, the rental value of the premises during the unlawful detainer, making due allowance for the fact that the defendants had use of but half of the land during part of the time of such unlawful holding. Since the action is not upon contract (*Arnold v. Krigbaum*, 169 Cal. 146, 146 Pac. 423, Ann. Cas. 1916D, 370) but for recovery of possession and, incidentally, for the damages occasioned by the unlawful detainer, such rental value may be greater or less than the rent provided for in the lease.

[8] The court allowed the defendants their cost of harvesting and marketing the crop. They claimed reimbursement also for their expenditures incurred in the preparation and seeding of the land. On service of the notice of forfeiture, it became the duty of the defendants, under their lease contract and under the law, to surrender possession of the premises to the plaintiffs. Had this been done, the plaintiffs would have taken the premises without liability for the defendants' expenditures theretofore incurred. It seems plain that by wrongfully withholding posses-

sion the defendants could not acquire a right to reimbursement for such expenditures which they would not have had if they had rightfully surrendered possession.

[9, 10] In their complaint the plaintiffs ask for judgment for \$800 as rent due prior to the notice of forfeiture, but covering a period of time largely after notice of the breach of which complaint is made. The appellants argue that the plaintiffs thereby waived the breach. "But waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts." *Alden v. Mayfield*, 164 Cal. 11, 127 Pac. 45. In unlawful detainer, recovery of possession is the main object, and recovery of rent a mere incident. It cannot be inferred that by setting up the incident it was intended to waive the primary purpose of the suit. "One who seeks the summary remedy allowed by the statute must bring himself clearly within its terms." *Opera House Ass'n v. Bert*, 52 Cal. 471; *Iburg v. Fitch*, 57 Cal. 192. The proceeding is primarily to recover possession of land. "In the absence of some statutory provision expressly authorizing it, damages cannot be recovered." 19 Cyc. 1169; 11 R. C. L. 1180. Damages accruing prior to the unlawful detention cannot be recovered in the proceeding. *Chase v. Peters*, 37 Cal. App. 358, 174 Pac. 116. Rents may "be recovered only because the statute so provides." *Chase v. Peters*, *supra*.

From what has been said, it logically follows that rents can be recovered only in cases where the statute so provides. The statute provides for the recovery of rent, the agreed rent, only in case of "default in the payment of rent." Damages or rent accruing prior to forfeiture may, of course be recovered in an independent action. *Hicks v. Herring*, 17 Cal. 566. There is some suggestion to the effect that the defendants stipulated at the beginning of the trial that judgment might be rendered against them for the rent provided for in the lease. While the stipulation does not appear in the record, the only inference to be drawn from what was said by respective counsel is that defendants offered to allow judgment to be taken against them for the amount of such rent only as a complete settlement of the case and not in addition to any judgment the court might render for damages.

The judgment appealed from is reversed.

We concur: HART, J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing in the Supreme Court is denied.

The judgment of the District Court of Appeal reversing the case remands it to the superior court for a new trial. As we do

not entirely approve the opinion of the District Court, it is necessary that we state the points not approved, so that the same may not become the law of the case upon such new trial.

[11] Any competent evidence tending to show that planting the land, or a part thereof, in barley was a reasonable or usual method of preparing it for the pasturage of sheep, or that the growing barley was intended in good faith to be used, or was used, for sheep pasture, and not to produce grain, or that the planting and growing of the barley was an appropriate method of preparing that land for the sowing of white clover thereon, and that it was done in good faith for that purpose, should have been admitted. We express no opinion, however, on the question whether evidence of the negotiations preceding the execution of the lease was competent evidence for such purposes.

We also withhold approval from the part of the opinion stating that the defendants did not plead facts sufficient to constitute an estoppel or to show a waiver of the forfeiture claimed by the plaintiff. If the answer is insufficient in that respect, and the defendants can truthfully amend the same, such amendment should be allowed if leave is applied for.

SHAW, C. J.; LENNON, J.; SHURTLIFF, J.; SLOANE, J.; WILBUR, J.; RICHARDS, Justice pro tem., concur.

54 Cal. App. 522

GLASCOCK v. WILDE, City Clerk. (Civ. 3534.)

(District Court of Appeal, Second District, Division 2, California, Oct. 13, 1921. Hearing Denied by Supreme Court Dec. 12, 1921.)

1. Municipal corporations §120—City council's assertion as to ordinance having been repealed credited by court.

City council's assertion, in ordinance that ordinances dealing with same subject-matter had been repealed, and that there are no existing ordinances relating thereto, will be given the fullest respect and credence by the courts, unless falsity thereof is adequately demonstrated.

2. Municipal corporations §63(1)—City council's assumption that matter affects public interest conclusive upon courts.

When the Legislature, or board of supervisors, or city council engaged in the exercise of legislative functions, proceed upon the assumption that a matter concerning which the acts is one affecting the public interest, or designed to promote the general welfare, the assumption is conclusive upon the courts unless it is plainly apparent to them that the view entertained by the legislative body is without just foundation.

3. Municipal corporations $\S$ 122(1) — Denial of statement in ordinance that there are no other ordinances relating to subject-matter insufficient to impeach assertion, in absence of affirmative allegations designating particular ordinances.

Mere denial that at the time of the enactment of an ordinance there was no other ordinance relating to the same subject-matter without affirmative allegations designating particular ordinances upon the subject, held insufficient to controvert statement in ordinance that there were no other ordinances in effect relating to the subject-matter.

4. Municipal corporations $\S$ 120—Ordinance prohibiting solicitation of custom and patronage upon trains and at depots held an emergency measure.

Ordinance prohibiting solicitation of custom and patronage at depots and streets and sidewalk adjacent thereto, and upon trains, cars, boats, and vehicles, held properly declared an emergency measure by the city council under Los Angeles City Charter, $\S$ 198g, providing that an ordinance required for the immediate preservation of public peace or safety may be made effective upon publication where it contains a statement showing its urgency and is passed by three-fourths vote of the council.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Petition for writ of mandate by M. H. Glascock against Charles L. Wilde, City Clerk of the City of Los Angeles, State of California. Judgment refusing writ, and defendant appeals. Affirmed.

Warren L. Williams and Seymour S. Silvertown, both of Los Angeles, for appellant.

Charles S. Burnell, City Atty., and Wm. P. Mealey, Asst. City Atty., both of Los Angeles, for respondent.

WORKS, J. The petition in this matter demanded the issuance of a writ of mandate requiring defendant to perform certain official acts. A demurrer to the petition was sustained, whereupon an amended petition was presented. A demurrer to that pleading being likewise sustained, but without leave further to amend, judgment went for defendant, and petitioner appeals. The sole question in the case is whether the demurrer to the amended petition was properly sustained.

The charter of Los Angeles provides, in section 198g, quoting only so much of it as is pertinent to our present inquiry:

"No ordinance passed by the council shall go into effect until the expiration of thirty days from its publication, except [certain specified ordinances, and] an ordinance required for the immediate preservation of the public peace, health or safety, which shall contain a specific statement showing its urgency, and is passed by a three-fourths vote of the council."

This language is contained in the portion of the charter securing to the people of the city the power to invoke the right of referendum and prescribing a system of procedure for the exercise of that right. The postponement for 30 days of the taking effect of ordinances, generally, is intended to furnish an opportunity for the circulation and filing of referendary petitions against them during that period. Ordinances of the kinds which are excepted from the operation of the 30-day clause, including those "for the immediate preservation of the public peace, health or safety," etc., take effect upon their publication, and the right of the people to exercise the referendum against them is denied, therefore, by section 198g.

The city council of Los Angeles passed an ordinance entitled

"An ordinance prohibiting the solicitation of custom and patronage in railroad depots and upon railroad depot grounds and premises and upon certain portions of the public streets adjacent thereto; regulating the solicitation of custom and patronage upon railroad trains, cars, boats and vehicles operated as common carriers; regulating the standing of vehicles upon depot grounds and premises and upon portions of the public streets, in the city of Los Angeles, adjacent thereto; prescribing a penalty for the violation thereof, and declaring that the enactment thereof is urgently required for the immediate preservation of the public peace, health and safety."

Following sections regulatory of the matters referred to in the title it was provided in section 9 of the ordinance that—

"By reason of the fact that Ordinance No. 33,801 (New Series), entitled 'An ordinance regulating the business of soliciting custom or patronage upon the public streets, boats, railway trains and depots and providing for the issuance of permits thereof,' approved March 1, 1916, was expressly repealed by the provisions of section 2 of Ordinance No. 39386 (New Series), entitled 'An ordinance regulating the business of soliciting patronage upon public streets,' approved September 23, 1919, and by reason of the repeal of Ordinance No. 39385 (New Series), entitled 'An ordinance regulating soliciting upon railroad trains, prohibiting soliciting upon depot grounds and upon certain portions of the public streets adjacent thereto, regulating the standing of vehicles upon portions of the public streets and prescribing a penalty for the violation thereof,' approved September 23, 1919, there is now no ordinance of the city of Los Angeles in force or effect regulating the solicitation of custom and patronage in or about railroad depots and premises or upon public streets or sidewalks adjacent thereto, or regulating the solicitation of such custom and patronage upon trains, cars, boats and vehicles operated as common carriers, or regulating the standing of vehicles upon depot grounds or premises, or upon public streets adjacent thereto, and the absence of adequate

prohibitory and regulatory legislation admits of, has resulted in, and will continue to result in the indiscriminate and unrestrained solicitation of custom and patronage upon such trains, cars, boats and vehicles and at and about such railroad depots and premises and upon public streets and sidewalks adjacent thereto, and the peace of the general public will be disturbed and the safety of the general public will be greatly and seriously endangered, and the general public, but especially the traveling public, and more especially unaccompanied females arriving in the city of Los Angeles by rail, and otherwise, will be greatly annoyed, inconvenienced and harassed and their comfort, safety, welfare and health endangered thereby, for which said reasons this ordinance is urgently required for the immediate preservation of the public peace, health and safety, and the city clerk shall certify to the passage of this ordinance by a three-fourths vote of the city council and cause it to be published once in the Los Angeles Daily Journal, and thereupon it shall take effect and shall thereafter be in force."

Before the expiration of 30 days after the passage of the ordinance appellant presented to respondent referendary petitions against the enactment. The petition in this matter alleges that these referendum petitions were in all respects according to law in form, and that they were presented to respondent in the manner required by law. It is also alleged that they contained the signatures of such a number of the qualified electors of the city as made it incumbent upon respondent to file and examine them and to certify and present them to the city council, these duties being required of respondent by the provisions of the city charter in proper cases. Upon due request therefor, respondent refused to perform the acts mentioned, and the filing of the petition in this matter by appellant was the outcome of the refusal.

The question of the sufficiency of the petition for a writ of mandate turns upon two points: First, are the statements of fact made in the ninth section of the ordinance to be taken as true? Second, if they are so to be taken, do they, together with the subject-matter of the ordinance, show that it presented such a case or urgency as is contemplated by the above-quoted provisions of section 198g of the city charter?

The statements of fact in section 9 which are principally of moment in treating the first question are those to the effect that, by reason of the repeal of certain designated ordinances, "there is now no ordinance of the city of Los Angeles in force or effect regulating" the matters which are the subject of the enactment sought by appellant to be set aside by the referendum. If this statement is true the assertions made immediately following it are necessarily true. To be more specific, if it be true that at the time of the passage of the ordinance now under consideration there was in force in Los Angeles no ordinance covering the same subject-matter,

it necessarily follows that for lack of such legislation there must have resulted, and it is equally true that there would have followed, an "indiscriminate and unrestrained solicitation of custom and patronage" upon the means of conveyance mentioned in the ordinance and at and about the places referred to in it. It appears to us that it would follow, as well, from the absence of such regulatory legislation in a large city, that the peace of the general public would be disturbed; that the safety of the general public would be greatly and seriously endangered; that the general public, and especially the traveling portion of it, and more especially women travelers, would be greatly annoyed, inconvenienced, and harassed, and their comfort, safety, welfare and health endangered.

[1, 2] Therefore, was there, at the time of the passage of the attacked ordinance, no ordinance in force in Los Angeles upon the same subject? The assertion of the city council that there was not would ordinarily stand as conclusive. A city legislative body must always have the highest degree of knowledge as to what of its enactments have been repealed and what are still in force. When such a body, in the pursuit of its legislative duty, makes an assertion based upon that knowledge, the assertion demands the fullest respect and credence at the hands of the courts, unless its falsity be adequately demonstrated, if, indeed, the courts are not absolutely bound by it, which we need not now decide. Speaking on a somewhat similar subject and having in mind a principle which is equally applicable here, this court said in *County of Los Angeles v. Dodge*, 197 Pac. 403:

"When the Legislature or a board of supervisors or city council engaged in the exercise of legislative functions proceeds upon the assumption that the matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts, unless it is plainly apparent to them that the view [entertained by the legislative body] is without just foundation."

[3] Appellant's petition for a writ of mandate does not adequately controvert the assertion made by the council, granting for the sake of argument that it might have been controverted at all. The pleading merely "denies that at the time of the enactment" of the ordinance in question here "there was no ordinance of the city of Los Angeles in force and effect, or force or effect, regulating the solicitation of custom and patronage, or custom or patronage, in or about the railroad depots or premises, or upon public streets or sidewalks adjacent thereto, or regulating the solicitation of such custom and patronage upon trains, cars, boats, and vehicles, or upon trains, or cars, or boats, or vehicles operated as common carriers, or

regulating the standing of vehicles upon depot grounds or premises or upon public streets adjacent thereto. Petitioner denies that there ever was an absence of such legislation of any nature, whatsoever or at all." There was no attempt to show, by affirmative allegation in support of petitioner's contention, what ordinances were in force upon the subject in question. In short, the petition treated the assertion of the council merely as if it were contained in a pleading of a private adversary in an action at law, not as the formal statement of a fact peculiarly within its knowledge made by a public legislative body in the performance of its duty. Such a treatment does not meet the exigencies of the occasion. The assertion of the council must stand as unimpeached and conclusive.

[4] Having arrived at this determination, the remaining question is easy of solution. It is, in fact, practically settled by what we have said in discussing the first question, for we have already expressed the view that the other matters stated in section 9 naturally and inevitably follow from the assertion that there was not in force in Los Angeles, at the time of the passage of the assailed ordinance, any ordinance upon the same subject. Further, however, the ordinance now in question has already been before the first division of this court in a proceeding in which the point now before us, if not actually concluded, was in the mind of the court. It was there said:

"The legislative body, presumably upon a sufficient investigation and knowledge of the situation existing, has determined that facts existed constituting an emergency, such that the peace and safety of the community, and particularly the traveling public, required that appropriate legislation be immediately enacted. The facts recited in the ordinance are facts which reasonably might be held to constitute such emergency." *Ex parte Statham*, 187 Pac. 986.

The courts have made frequent declaration concerning the harassing and annoying character of the unrestrained practices which it was the object of the ordinance in question to restrain and regulate (*Depot C. & B. Co. v. Kansas City T. Ry. Co.* [C. C.] 190 Fed. 212; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 1921. See, also, *Redline T. Agency v. Southern Pac. Co.*, 3 Ops. and Ords. R. R. Comm. Cal. 526). We are satisfied that the ordinance was an urgency measure within the terms of section 198g of the Los Angeles charter. The demurrer was properly sustained.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 614

McCORD v. MADDUX et al. (Civ. 3943.)

(District Court of Appeal, First District, Division 1, California. Oct. 20, 1921. Hearing Denied by Supreme Court Dec. 19, 1921.)

1. Appeal and error $\Leftrightarrow$ 1071(1)—Finding, if outside the pleading, held not to harm appellant.

In an action by special administrator to set aside a deed given by intestate in which the answer of the grantees alleged title from the date of the deed, but did not allege, as was the fact, that the deed was placed in escrow to be delivered on death of grantor, finding of the court that title presently passed by such escrow delivery was not harmful to plaintiff appellant if outside the pleading, where he was fully aware of the fact.

2. Deeds $\Leftrightarrow$ 208(5)—Conveyance placed in escrow, to be delivered, on death held to pass title.

In action by special administrator to set aside a deed given by intestate to a third person, to be delivered to grantees on her death, evidence held to show that intestate intended to presently grant the title to grantees, and not to exercise control over the deed.

3. Deeds $\Leftrightarrow$ 61—Present title may pass on delivery to third person to deliver on death of grantor.

A person may make a conveyance of property and place it in the hands of a third party, to be delivered to the grantee on the death of the grantor, and such delivery will be effectual to pass a present title if the grantor's intention is to make such delivery absolute, and place it beyond his power thereafter to revoke or control the deed.

Appeal from Superior Court, Napa County, Henry C. Gesford, Judge.

Action by James H. McCord, as special administrator of the estate of Mary McCord, against Lillie E. Maddux and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McKannay & Hunt, of San Francisco, for appellant.

Clarence N. Riggins, of Napa, for respondents.

RICHARDS, J. This appeal is from a judgment in favor of the defendants in an action brought by the plaintiff as special administrator of the estate of Mary McCord, deceased, to quiet title to certain real estate situate in the county of Napa, and to have canceled a certain deed from Mary McCord to Lillie E. Maddux and Anna A. Newell, two of the defendants in the action, which had been placed of record, and thus constitutes a cloud upon the title to said property, and which deed the plaintiff alleges the said decedent never made nor delivered to said grantees. The answer of the defendants

denies title to said premises in Mary McCord at the time of her death, and alleges that said Mary McCord in her lifetime, and while the owner of said real estate, made, executed and delivered said deed thereto to the said grantees named therein, who had ever since been, and still were, the owners of the whole thereof. The cause went to trial upon the issues as thus presented, when certain evidence, to be hereafter adverted to, was adduced. Upon its submission the trial court, after making certain formal findings, proceeded to find that Mary McCord, on or about the 5th day of October 1912, while the owner of the whole of said real estate, had freely and voluntarily made, signed, and acknowledged her deed in writing, whereby she granted and conveyed unto said Lillie E. Maddux and Anna Augusta Newell all of said property, and that on or about said date she had delivered said deed to one W. J. Blake, and then and there instructed said Blake to hold said deed during her lifetime, and upon her death to deliver the same to said grantees; that said Mary McCord reserved no power thereafter to revoke or control said deed, and intended at the time she so delivered it to said Blake to make said delivery absolute, and to place said deed beyond her power and control, and thereby divest herself of the title to said real estate, excepting a life estate therein; that said W. J. Blake held said deed pursuant to said instructions during the lifetime of said Mary McCord and upon her death delivered the said deed to said grantees.

As conclusions of law from the foregoing findings of fact, the trial court found said defendants to be the owners of the property, and ordered judgment in their favor. From such judgment this appeal is taken.

[1] The first contention of the appellant is that the trial court in making the foregoing findings had gone outside the issues in the case, to the plaintiff's injury. It is true that the defendants in their answer asserted complete title in themselves from and after the 5th day of October, 1912, the date of the execution of said deed, and had not pleaded nor relied upon an escrow delivery of the same to W. J. Blake as the source of their title. But in their answer elsewhere the defendants had denied the plaintiff's asserted right and interest in said property, and had generally averred title in themselves. This would have put the plaintiff upon proof of his own asserted title, and thus have created an issue which would have justified the findings of the trial court. The only ground for complaint on the part of the plaintiff and appellant would be that he was in some way misled to his injury by the findings of the court; but in this respect the record shows that he was at all times during, and even prior to, the trial of the cause fully aware of the circumstances surrounding the making

and delivery of the deed which formed the sole basis of the defendants' assertion of ownership of the premises in question, and hence could neither have been misled nor surprised by the findings and conclusions of the trial court.

[2] The next, and main, contention of the appellant is that the findings of the trial court to the effect that Mary McCord, at the time of the making, execution, and delivery to W. J. Blake of the deed in question, did and intended to divest herself of the title to the real estate therein described, are against the evidence, the contention of the appellant being that upon the undisputed facts in the case the findings of the court should have been that the grantor in said deed, by her said making and delivery of the same, did not intend to divest herself of the power to revoke said deed or control the title to the premises described therein, but only intended and attempted to make a testamentary disposition of the property, to become effectual at the time of her death.

In order to test this contention, the facts of the case may be briefly recited: Mary McCord, on October 5, 1912, was, and for some years prior thereto had been, the owner and in possession of the real estate involved in this action, which consisted of a farm known as the "home place," and which at that time was in the possession of one James H. McCord, who was her son, and who was holding and cultivating the premises as her tenant. She was then 78 years of age, and was living with one or the other of her two daughters, the defendants herein. She had recently been subject to a severe illness, from which she was somewhat recovered. For several years prior to said date she had for her business agent one W. J. Blake, who was in the real estate and insurance business in St. Helena, and was also a notary public and justice of the peace. He held in fact her power of attorney, and attended to the details of her affairs, particularly with reference to the leasing and handling of the home place. On or about said last-named date she sent for Mr. Blake, who came to the Kibbler building in St. Helena, where she was staying with one of her daughters, and she there instructed him to prepare certain papers, consisting of a deed of gift of the home place, and also of a bill of sale of the personal property thereon, to her two daughters, Mrs. Maddux and Mrs. Newell. He returned to his office and prepared said documents for her signature, and took them to her in the Kibbler building, where she signed and acknowledged the same, and then gave them to him, with instructions to deliver them to Mrs. Maddux and Mrs. Newell upon her death. Mr. Blake took the two documents to his office, placing them in his safe. Within a few days thereafter Mary McCord requested her two daughters to go with her to the

office of Mr. Blake, where, according to the testimony of Mrs. Newell, she said the papers were, "and that she would hand them to us." They went there on the following day, and when they arrived at Mr. Blake's office Mrs. McCord asked for the papers, in order, as she stated, to hand them to her daughters. Mr. Blake gave them to her, and she then handed them to her daughters, passing the papers to each of them and telling them what they were, after which she gave the papers back to Mr. Blake, and repeated her instructions to him to keep them safely and deliver them to Mrs. Maddux and Mrs. Newell after her death.

There was a further transaction which shed some light upon this one. Mrs. McCord had a deposit in a local bank about which she had also consulted Mr. Blake at the time of the delivery to him of the papers above referred to, and he testified that she asked him to arrange the matter of her bank deposit so that Mrs. Maddux and Mrs. Newell might have her bank deposit upon her death, and he advised the opening of a joint account in the names of her two daughters and herself. This she did immediately after the transaction with reference to the deeds. Thereafter, and up to the time of her death in 1919, Mrs. McCord continued to live with one or the other of her said daughters. She also, with the aid of Mr. Blake, attended to whatever business was to be done with reference to the lease and change of tenants upon the premises in question, and payment of the taxes thereon. She also made sales of some small portions of the personal property thereon, such as a horse for \$10, and some puncheons for an unascertained price. She also paid the insurance upon the buildings on the property, and made or caused to be made some minor repairs thereon. The papers affecting the property remained uncalled for and unchanged in the hands of Mr. Blake until her death intestate in 1919. Within a few days thereafter they were delivered to the grantees by Mr. Blake and duly recorded.

Upon these facts as above briefly recited, the appellant contends that the trial court should have found that Mary McCord, in making and delivering the deed in question to Mr. Blake, did not intend to vest the present or any title to the premises described therein, or to do other than attempt to make a testamentary disposition thereof, and that the findings of the court as to the existence and consummation of such an intention are not supported by the evidence in the case.

In making this contention counsel for the appellant strongly relies upon the case of *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703. Singularly enough, the respondents also strongly rely upon the same case as supporting their contention, which is that the question as to the intent of Mary

McCord in the making and delivery of the deed in question to Mr. Blake was a question of fact to be determined by the trial court in the light of all the circumstances in the case, and that his conclusion thereon will not be disturbed by the court upon appeal. It is therefore interesting to see just what was decided in the case of *Williams v. Kidd*.

[3] The learned and lamented Justice Lorigan, who wrote the opinion in that case, laid down very clearly and correctly the law governing cases of this character. We cannot do better than to quote some excerpts from that opinion:

"It is well settled," says the learned justice, "that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor, and that such a delivery will be effectual to pass a present title to the property to the grantee if the intention of the grantor is to make such delivery absolute and place it beyond the power thereafter to revoke or control the deed. Where delivery is made under these circumstances and with this intention, it is fully operative and effective to vest a present title in the grantee, the grantor retaining only a life estate in the property, and the third party or depositary holds the deed as a trustee for the grantee named in it. *Bury v. Young*, 98 Cal. 451, 35 Am. St. Rep. 186, 33 Pac. 338; *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.

"On the other hand, it is equally well settled that, where a deed is deposited with a third party, to be handed to the grantee on the death of the grantor, unless this is accompanied by an intention on the part of the grantor that title to the property shall thereby immediately pass to the grantee, there is no delivery of the deed, and consequently no title is transferred. If the deed is handed to the depositary without any intention of presently transferring title, but, on the contrary, the grantor intended to reserve the right of dominion over the deed and revoke or recall it, there is no effective delivery of the deed as a transfer of title. So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that the title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect. * * *

"It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact

to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question. *Bury v. Young*, 98 Cal. 451, 35 Am. St. Rep. 186, 33 Pac. 338; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *Est. of Cornelius*, 151 Cal. 552, 91 Pac. 329; *Follmer v. Rohrer*, 158 Cal. 757, 112 Pac. 544."

Following a careful review of the facts in that case, which differ in certain essential respects from the facts of the case at bar, the learned justice continued:

"These matters, in the main, make up the evidence under which the court was to determine whether, when Williams delivered the deed in question to Kidd, he intended thereby to pass a present title in the property to the grantee. The court found that he did not. This finding of the court, it is true, rests mainly upon inferences which it deduced from the facts and circumstances in evidence; but if these inferences were fairly and reasonably deducible from them, the finding must stand. This court cannot set aside the finding of the trial court unless it appears that there is no evidence to support it, or the evidence is so clearly preponderating against the finding as made that it can be said that there is no substantial evidence to sustain it. We are satisfied from a full consideration of the evidence that this cannot be said."

From these extended excerpts drawn from that case it will be seen that the Supreme Court has clearly determined that the question as to the intention with which the grantor of real estate makes and delivers a deed thereof to a third person, with instructions to deliver the same to the grantee upon the death of the grantor, is a question of fact to be determined by the trial court from all the circumstances of the case, and that its determination of that fact, if it can be fairly drawn as a reasonable inference from evidence adduced before the trial court, will not be disturbed upon appeal. The Supreme Court did not disturb the determination of the trial court in the case of *Williams v. Kidd*, nor do we think we should do so in the case at bar. From a careful review of the evidence in this case we are convinced that the inference could fairly and reasonably be drawn that the grantor in the deed in question intended by her act in making the same, in delivering it to Mr. Blake, in handing it to the grantees, and in explaining to them its purpose, in redelivering it to Mr. Blake with the instruction to keep it safely and deliver it to her two daughters upon her death, in leaving the said deed with its depository for the seven remaining years of her life, in making no other or further attempt to dispose of the premises other than temporary uses consistent with a life estate therein, and in finally dying intestate, manifested an intention to transfer the title to the premises in question by delivery of the deed; and, the trial court

having so found, we will not disturb its finding and resulting judgment upon appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 612

SAMPANES v. CHAZES. (Civ. 2333.)

(District Court of Appeal, Third District, California. Oct. 19, 1921.)

1. Judgment $\S$ 143(17)—No abuse of discretion in setting aside default judgment entered contrary to settlement.

Where an affidavit and oral testimony in support of a motion, under Code Civ. Proc. § 473, to set aside a default judgment, showed that a complete settlement was entered into between the parties, and that plaintiff agreed to dismiss the action, but failed to do so, and that defendant did not learn of the default until some time after it was entered, the trial court did not abuse its discretion in granting the motion.

2. Appeal and error $\S$ 935(2)—Delay in moving to set aside default presumed satisfactorily excused, where parol proof not brought up.

Where parol proof, supplementing an affidavit in support of a motion to set aside a default judgment, was not brought up, the presumption is that it furnished a complete and satisfactory excuse for any delay in instituting the proceedings, which was not sufficiently explained in the affidavit; all intentions being in favor of the validity of the trial court's action and the regularity of the proceedings therein.

3. Judgment $\S$ 160—Affidavit of merits, in support of motion to set aside default, held sufficient.

An affidavit, in support of a motion to set aside a default judgment, "that affiant has fairly and fully stated the facts of the case and those upon which he bases his defense," etc., is a sufficient affidavit of merits.

4. Judgment $\S$ 160—Verified answer, denying all material allegations of complaint, held sufficient affidavit of merits on motion to set aside default.

A verified answer, filed with a notice of a motion to set aside a default judgment, positively denying all the material allegations of the complaint, is a sufficient affidavit of merits.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Andrew Sampanes against Sam Chazes. From an order setting aside a default judgment, and permitting defendant to answer, plaintiff appeals. Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

Ralph H. Lewis and A. B. Reynolds, both of Sacramento, for respondent.

BURNETT, J. The appeal is from an order setting aside a judgment by default and permitting the defendant to answer. The motion for said order was based upon the ground of inadvertence, surprise, and excusable neglect. It was supported by an affidavit of defendant and by oral testimony. The proceeding was taken under section 473 of the Code of Civil Procedure, and notice was given within 6 months of the entry of the default. In the affidavit of defendant it appears that a complete settlement of all the matters in controversy was entered into between respondent and appellant on or about the 21st day of August, 1920, and it was agreed at the time that the action should be dismissed. It shows, further, a breach of faith on the part of appellant in failing to dismiss the action and in having the default of defendant entered. Therein it appears, also, that defendant did not learn of the default until some time after it was entered.

[1] The general features of the showing made, which we have thus outlined, show a case appealing to the wise discretion of the trial court, and we cannot say it was an abuse of that discretion to grant the motion. The principle that should control in such cases has been often set forth, and it needs no repetition. It is sufficient to refer to the decision of the Supreme Court and the respondent's brief in the case of *Craig v. San Bernardino Inv. Co.*, 101 Cal. 122, 35 Pac. 558.

[2] If it should be thought that said affidavit was not sufficiently full in explanation of the delay of respondent in instituting the proceedings, we must remember that it was supplemented by parol proof. This not having been brought up, the presumption is, of course, that it furnished a complete and satisfactory excuse for any seeming remissness in that respect. The law is well settled that all intendments are in favor of the validity of the action of the trial court and of the regularity of the proceedings therein. *McGowan v. Kreling*, 117 Cal. 31, 48 Pac. 980; *Alferitz v. Cahen*, 145 Cal. 397, 78 Pac. 878.

[3] We may add that there is no virtue in the claim that the affidavit of merits is insufficient. Appellant, in his quotation of it, omitted this significant clause: "That affiant has fairly and fully stated the facts of the case." This is followed by the expression: "And those upon which he bases his defense to the above-entitled action," etc.

[4] Moreover, a verified answer was served and filed with the notice of the motion to set aside and vacate the judgment, and the motion, according to said notice, was based in part upon this answer. Therein was a denial of all the material allegations of the complaint which could possibly be construed as entitling plaintiff to any relief. "A sworn

answer, positively denying the material allegations of the complaint, is a sufficient affidavit of merits." *Fulweiler v. Mining Co.*, 83 Cal. 126, 23 Pac. 65.

We are not unmindful of the other points made by respondent, which it is claimed should lead to an affirmance of the judgment, including the contention that the record is not sufficiently authenticated, and that the complaint fails utterly to state a cause of action; but, as the matter to which we have directed specific attention seems decisive of the controversy, any further consideration would appear useless.

The order is affirmed.

We concur: **FINCH, P. J.; PREWETT,**
Justice pro tem.

54 Cal. App. 622

**McGARRY v. ELLIS, Superintendent of
Streets, et al. (Civ. 3987.)**

(District Court of Appeal, First District, Division 1, California. Oct. 21, 1921.)

1. Municipal corporations $\S$ 450(2) — Entire city may be made improvement district.

Under Improvement Act 1911, providing for the district plan for making public improvements, and leaving it to the discretion of the governing officials to determine what the exterior boundaries of a district shall be, the entire city may be made an improvement district.

2. Municipal corporations $\S$ 294(3) — Notice of passage of resolution of intention need not describe specific property in district, nor statement of property exempted.

Under Improvement Act 1911, notice of passage of resolution of intention to make public improvement need not describe the specific properties within the exterior boundaries of the district created, nor include therein statement of property exempted from the assessment.

3. Municipal corporations $\S$ 488, 489(5) — Variance between notice of resolution of intention and resolution not fatal, where objection was not made as required.

Where resolution of intention to make public improvement made the exterior boundaries of city the exterior boundaries of assessment district, and declared all property therein benefited and subject to assessment, but exempted certain described property used for school purposes, and the notice of resolution posted in the city recited the improvement and property benefited, but did not mention the exempted property, the variance did not render assessment on plaintiff's property in the city void, where he failed to make objections at time and place the notice provided, in view of Improvement Act 1911, § 5, providing that the notice of passage of resolution of intention shall be in legible characters, state the fact of passage of resolution, and refer to the resolution of intention for further particulars,

and section 9, making it sufficient for orders and notices subsequent to resolution of intention to briefly describe the work or the assessment district, or both, and refer to resolution of intention for further particulars, and in view of section 20, subd. 8, giving power to exempt school properties, and section 16, requiring protest at time and place specified to save rights.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by P. H. McGarry against R. W. Ellis, Superintendent of Streets of the City of Clovis, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Everts, Ewing & Wild, of Fresno, for appellant.

Gallaher, Simpson & Hays, of Fresno, for respondents.

RICHARDS, J. This is an action by the plaintiff herein, alleging himself to be a property owner of the city of Clovis, to restrain the defendant R. W. Ellis, as superintendent of streets of said city, and the defendant Clark & Henery Construction Company, as contractors, from proceeding with the performance of certain street work within said city under proceedings theretofore inaugurated by the officials thereof under the provisions of the Improvement Act of 1911 (St. 1911, p. 730), and which proceedings had progressed through the various legal stages provided for in said act up to the award of the contract to do such street work as was provided for therein to the defendant contractor and to the actual commencing of the work under such contract. The resolution of intention to do the work in question contained the following provision:

"And whereas, said contemplated work and improvement is in the opinion of said board of trustees of more than local or ordinary public benefit, said board hereby makes the costs and expenses of said work or improvement chargeable upon a district, which district said board of trustees hereby declares to be the district benefited by said work and improvement, and to be assessed to pay the costs and expenses thereof, which said district, is and shall be the entire city of Clovis and all property lying within the exterior boundaries of said city of Clovis, and the exterior boundaries of said city of Clovis shall constitute the exterior boundaries of said district."

Following the foregoing provision in said resolution there was another clause therein reading as follows:

"And whereas, those certain lots, pieces or parcels of land particularly described as follows: All of block 26 of East Clovis, and lots 1 to 16 of block 27 of East Clovis, and lots 1 to 25, inclusive, of block 25 of East Clovis, and used in the performance of a public function, to wit, for public school purposes, and belonging to Clovis Union High School district of Fresno county, California, are included

within the district aforesaid, the board of trustees hereby declares that said lots, pieces, or parcels of land shall be omitted from the assessment hereafter to be made, to cover the costs and expenses of said work and improvement."

Upon the adoption of said resolution of intention, the notice of passage thereof, and of the proposed making of said improvement required by the Improvement Act was duly posted on all the streets, alleys, and highways of the city of Clovis, and by its terms all persons having any objection to the making of said improvement were required to appear before the board of trustees of said city upon a designated day and show cause, if any existed, why said proposed improvement should not be made in accordance with the resolution of intention on file in the office of the city clerk, to which reference was expressly made for further particulars.

In the Improvement Act in question, in prescribing the form of said notice, it is provided that it—

"shall, in legible characters, state the fact of the passage of the resolution of intention, its date, and briefly, the work or improvement proposed, and refer to the resolution of intention for further particulars." Section 5.

In connection with this section of the Improvement Act, expressly declaring what the notice provided for therein should contain, section 9 of said act is also to be read, which provides in part as follows:

In "all resolutions, notices, orders and determinations subsequent to resolution of intention and notice of improvement, it shall be sufficient to briefly describe the work or the assessment district or both and to refer to the resolution of intention for further particulars."

The notice which was posted in pursuance of these sections of the Improvement Act conformed to their requirements in all of the above particulars, but in so doing it contained the following statement as to the district to be benefited by and assessed for the costs and expenses of said improvement, namely:

"And whereas, said contemplated work and improvement is in the opinion of said board of trustees of more than local or ordinary benefit, said board hereby makes the costs and expenses of said work or improvement chargeable upon a district, which district said board of trustees hereby declares to be the district benefited by said work and improvement, and to be assessed to pay the costs and expenses thereof, which said district is and shall be the entire city of Clovis, and all property lying within the exterior boundaries of said city of Clovis shall constitute the exterior boundaries of said district."

The plaintiff herein, while a property owner of said city of Clovis, did not appear at the time specified in said posted notice of the proposed improvement to protest against the making thereof, nor was any protest, in

fact, made by any one during the course of the proceedings leading up to and including the award of the contract for making said improvement; and the sole contention of the plaintiff in this action is that the officials of said city never acquired jurisdiction to make the improvement in question. The basis of this contention is this: That while in the resolution of intention to make the improvement it is provided that the district to be benefited by and assessed for said improvement "shall be the entire city of Clovis and all property lying within the exterior boundaries of said city of Clovis," it is also provided that certain specified lots and blocks within said city used for school purposes "shall be omitted from the assessment hereafter to be made to cover the costs and expenses of such work and improvement"; and while, as the appellant contends, these two provisions of said resolution of intention constitute the description of the district to be assessed, the notice of improvement which was posted in pursuance of said act and of said resolution of intention entirely omitted any reference to the school properties thus exempted from the assessment, and was, therefore, according to his contention, void as not embracing a description of the district to be benefited and assessed, and as failing to notify the property owners thereof

[1, 2] We find no merit in this contention. The Improvement Act of 1911, under which this proposed improvement was to be made, provides for the district plan of making such public improvements, leaving it to the discretion of the governing officials of the municipality to determine what the exterior boundaries of such district shall be. The board of trustees of the city of Clovis was therefore entitled to include the entire city within the exterior boundaries of such district, if in the discretion of the members of said board the scope of the improvement justified such inclusion. *Kane v. Wedell*, 202 Pac. 340, decided by this court October 13, 1921; *Minnesota Land Co. v. Billings*, 111 Fed. 972, 50 C. C. A. 70. The Improvement Act of 1911 also specifically provides for an exemption of property within said district used for school purposes in the discretion of the governing body of the city proposing to make such improvement upon the district plan. Improvement Act 1911, § 20, subd. 8. It follows that in the inclusion of the entire city of Clovis described by its exterior boundaries within the district to be benefited and assessed for the improvement, and also in the exclusion from such assessment of the designated lots

and blocks devoted to school purposes, the governing body of the city of Clovis were acting strictly within their powers; nor did the fact of the exemption of the designated school properties from assessment in any way affect the size of the boundaries or description of the district itself. It was definitely bounded by the exterior boundaries of the city of Clovis. In the issuing and posting of the notice of the passage of such resolution of intention the board of trustees of said city were not bound, therefore, to include therein the statement of this exemption nor the description of the specific properties within the exterior boundaries of the district omitted from the assessment. *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585; *Hutton v. Newhouse*, 41 Cal. App. 690, 183 Pac. 276.

[3] It is, however, contended by the plaintiff and appellant herein that the omission from said notice of the fact and extent of these exemptions misled him as to the extent to which his own property would be assessed and as to the increase in his burden due to the exclusion from assessment of these exempted properties, as a result of which misleading he made no protest against the proposed improvement at the time and place provided for such protest in said notice. It is a sufficient answer to this contention that by the terms of the improvement act above referred to the notice is only required "to briefly describe the work or the assessment district or both", and to refer to the resolution of intention for further particulars. This provision made it the duty of the property owner within the designated district to inform himself as to the full terms and effect of the resolution of intention in order to guide his action or inaction in the matter of protesting against the proposed improvement; and not having so informed himself, and not having made his protest as required under said act and by said notice, he was concluded from urging the fact that he was in any manner misled by the form of the notice, and also, we think, concluded from urging the point upon which he rests his sole contention in this matter. Improvement Act 1911, § 16; *Watkinson v. Vaughn*, 182 Cal. 55, 186 Pac. 753. The cases cited by the appellant as supporting his contention do not in our opinion in any way militate against the foregoing conclusions nor the authorities which support them.

Judgment affirmed.

We concur: WASTE, P. J., KERRIGAN, J.

54 Cal. App. 673

**SHEPHERD et al. v. SUPERIOR COURT IN
AND FOR FRESNO COUNTY et al.
(Civ. 4053.)**

(District Court of Appeal, First District, Division 1, California. Oct. 27, 1921. Rehearing Denied Nov. 26, 1921. Hearing Denied by Supreme Court Dec. 22, 1921.)

1. New trial ☞113—Order granting is judicial act, and cannot be made by judge out of court.

Under Code Civ. Proc. § 660, relative to the hearing of motions for new trials, and section 166, specifying the powers of a judge of the superior court at chambers the determination of a motion for new trial is a judicial act which the judge cannot make out of court by telephoning his courtroom clerk, who was then at his own home, to enter an order granting the motion.

2. Judges ☞27—Authority to transact business out of court exceptional, and exists only when authorized by statute.

The general rule is that all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional, and does not exist unless expressly authorized by statute.

3. Time ☞10(7)—For new trial not extended because expiring on Sunday.

Under Code Civ. Proc. § 660, providing that the power of the court to pass on a motion for a new trial shall expire within three months after verdict, etc., such time was not extended by the fact that it expired on Sunday, and that the last day and all of the Saturday preceding from 12 o'clock noon were holidays, and a nonjudicial period.

4. Holidays ☞5—Judicial business not transacted unless expressly authorized.

The superior court cannot, on a legal holiday, transact any judicial business outside of the constitutional and statutory exceptions.

5. Time ☞10(7)—When last day of period limited was Sunday, time for granting new trial ended at noon on Saturday.

Under Code Civ. Proc. § 660, providing that the court's power to pass on a motion for a new trial shall expire within three months after verdict, etc., and that if such motion is not determined within such time the effect is to deny the motion without further order, where the last day of such period was Sunday, the court's power to determine a pending motion expired at 12 o'clock noon on Saturday, and when not determined before that time its jurisdiction was lost, and an order subsequently made was in excess of the court's jurisdiction.

6. Prohibition ☞3(2)—Granted to prevent new trial under void order.

Where an order granting a new trial was void because in excess of court's jurisdiction, but the court was about to go forward with a new trial, there was no plain, speedy, or any, remedy by appeal, and relief would therefore be granted by writ of prohibition.

Original application by B. F. Shepherd, Jr., and another for a writ of prohibition, directed to the Superior Court for the County of Fresno and S. L. Strother, judge thereof. Peremptory writ issued.

Lewis H. Smith, of Fresno, for petitioner Shepherd.

J. P. Bernhard, of Fresno, for petitioners De Vaux.

G. Levin Aynesworth and L. N. Barber, both of Fresno, for respondents.

WASTE, P. J. The petitioners have applied for a writ of prohibition to restrain the respondent from proceeding with the retrial of a case, after motion for a new trial granted. The order purporting to grant the motion is regular on its face, but is shown by uncontroverted evidence to have been irregularly made and entered.

The petitioners were defendants in an action brought in the court below, entitled *Kahrman et al. v. Shepherd et al.* (No. 23376). Judgment was rendered in their favor. On the 3d day of January, 1921, as such defendants, they gave notice to the plaintiffs in the action of the entry of the judgment. Plaintiffs in the action thereupon interposed a motion for a new trial, which, after argument and submission, was taken under advisement by the trial court. By the terms of section 660 of the Code of Civil Procedure the period of limitation on the power of the court to determine the motion expired on Sunday, April 3d. Between 3 and 4 o'clock on Saturday afternoon, April 2d, the trial judge telephoned from his residence to his courtroom clerk, who was then at his own home, to enter an order granting the motion for a new trial. This order was not entered by the clerk until the next Monday morning, April 5th, when it was made to appear in the minutes as though made and entered during a regular session of the court on Saturday, April 2d. The petitioners here subsequently made a motion to vacate and set aside the order granting a new trial, which was denied, and the respondent is about to go forward with the retrial of the case, to prevent which this proceeding was brought.

The petitioners contend that the action of the trial court in granting the motion for a new trial was a nullity, for two reasons which we deem worthy of consideration: First, because the purported order was made on a holiday; and, second, for the reason that it was not given and made in court. Corollary, we may say, to both propositions is the suggestion that the time within which the trial court could determine the motion for a new trial had expired by the limitation fixed by the Code section.

If we were only called upon to consider the effect of a court order made and entered on

a holiday, but within time, we would not hesitate to hold with the respondent, and say that the action of the trial court resulted in a mere irregularity, which was waived by the subsequent attitude of the petitioners in not calling the attention of the respondent, or of the plaintiffs in the action, to their objection to the procedure until after the time within which the plaintiffs might have appealed from the judgment against them. *McGrath v. Langford*, 35 Cal. App. 215, 217, 169 Pac. 424; *People v. Maljou*, 34 Cal. App. 384, 388, 167 Pac. 547. Another and more serious consideration is presented by the fact that the respondent attempted to perform a judicial act out of court.

[1, 2] The motion for a new trial was not heard by the respondent judge merely as an individual, but by the court. Its determination was a judicial act (Code Civ. Proc. § 660; *Campbell v. Genshlea*, 180 Cal. 213, 214, 180 Pac. 336), and the order granting the motion was not one which the respondent had a right to make out of court. The powers of a judge of the superior court at chambers are enumerated in section 166 of the Code of Civil Procedure, and the authority to determine a motion for a new trial is not among them. The general rule is that all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional, and does not exist unless expressly authorized by statute. *Carpenter v. Nutter*, 127 Cal. 61, 64, 59 Pac. 301, and cases cited. When a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is judge, even though he be the only one present. *Von Schmidt v. Widber*, 99 Cal. 511, 514, 34 Pac. 109. But even this broad limitation was never intended to cover a case like the present one, in which the respondent essayed a judicial act while at his private residence away from the courthouse, and not even in the presence of his clerk.

[3-6] Then, again, the respondent had no jurisdiction, either as judge or court, to make the order granting the motion for a new trial. The three months' period of limitation within which the court could determine the motion expired on Sunday, April 3d, and was not extended by the fact that the last day, and all of the Saturday preceding from 12 o'clock noon until 12 o'clock midnight, were holidays and a nonjudicial period. *Bidwell v. Sonoma County Transportation Co.*, 39 Cal. App. 330, 333, 178 Pac. 722. The superior courts cannot, on a legal holiday, transact any judicial business outside of the constitutional and statutory exceptions. In *re Smith*, 152 Cal. 566, 572, 93 Pac. 191. Consequently, it was incumbent upon the re-

spondent to have determined the pending motion for a new trial in the court below before 12 o'clock noon of Saturday, April 2, 1921. Not having done so, the effect was a denial of the motion, without further order of the court, by operation of the statute (Code Civ. Proc. § 660), which deprived the respondent of any further power in the matter. Its jurisdiction to determine the motion for a new trial was lost. Consequently, in proceeding to take any steps looking to a retrial of the case of *Kahriman et al. v. Shepherd et al.* (No. 23376), respondent is acting in excess of its jurisdiction. Petitioners have no plain, speedy, or any, remedy by appeal from the order granting the new trial, and are therefore entitled to the relief prayed for. *Havemeyer v. Superior Court*, 84 Cal. 327, 397, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

Let a peremptory writ of prohibition issue in accordance with the views herein expressed.

We concur: KERRIGAN, J.; STURTEVANT, Justice pro tem.

54 Cal. App. 654

GATES v. DALEY et al. (Civ. 3395.)

(District Court of Appeal, Second District, Division 2, California. Oct. 25, 1921.)

Master and servant — §302(2) — Automobile truck owner liable for negligence of driver's assistant.

The owner of an automobile truck is liable for its negligent operation by one driving with permission of the driver, while he is resting, though he had no authority to engage an assistant.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Harry E. Gates against George R. Daley and others. From a judgment for plaintiff, defendant Daley appeals. Affirmed.

Charles C. Crouch, of San Diego, for appellant.

James L. Allen, of Brawley, and Conkling & Brown, of El Centro, for respondent.

WORKS, J. Action for damages caused by the negligent operation of an auto truck. Plaintiff had judgment, and defendant Daley appeals.

The auto truck was the property of appellant, and the defendant George Edge was employed by him to drive it. In the regular course of his employment Edge went on a long trip with the vehicle, accompanied by his wife. At a point on the journey Edge became fatigued, and in order temporarily to rest himself, allowed Mrs. Edge to oper-

ate the truck. It was while she was at the wheel that the accident occurred out of which this litigation arises. Edge had no authority from appellant to engage a substitute or assistant to drive the truck.

Appellant contends for a reversal of the judgment against him on the ground that Mrs. Edge was not employed by him, nor under any authority conferred on Edge by him, to operate the truck, claiming that the liability of an owner of an instrumentality for damages caused by its negligent operation by another person can only be predicated of the fact that such other person was at the time the agent of the owner. In support of his view appellant cites abundant authority from some of the other states; the cases referred to upholding that view in no uncertain terms. In fact, however, there are many cases on both sides of the question, an exhaustive citation of them being found in 18 R. C. L. p. 785, par. 245, notes; 26 Cyc. 1521; note to Thyssen v. Davenport Ice Co., 13 L. R. A. (N. S.) 572; note to Geiss v. Twin City Taxicab Co., 45 L. R. A. (N. S.) 382.

The cases in which masters have been held liable for the negligence of assistants to their regularly employed servants, laying aside those instances in which the servants have engaged the assistants under an express authority conferred by the masters, seem to be divided into two classes: First, those cases in which the assistants committed the acts of negligence in the presence, and therefore impliedly under the direction, of the servants; second, those in which the assistants, although being negligent while working out of the presence of the servants, were engaged in the rendition of services which they had been accustomed to perform at the servants' request for considerable periods of time, thus giving rise to the view that the servants enjoyed an implied authority to engage them. A fair sample of the first class of cases is Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N. S.) 382. After referring to several authorities on the subject the Supreme Court of Minnesota there said:

"We think they support the conclusion that the master is liable when the act is done in the presence of the servant and by his direction, or with his acquiescence, though the person doing the act is not a servant of the master, and though the master has not authorized the servant to employ an assistant."

A case of the second class, on the facts stated, is found in the decision of our Supreme Court in Bank of California v. Western Union Tel. Co., 52 Cal. 280; but the opinion there found is practically based upon Althorf v. Wolfe, 22 N. Y. 355, a case undoubtedly belonging in the first class. The present case, if the judgment against appellant is to stand, naturally falls in the same classification with

Althorf v. Wolfe and with Geiss v. Twin City Taxicab Co., supra. By its indorsement and adoption of the doctrine of Althorf v. Wolfe, our Supreme Court has aligned itself with the courts of those states whose decisions fall under the group to which that case belongs. Appellant was therefore liable for the damages occasioned by the negligence of Mrs. Edge.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(54 Cal. App. 645)

PLUMB v. STAHL et al. (Civ. 2366.)

(District Court of Appeal, Third District, California. Oct. 24, 1921. Rehearing Denied Nov. 23, 1921.)

1. Libel and slander — 7(6) — Charge of burglary libelous per se.

Publication in a newspaper of a charge that one has committed a burglary, and that he was suspected of having committed another burglary, is libelous per se.

2. Libel and slander — 124(8) — Where publication of libel charging felony is admitted, plaintiff entitled to damages.

Where newspaper published of plaintiff that he had committed a burglary, and defendant admitted the publication, and that the charge was untrue, it was error to instruct the jury that it was their province to determine whether or not damages should be allowed.

3. Libel and slander — 5 — When malice may be rebutted stated; "Malice in Fact"; "Malice in Law."

That form of malice the existence of which cannot be rebutted is a legal malice, or "malice in law," and, the libel being admitted, this form of malice is conclusively presumed; but "malice in fact," which is a vexatious purpose to injure, may be rebutted.

[Ed. Note.—For other definitions, see Words and Phrases, Malice in Fact; Malice in Law.]

On Rehearing.

4. Libel and slander — 105(1, 2) — Immaterial evidence should have been excluded.

In action for libel against newspaper for publishing that plaintiff had committed a burglary and was suspected of having committed another burglary, in which defendant admitted charge was untrue, court erred in admitting evidence to show whereabouts of plaintiff and as to other matters concerning plaintiff and a companion, and evidence that defendant had published, prior to publication in suit, that a crook tried to rob store, was likewise inadmissible, though proof showed that store was under office of plaintiff.

5. Libel and slander — 111 — Evidence held admissible to rebut malice.

Where plaintiff sued for libel in charging him with having committed a burglary and

alleged malice, defendants, though admitting the publication, and that charge was untrue, were entitled to show, to rebut the malice charged, and thereby reduce punitive damages, that they believed that the man reported to them as having committed the burglary was plaintiff, and that it had been reported to them that another of the same name had committed the offense.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by William Plumb against Henry F. Stahl and another. Judgment for defendants, and plaintiff appeals. Reversed.

Frank A. Duryea, of San Francisco, for appellant.

Joseph M. Raines and W. U. Goodman, both of Fairfield, for respondents.

PREWETT, Justice pro tem. [1, 2] The respondents published in their newspaper a charge that appellant had committed a burglary, and that he was suspected of having committed another burglary. The appellant lived and carried on business within the city in which the libel was published. The respondents admit that the charge is untrue, and thereby admit the commission of the libel. The appellant sued for damages. The language charged is clearly libelous per se. Words of doubtful import and words of two or more meanings are not libelous unless the jury finds that they were used in a libelous sense. But it has always been held that it is libel per se to charge a person with the commission of a crime involving moral turpitude. In this case there is no pretense that the libel was not published, and no pretense that the language used is true. Under this state of facts the appellant was entitled to a verdict for damages, and it was error for the court to charge the jury that they might find to the contrary. The publication being admitted, it was error to charge the jury that it was their province to determine whether or not damages should be allowed. Under the law the appellant should have had a verdict.

In *Childers v. Mercury, etc.*, 105 Cal. 289, 38 Pac. 903, 45 Am. St. Rep. 40, the court says:

"This publication charged plaintiff with the commission of a felony. It was false, not privileged, and libelous per se. Upon such a state of facts, the cause of action for actual damages is conclusively established. * * * And the amount and measure of damages are the only questions left for litigation."

This case has been frequently cited with approval.

In *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392, the court holds that:

"It was not necessary that damages resulting from injury to the feelings be specially alleged, or that proof of such injury be specially given."

In this case it is further held that an erroneous verdict in a libel case will be set aside, even though the court may think that only nominal damages will be awarded, citing in support of the doctrine the case of *Lick v. Owen*, 47 Cal. 252. This cited case shows that, if a publication be libelous and not privileged, the presumption that it is malicious is conclusive and cannot be rebutted.

"If the publication is a libel per se, the plaintiff is entitled to recover compensatory damages." *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241.

"The plaintiff was therefore entitled to substantial damages for the injury admittedly suffered by him—that is to say, to 'damages reasonably adequate' to the injury suffered, and the jury should have been instructed to that effect." *Turner v. Hearst*, 137 Cal. 232, 70 Pac. 18.

A large number of similar cases are drawn to the attention of the court, but a detailed examination of them is unnecessary, since they are in harmony with the foregoing. Our attention has not been drawn to any case to the contrary. The respondents are evidently convinced that none exist, for they have cited none.

[3] That form of malice the existence of which cannot be rebutted is a legal malice, or malice in law. The libel being admitted, this form of malice is conclusively presumed. But malice in fact, a vexatious purpose to injure, may be rebutted, and the cases cited by respondents go wholly to this form of malice.

The respondents, by asking the court to charge the jury that they might find a verdict for any sum above one cent and not exceeding the amount claimed by the appellant, concede the soundness of his claim that he proved his case when he showed the publication of the libel.

The court, in a number of instances, modified the proposed instructions by charging the jury that it rested with them to find whether or not the appellant was damaged. This relegated to the jury the conclusive presumption that the article complained of was libelous, and entitled the appellant to damages, and charged them, in effect, that they might disregard that presumption. One or two examples of a number will illustrate this point. In instruction numbered 6 the court says:

"In connection with that portion of the article which I have already instructed you is libelous per se, [it] subjects the defendants to liability for damages to the plaintiff, if you so find from the evidence."

And in the ninth instruction, the court uses this language:

"The plaintiff is entitled to verdict against the defendants for such general or actual damages, if any, as you may find from the evidence."

These modifications left it to the jury to determine whether or not they would find a verdict for the appellant.

Under the admitted facts of the case, the appellant was entitled to a verdict. Even if the court had not made these modifications, we would still be under the necessity of reversing the judgment, since the evidence does not justify the verdict.

The judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

On Rehearing.

PREWETT, Justice pro tem. [4] In denying the petition in this case for a rehearing, it is proper to add that it was error to require the witness, Mrs. Plumb, to testify on cross-examination, as to the whereabouts of her son and as to other matters concerning him and his companion. These matters were not in issue, and their truth or falsity was a matter or no moment in this case. Likewise, the testimony of Officer Malone along the same lines should not have been admitted.

Evidence of the publication in the newspaper of respondents, about one month prior to the publication of the libel in question, and entitled "Crook Tried to Rob Store," was for like reasons improperly admitted. That some one attempted to commit the burglary in the publication mentioned may be conceded, but the respondents do not claim that the appellant did it or was in any manner connected with it. The proofs showed that the store referred to is under the office used by the appellant as a taxicab office. The evidence could only have been offered for the purpose of prejudicing the case of the appellant, in view of the charge in the libel that he was suspected of having attempted the burglary. It was otherwise wholly immaterial.

[5] Other points urged by appellant do not require special notice. The appellant chose to tender the issue that the libel was published "maliciously," and so long as the complaint remains in its present shape he must bear the burdens arising from that tender. The respondents are entitled to meet the charge of malice (in order to reduce the amount of punitive damages) by appropriate pleadings and evidence. If the demands of the appellant had been limited to mere compensation for the actual injury suffered, of course the proofs would have been limited to that question. Under that state of the issues, the respondents would have been restricted to proofs minimizing the extent of the actual injury suffered. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

Under the issues in the case, the court did not err in permitting the respondents to show that they believed that the William Plumb reported to them as having committed

the burglary was the appellant, and as explanatory of their attitude as to actual malice, that it had in fact been reported to them from reliable sources, that another person of the same name had committed the offense. But under an issue as to mere compensation only, such proofs would have been inadmissible. *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; *Id.*, 107 Cal. 262, 40 Pac. 392. Rehearing denied.

We concur: FINCH, P. J.; BURNETT, J.

CAVANAGH et al. v. SHAVER et al.* (Civ. 3972.)

(District Court of Appeal, First District, Division 2, California. Oct. 15, 1921.)

1. Municipal corporations ☞581—Evidence held to show city's receipt of money deposited on refusal of tender to redeem from sale.

In an action to recover money tendered by plaintiffs to redeem from a sale for a street assessment, and, on refusal to accept it under protest, deposited by plaintiffs in a bank, a certificate of deposit, bearing the indorsement of the superintendent of streets and street superintendent, held to show that the city had received the money.

2. Municipal corporations ☞581—Deposit of money claimed to be necessary for redemption from sale held made under duress.

Where plaintiffs' land was sold for a street improvement assessment and shortly before the time for delivery of a deed plaintiffs, under protest, tendered the amount claimed by the superintendent of streets to be necessary to redeem, and, on his refusal to accept it, deposited it in a bank, the deposit was made under duress, as in the absence of payment the title already clouded would have been permanently lost.

3. New trial ☞2—Not unauthorized when judgment granted on pleadings and statements of counsel.

In an action against a city and its superintendent of streets to recover money tendered to redeem land from a sale, and, on refusal of the tender, deposited in a bank, where the answer alleged that defendants had not received the money and at the trial moved for judgment which was granted after a colloquy between the court and counsel in which statements were made which were treated as evidence, the court had jurisdiction to grant a new trial in view of the implied denial of the averment of the answer under Code Civ. Proc. § 462, preventing judgment on the pleadings, and section 582, relative to judgments on the merits.

4. Appeal and error ☞884—Defendants collecting money pending suit not entitled to attack complaint or assert that action was prematurely brought.

In an action to recover money tendered to a city superintendent of streets under protest,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on rehearing see 207 Pac. 275, 56 Cal. App. 58.

to redeem from a sale and on his refusal to accept, deposited in a bank, defendants who made the point that the complaint did not allege that they had received the money, disclaimed in their answers, but collected the money before judgment held not entitled to attack the sufficiency of the complaint or assert that the action was prematurely commenced because they had not then received the money.

5. Appeal and error —232(2)—Objection not made to evidence in trial court would not be considered.

Where there was no objection to a certificate of deposit indorsed by and paid to defendant's officer for want of proof of the signatures thereon, defendants were not entitled to urge that matter in the appellate court.

6. Municipal corporations —581—Statute held to adopt general laws as to penalties and procedure on redemption from sale for assessment.

Under St. 1889, p. 74, § 16, providing that provisions of law in reference to sale and redemption of property for delinquent taxes shall be applicable to the sale and redemption of property for delinquent assessments for street improvements, the penalties on redemption and the procedure on redemption are governed by the general laws covering taxes.

7. Municipal corporations —300—City council in adopting street ordinance could adopt general statutes as they stood in any particular year.

Under Petaluma charter, art. 3, § 21, authorizing the city council to provide for the widening of streets and, in the ordinance, to embrace such powers as are granted by a general law, the city's legislative body could adopt the provisions of the Political Code as they stood in the year 1894, or in any other year.

8. Appeal and error —909(6)—Presumed in support of judgment that ordinance not before court adopted general statutes after repeal of provision for penalty.

In an action to recover back money tendered to redeem from a street assessment sale and deposited on refusal of the tender, where the ordinance regarding the improvement is not before the court it must be assumed in support of the judgment below that it adopted the provisions of the Political Code as they stood after the repeal of section 3779 relative to the penalty to be paid on redemption from tax sales.

9. Appeal and error —901—Party claiming error must show facts constituting.

It is presumed that the case was properly tried and decided, and one claiming that error has been committed should show by the record on appeal the facts constituting the error.

10. Appeal and error —634—Judgment affirmed for defects in record.

Where papers brought up on appeal are stipulated as being full, true and correct copies but there is nothing to show that they are the ones on which the trial was had, or in which the trial resulted, and there is nothing to show

that the judgment roll is before the court, nor to show the date of filing of any paper and the bill of exceptions, though certified as being the engrossed bill, is neither stipulated nor certified as full, true and correct, the judgment will be affirmed, especially where it is apparent that there has been no miscarriage of justice.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by J. E. Cavanagh and others against E. S. Shaver individually and as superintendent of streets and street superintendent of the City of Petaluma and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellants.

W. T. Mooney, of Petaluma, for respondents.

STURTEVANT, J. The city of Petaluma was organized and is existing under and pursuant to a freeholders' charter. Stats. 1911, p. 1799. Pursuant to the provisions of section 21 of article 3 of said charter, the city has the power by ordinance to provide for the widening of a street, and in such ordinance to embrace such powers as are granted by a general law. The state of California enacted a general law on that subject. Stats. 1889, p. 70. Among other things, in section 16 of said act it is provided:

"All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

When the last statute was enacted, chapter 7 of title 9 of part 3 of the Political Code, sections 3746-3819, prescribed the law in reference to the sale and redemption of property for delinquent state and county taxes.

On the 20th day of October, 1913, the city of Petaluma commenced proceedings for the opening, extending, and widening of Douglas street in said city. At that time the plaintiffs were property owners in said city. The proceedings were conducted to such a point that the properties of the plaintiffs were sold for the nonpayment of the assessments. Such sale was made to W. J. Hickey. When the time was arriving at which the said W. J. Hickey might appear and demand a deed, the plaintiffs tendered to E. S. Shaver, as superintendent of streets, \$9,065.53, being the amount claimed by the superintendent of streets as necessary to justify a redemption. Such tender was accompanied by a written protest. The superintendent of streets did

not accept the tender, and thereupon the plaintiffs deposited the \$9,065.53 in the Petaluma National Bank, and immediately served a written notice to that effect on the superintendent of streets. Thereafter they commenced an action against him to recover a money judgment for the amount so deposited. The defendants appeared and filed answers, denying that they had received the money, and disclaiming a right thereto. Thereafter, on the 11th day of April, 1918, the case came on for trial, and judgment was ordered in behalf of the defendants. Another action was commenced by the purchaser, W. J. Hickey, for the purpose of obtaining deeds. That action was brought on for trial after the 11th day of April, 1918, and judgment was rendered against the purchaser, because the owners had tendered to the superintendent of streets the full amount necessary to authorize a redemption, and the redemption should have been allowed. When that judgment was rendered E. S. Shaver had ceased to be the superintendent of streets, and had been succeeded by James A. Potter as superintendent of streets. On July 6, 1918, and after the rendition of the judgment in the Hickey case, James A. Potter, as superintendent of streets, went to the bank and collected the amount theretofore deposited by the plaintiffs. Then, on July 29, 1918, the trial court signed a judgment. In the meantime, these plaintiffs had prepared a motion for a new trial, which was granted, and thereafter, on the 18th day of November, 1918, the case again came on for trial. On the second hearing of the case these plaintiffs contended that when they made their tender of \$9,065.53 they did so because the superintendent of streets demanded that sum. They also contended that said sum included, among other items, a penalty of \$3,337.89, and that said item was not a proper charge, and should not have been demanded nor paid. In this last contention the trial court agreed with the plaintiffs and awarded the plaintiffs a judgment for that amount. The defendants appealed from the judgment and have brought up papers purporting to be the judgment roll and a bill of exceptions. No motion to dismiss has been made because of any defect in the record on appeal.

[1] The appellants assert that the evidence does not show that the money alleged to have been deposited in bank ever came to the hands of the defendants, or either of them, or was ever claimed by them or either of them. In so far as E. S. Shaver, or E. S. Shaver, as superintendent of streets, is concerned, the contention is well founded if the record and bill of exceptions are full, true, and correct as to all papers and proceedings. As to the city of Petaluma, the contention is not sustained by the record. The certificate of deposit was offered in evi-

dence, and on it appears the indorsement, "Paid 7/6/18," and also the indorsement, James A. Potter, Superintendent of Streets and Street Superintendent of the City of Petaluma and Successor in Office to E. S. Shaver." During the second hearing the question of the payment of the certificate being under discussion, Mr. Hall, attorney for the appellants, admitted that the certificate of deposit had been paid after the judgment in the Hickey suit, which judgment held that the tender was good.

[2] The appellants claim that the deposit was not made under duress. We think they are mistaken. True, the title of the plaintiffs had already been clouded at the time of the tender. But in the absence of the payment, the plaintiffs' title would have been permanently lost.

[3] The appellants claim that the trial court had no jurisdiction to grant a new trial. In making this contention we understand them to rely upon the rule stated in *Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019, and *Stow v. Superior Court*, 178 Cal. 140, 172 Pac. 598. We think that this case is not controlled by either of said cases, but that the latter case is more nearly in point, and in that event the trial court did not exceed its jurisdiction in granting the so-called motion for a new trial. It might be better said that the trial court was merely remarking that it took a different view of the pleadings than it entertained on a previous date, and was hearing the case for the first time; or, to put it another way, that it had inadvertently exceeded its jurisdiction on the former occasion when the plaintiffs were not awarded a trial, and that the matter was being cured by having a formal trial on the latter date. The first step in the proceedings is, by one of the defendants' attorneys, called a motion for judgment on the pleadings; by another of defendants' attorneys it is called a motion for a nonsuit. It is not clear that the first trial was not a trial on the merits. True, the plaintiffs had not alleged "that the defendants had and received" any money; but, the defendants, in their answer, inserted an allegation that they had not had and received the money. The averment of the answer was deemed denied by virtue of the provisions of section 462, Code of Civil Procedure. In the face of such a record the defendants had no right to move for judgment on the pleadings. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231. To avoid the rule in that case the defendants at the hearing on April 11, 1918, made certain statements to the trial court, which were taken and acted on as evidence. The trial court so considered the record, as appears from the proceedings:

"Mr. Dole: If your honor please, before we proceed with taking any evidence, I want to make a motion for judgment on the pleadings in favor of defendants. * * *

"The Court: And that he refused to accept the same. * * *

"Mr. Hall: Yes; failed, neglected, and refused. * * *

"The Court: You say it is not our money; we don't want it?

"Mr. Dole: Yes.

"The Court: * * * I will hear from Mr. Mooney. * * *

"The Court: You do not even allege you applied to the bank and they refused to pay you back your money.

"Mr. Mooney: No; we have not, your honor. I think the money is not there for us.

"The Court: Well, I think the bank should be a party to it, * * * because Shaver has never gotten it, and he says he has never gotten it; does not want it; would not have it."

"It appearing that the defendants, each and all, disclaim any interest whatever in the fund deposited by the plaintiffs in said bank for the use and purposes described in the complaint, and the fact of the allegation appearing in the complaint that Shaver and the other defendants have at all times refused to accept the money, and they in no way appearing to hinder or impede its repayment to the parties who are properly entitled to it, or who made the deposit, under the disclaimer, so far as these defendants are concerned, the court finds, as a matter of fact, on the statement in the pleadings, that the defendants are not impeding or standing in the way of the payment of this money, and are willing that the bank should pay it; in fact, disclaim any interest whatever in it. It is the order of the court that judgment to that effect be made, and that defendant have judgment for their costs."

These, and other matters, tend to show a trial of the case on its merits. Code Civ. Proc., § 582.

[4] The appellants complain with much vigor that the plaintiffs' complaint does not state a cause of action. It is far from being a model of good pleading. In view of the facts recited in the introduction of this opinion, we think that the appellants are estopped to raise that question. We are fully aware that the appellants have acted, and are acting, in the best of good faith in everything that they have done. However, they were not entitled to make the point that the complaint did not allege that they had received the money to insert a disclaimer in their answers, and then to go and collect the money before the trial court's judgment had been signed or entered. If they desired to have this court pass on the sufficiency of the complaint, they should have allowed the facts to remain as the facts were on the date the action was commenced, and not to alter the facts by an overt act which would greatly prejudice the rights of the plaintiffs.

In this same connection the appellants claim the action was prematurely commenced. In this connection the appellants assert that they received the money after the plaintiffs had commenced this action. What we have said above regarding the attack on the

complaint applies to this attack as to the date of the commencement of the action.

[5] The foundation was very imperfectly laid for the introduction in evidence of the certificate of deposit, but the objection to its introduction was equally faulty. The proceedings were as follows:

"Mr. Mooney: I have also here a certificate of deposit which was made by the plaintiffs in this action, and which has since been cashed in by the city. Is there any objection to that?

"Mr. Dole: That is objected to as incompetent, irrelevant, immaterial, and hearsay.

"Mr. Hall: Now, if your honor please, counsel is endeavoring to open this whole case. Your honor passed your judgment on this case and then granted a new trial upon one theory alone. Now, is it the idea to open up this case entirely—your honor can readily understand that the introduction of this evidence throws the bars all down and means a complete trial of the case.

"The Court: I do not think it is hearsay."

We find no record as to the proof of signatures on the certificate, but such objection was never made or called to the attention of the trial court. The appellants therefore are not entitled to have this court consider matters which were never before the trial court.

[6-8] As hereinabove stated, the trial court gave judgment in favor of the plaintiffs for a sum of money which it is stated in the record was claimed by the defendants as a penalty of 50 per cent. The ordinance adopted by the city of Petaluma is not before us. It is stated in the briefs of the appellants that by cross-reference and adoption the statute imposing the penalty is section 3779 of the Political Code as it was worded on March 6, 1889. That section provides as follows:

"On filing the certificate [of redemption] with the county recorder, the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon."

In reply to this contention the respondent cites and relies on San Francisco, etc., L. Co. v. Banbury, 106 Cal. 129, 39 Pac. 439, and also calls attention to the fact that the act of 1889, hereinbefore referred to, provides a full scheme and plan as to assessments, penalties, charges, and costs, and that section 16 of that statute should have application only in such matters as are not clearly provided for in other portions of the act of 1889. In this contention respondent would be correct if his statement of the law were correct, but a most cursory reading of section 16 of the act of 1889 shows that that statute does not provide, nor purport to provide, the penalties on redemption or the procedure on redemption, but such matters are to be ascertained by consulting the general laws. As stated, the sale in question was

made to a private individual and not to the state. When section 3779 of the Political Code was in force it spoke with reference to sales to a private individual. The section was repealed March 28, 1895. When the ordinance regarding the opening of Douglas street was enacted the legislative body of Petulama had the power to adopt by the terms of an ordinance the provisions of the Political Code as they stood in the year 1894, or in the year 1895, or in any other year. Without having that ordinance before us, we are unable to state what statute was adopted. These matters were before the trial court. Every intendment is in favor of the judgment of the trial court, and we must assume therefore that the ordinance on its face showed the adoption by cross-reference of the provisions of the Political Code after the repeal of section 3779, supra.

[9, 10] Conceding that we are in error in our reasoning as to any point discussed above, still we think the judgment should be affirmed. It is presumed that the case was properly tried and decided. He who would claim that error has been committed should show by the record on appeal the facts constituting the error. This the appellants have not done. Some papers have been brought up which are stipulated as being full, true, and correct copies. There is nothing in the record showing said papers are the ones on which the trial was had, or that they are the result of the trial. There is nothing to show that the judgment roll is before us, nor to show the date of the filing of any paper. The bill of exceptions is certified as being the engrossed bill; but it is neither stipulated nor certified as being a full, true, and correct bill. Moreover, it is patent that there has not been a miscarriage of justice.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

54 Cal. App. 665

PEOPLE v. MACCHIAROLI. (Cr. 778.)

(District Court of Appeal, Second District, Division 1, California. Oct. 26, 1921.)

1. Rape ☞19—Aider and abettor must both aid and abet.

To support a conviction of rape as an aider and abettor under Pen. Code, § 31, it must be proved that he both aided and abetted in the commission of the crime.

2. Rape ☞19—Defendant guilty of rape as aider and abettor.

Where defendant and two others held up and robbed a man and a woman, and the others then raped the woman while defendant prevented the man from interfering by holding

a gun against him, defendant was guilty of rape as an aider and abettor.

3. Robbery ☞15—Robbery of two held joint enterprise so as to render defendant liable for whole robbery.

Where defendant and two others held up a man and a woman seated in an automobile and defendant robbed the man while the others robbed the woman, and all then drove away in the automobile, there was a joint enterprise and defendant was guilty of robbing the woman.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Frank Macchiaroli was convicted of robbery and rape, and from the judgment and an order denying a new trial he appeals. Affirmed.

Guy Eddie and William F. Adams, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SHAW, J. Appellant was indicted on four counts. The first count charged him with the robbery of an automobile and of money and other personal property from one Esquerre. The second count charged him with the robbery of some earrings and a gold ring from a young woman who was the companion of Esquerre in the automobile at the time of the robbery. The third count charged him with the crime of rape in that he aided and abetted one Gonzales in the rape of the woman. The fourth count charged him with the crime of rape in that he aided and abetted one Marsiglia in the rape of the woman. The defendant, having been found guilty of all of these counts, has appealed from the judgment and from an order denying his motion for a new trial.

[1] The first contention of appellant is that the evidence is insufficient to justify his conviction on either the third or the fourth count. He claims that while his acts may have aided in the accomplishment of the crime of rape by Gonzales and Marsiglia, yet that there is no evidence that he abetted them in the commission of those crimes. In order to sustain the conviction on these counts, it must have been proven that the defendant did "aid and abet" in the commission of the crimes. Pen. Code, § 31. "The law declares that all persons concerned in the commission of a crime, whether they directly commit it, or aid and abet in its commission, or advised and encouraged its commission, are principals." *People v. Coffey*, 161 Cal. 433, 440, 119 Pac. 901, 904 (39 L. R. A. [N. S.] 704). In *People v. Bond*, 13 Cal. App. 175, 185, 109 Pac. 150, 155, the court adopted the following definition:

"To abet is to incite or encourage a person to commit a crime. An abettor is a person who, being present or in the neighborhood, incites another to commit a crime and thus becomes a principal in the offense."

Applying the definition to that case, wherein the defendant Bond and one Carpenter were jointly charged with the murder of one Robert Junior, and it was claimed that the shot which caused the death of Junior was fired by Carpenter, the court said:

"If, with the knowledge of Bond, Carpenter feloniously made the assault and the former voluntarily assisted in taking the life of the Indian, although he did not fire the fatal shot, both would be equally guilty. It would be absurd to say that if Bond knowingly contributed to the death of Junior he would not be an aider and abettor of whatever crime was committed."

[2] In this case it appears from the evidence that appellant, Macchiaroli, together with Gonzales and Marsiglia, came to the automobile in which Esquerre and the woman were seated and ordered them out of the machine. Esquerre was made to step out of the automobile on one side, and the woman on the other side. While appellant took money and other personal belongings from Esquerre, the other two took certain jewelry from the woman. Then Gonzales and Marsiglia carried the woman across the road, where the crime of rape was committed by them. After this the woman was brought back and left with her companion on the road side, while appellant and his accomplices drove away with Esquerre's automobile. In the confession afterwards made by appellant, which was duly admitted in evidence, he claimed that while the rape was being committed he made some objection. At the same time, however, the evidence shows that appellant held Esquerre there with a revolver against him. Esquerre testified that when he heard the woman cry out the only reason why he did not go to help her was that appellant was holding the gun against him. These circumstances being well established, to hold that appellant did not both aid and abet the others in the commission of the crime of rape would be audaciously absurd.

[3] The only other point suggested in support of the appeal is that there was no evidence to justify conviction of appellant of the crime of robbery of the earrings and gold ring taken from the woman. That the robbery of both Esquerre and the woman was a joint enterprise of these three men, in which all were equally guilty, is so plain that no argument whatever is needed to sustain the conviction.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 609

PEOPLE v. ROLLINS. (Cr. 571.)

(District Court of Appeal, Third District, California. Oct. 19, 1921.)

1. Embezzlement $\S$ 44(4)—Evidence that accused received the money held sufficient.

In a prosecution for embezzlement, where it was claimed that the money embezzled belonged to complaining witness and another, evidence by the complaining witness that he gave the money to defendant out of his own pocket, if believed by the jury, is sufficient to justify conviction.

2. Criminal law $\S$ 406(5), 736(2)—Admissions by accused of commission of wrong of some sort admissible, and in relation to present charge for jury to determine.

In a prosecution for embezzlement, admissions by defendant that he had committed a wrong in the northern part of the state were admissible; it being for the jury to determine whether such admissions related to the present case.

3. Criminal law $\S$ 1186(4)—Alleged misconduct of prosecutor in cross-examination held not prejudicial.

In a prosecution for embezzlement, any possible error by the district attorney's question to defendant if at the time of his arrest he had not stated to policemen that he was "going right to Stockton to straighten up about that car" was not reversible error in view of the sustained objection and the court's direction that the jury should disregard it, and the fact that the evidence justified conviction, in view of Const. art. 6, $\S$ 4½, in relation to disregard of errors not affecting substantial rights.

Appeal from Superior Court, San Joaquin County; Geo. F. Buck, Judge.

G. C. Rollins was convicted of embezzlement, a new trial was denied, and he appeals. Affirmed.

Glenn West, of Lodi, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PREWETT, Justice pro tem. The appellant is charged with the crime of embezzlement committed by the felonious appropriation to his own use of the sum of \$140.75, intrusted to him for the purpose of paying certain laborers who were working under his immediate supervision as foreman. He was tried by a jury and found guilty as charged, and he brings this appeal from the judgment of conviction and from an order denying his motion for a new trial. The appellant makes three points:

[1] 1. That the evidence is insufficient to sustain a verdict of guilty, in this, that the money embezzled belonged to the complaining witness and another person, while

the charge is laid in the information that it belonged to the complaining witness alone. This witness testified that he gave the money to the appellant out of his own pocket. This, if believed by the jury, was sufficient. The evidence shows that the money in question was intrusted to the appellant to pay the wages of the laborers working under him, and that, instead of executing his trust, he appropriated the money to his own use and absconded. He went from Stockton to Los Angeles and later to San Jose, at which place he was arrested by a policeman. The claim or statement in appellant's brief that he surrendered himself to the policeman is evidently a mistake. He was arrested while in the act of selling a kit of carpenter's tools.

[2] 2. The appellant stated to the district attorney that he had admitted to a party in Los Angeles the commission of a wrong of some sort in the northern portion of the state. The appellant objected to the testimony of the district attorney to this effect upon the ground that there was no evidence showing that this admission related to the present case. But it might have related to this case, and it was the province of the jury, in the light of all the facts and circumstances in evidence, to determine whether or not it so related. It is a common practice for courts to admit in evidence statements, acts, or material objects, such as weapons, in the absence of direct and positive evidence connecting them with the case on trial. There was no error in the ruling complained of.

[3] 3. After a question as to whether or not the appellant was in an automobile when arrested, the district attorney asked this question: "Is it not a fact that, when the policeman approached you, you told them you were going right to Stockton to straighten up about that car?" The appellant objected to the question and assigned the act of the district attorney in propounding it as prejudicial misconduct; and in that connection his attorney stated in court: "That car belonged to the defendant, who paid \$700 for it." The court promptly sustained the objection and charged the jury that the matter should not have the slightest weight with them. This action of the court cured whatever error may have been committed. We are not disposed to commend the act of the district attorney in asking the question, but it is difficult to see how any injury to appellant could have resulted therefrom. Moreover, the evidence of the guilt of the appellant is so conclusive that the jury could not have failed to find him guilty, even though the alleged error had not been committed. We are satisfied that no miscarriage of justice arose by reason thereof. Section 4½ of article 6 of the Constitution was enacted to meet cases of this class.

The order denying the motion of appellant for a new trial and the judgment are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

54 Cal. App. 649

PEOPLE v. O'KEEFE. (Cr. 819.)

(District Court of Appeal, Second District, Division 1, California. Oct. 25, 1921.)

1. Burglary —10—In first degree must be committed in nighttime.

A conviction for burglary in the first degree is not justified, in the absence of evidence that the burglary was committed in the nighttime.

2. Criminal law —878(2)—Verdict held one of guilt on both counts.

Under Pen. Code, § 954, providing that an indictment may charge two or more different offenses of the same class, and that defendant may be convicted of any number of the offenses charged, and each one of which he is convicted must be stated in the verdict, where defendant was charged with burglarizing the same house on two different occasions, and evidence was received concerning both charges, and both were submitted to the jury, a verdict, finding him guilty of burglary in the first degree was a verdict of guilty on both counts.

3. Criminal law —1177—Defendant not prejudiced by insufficiency of evidence on one count when sentenced to only one term of imprisonment.

Under Pen. Code, § 954, as to charging different offenses in the same indictment, and section 669, requiring the imprisonment on a second conviction to commence at the termination of the first term of imprisonment, where defendant was found guilty on two counts charging burglary, but sentenced only for an indeterminate period for the crime of burglary, he was not prejudiced by the insufficiency of the evidence to sustain the verdict on one count if there was sufficient evidence under the other count, as he was entitled to the benefit of the judgment as limited by its own terms to one term of imprisonment.

4. Burglary —42(1)—Evidence insufficient to support conviction.

Evidence held insufficient to support a conviction for burglarizing a dwelling house, there being no evidence tending to prove defendant's guilt aside from his possession of stolen property more than two months after the burglary.

5. Burglary —36—Evidence that defendant was victim's divorced husband, etc., held irrelevant.

On a trial for burglary, evidence that defendant was the divorced husband of a woman residing in the burglarized house whose property was stolen, and that more than a month after the date of the alleged burglary he was found loitering about her home, and had placed under her door and in her automobile docu-

ments of an unexplained nature, was irrelevant, as creating a suspicion that he had a disposition to annoy his former wife.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Timothy O'Keefe was convicted of burglary, and from the judgment and an order denying a new trial, he appeals. Reversed.

Dorris & Henderson, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., and R. L. Chamberlain, of San Francisco, for the People.

CONREY, P. J. Appeal from the judgment and from an order denying defendant's motion for a new trial.

The information is in two counts. The first count charges that on or about the 23d day of December, 1920, the defendant unlawfully, feloniously, and burglariously entered a certain dwelling house in the city of Taft, with the intention then and there to commit the crime of larceny. The second count charges a similar entry of the same house on or about the 1st day of January, 1921. The verdict of the jury, without particular designation of either count, found the defendant guilty of burglary in the first degree. The judgment, after reciting that the defendant was duly convicted of "the crime of felony, to wit, burglary in two counts," ordered that the defendant be punished by imprisonment in the state prison of the state of California "for an indeterminate period for the crime of burglary in the first degree."

[1] Appellant contends that the verdict is defective in this, that it cannot be ascertained therefrom upon which of the counts the jury rendered its verdict, and that this is prejudicial to him for the reason that the verdict cannot possibly be supported on the second count. Appellant claims—and in this we agree with him—that there is no evidence to show that the burglary charged in the second count was committed in the nighttime. This being so, a verdict convicting the defendant of the crime of burglary in the first degree, as charged in the second count, could not be justified by the evidence.

[2] We are of the opinion that the verdict as rendered was a verdict of guilty on both counts. Under section 954 of the Penal Code, the indictment or information may charge two or more different offenses of the same class of crimes or offenses. "The defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict." Since evidence was received concerning both charges, and both were submitted to the jury, we think that the verdict in the form in which it was rendered was a verdict of guilty on both counts.

[3] On this state of the record, and in

view of the judgment as entered, the defendant has not been prejudiced by reason of the insufficiency of the evidence to sustain the verdict on the second count, if he was convicted upon sufficient evidence relating to the first count. Section 669 of the Penal Code reads as follows:

"When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be."

It is not here necessary to determine whether under the provisions of section 669, where a defendant has been convicted of two or more crimes covered by one verdict, the court would be authorized to sentence the defendant for successive terms of imprisonment for the several offenses of which he was found to be guilty. The judgment in this case did not attempt to go that far. He is entitled to the benefit of the judgment as limited by its own terms, whereby he is sentenced to only one term of imprisonment, for the crime of burglary in the first degree. Construing the verdict and judgment as we have done, there is no sufficient reason for a reversal under the claim of a defective or otherwise insufficient verdict.

[4] Appellant further contends that the evidence is insufficient to sustain the verdict against him on the first count. There is no direct evidence of his presence at the house in question at the time, nor until more than a month after the time, when the alleged burglary was committed. There is evidence that at a subsequent time certain articles stolen from that house were found in his possession. He invokes the rule that the mere possession of stolen property by a defendant is not sufficient evidence upon which to justify an inference of guilt, and that there must be other circumstances besides the unexplained possession of such property to justify a verdict of guilty of burglary. *People v. Boxer*, 137 Cal. 562, 564, 70 Pac. 671; *People v. Lang*, 142 Cal. 482, 76 Pac. 232. In the case last cited the court said:

"While possession of the stolen property is not of itself sufficient evidence of the guilt of the party in whose possession it is found, still the recent possession, unexplained, is a very strong circumstance, when taken in connection with other circumstances that point to guilt."

The question, therefore, is whether in this case other circumstances that point to guilt were established by the evidence. One of the stolen articles was a gold ring belonging to the complaining witness, Harvey Countess, which was last seen in his house on December

16, 1920. The ring having been lost, Mrs. Countess made a thorough search for it on December 19th, without success. It was not seen again until found on the 2d day of March following in the defendant's locker in his sleeping room. Two other men slept in that room, but the defendant's locker was fastened with a Yale lock, of which the key was found in the defendant's pocket. The arrest of the defendant occurred on the evening of the 2d day of March, when the defendant was found loitering about the home of Mr. Countess and his wife. Immediately preceding his arrest, the defendant had placed in their automobile an envelope containing papers, the contents of which are not explained, but which are referred to in the evidence as "literature." Similar papers had been found thrust under the door of the house on two or three occasions in February. At the time of his arrest the defendant admitted that those papers had been placed there by himself. Besides these facts, all of which were introduced over the objections of the defendant, it was also shown (his objections being likewise overruled) that he formerly had been the husband of Mrs. Countess, and that in the year 1902 they were divorced. At the time of his arrest there was found in the coat pocket of the defendant a letter addressed to Mrs. Countess by one of her friends. This letter, according to the testimony of Mrs. Countess, had been missing since December, or just before Christmas. There was also found in the locker, together with said ring, a revolver belonging to Mr. Countess, which he had last seen on New Year's day, and had first discovered its loss on the 2d day of March.

[5] We are forced to the conclusion that, aside from defendant's possession of the stolen property at a date more than two months after that property appears to have been stolen, there is no evidence tending to prove defendant's guilt of the crime of burglary as charged in the first count of the information. The fact that the defendant had been the husband of Mrs. Countess, and the fact that more than a month after the date of the alleged burglary he had placed under her door and in her automobile documents of an unexplained nature, and was found loitering about the home of Mr. and Mrs. Countess on the 2d day of March, are not circumstances tending to prove that at any time during the preceding December he was guilty of burglary of that house, either for the purpose of committing larceny, or at all. Such evidence tends to create a suspicion that the defendant had a disposition to annoy his former wife, and was likely to arouse prejudice against him in the minds of the jurors. Of this he would not be entitled to complain if at the same time

the evidence had any connection with the commission of the crime charged against him, but the facts thus shown are wholly unrelated to that crime. Aside from the bare fact of the possession of the stolen property at the time stated, there is absolutely no evidence that at or about the time of the commission of the burglary, or at any time prior thereto, the defendant ever was present in the house where the burglary was committed, or in that vicinity. We conclude that the evidence is insufficient to sustain the verdict against the defendant on the first count. The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

54 Cal. App. 677

JONES v. KEY et al. (Civ. 3733.)

(District Court of Appeal, Second District, Division 1, California. Oct. 27, 1921. Hearing Denied by Supreme Court Dec. 22, 1921.)

1. Municipal corporations ☞706(5)—Evidence held sufficient to support finding that plaintiff was not negligent.

In an action for injuries from an automobile collision, evidence held sufficient to support a finding that plaintiff was not negligent.

2. Evidence ☞474(3)—Admission of statement of plaintiff concerning the permanency of injuries held proper.

In an action for negligent injuries, the admission in evidence of a statement of the plaintiff that he did not believe he would ever recover full use of his arm and hand was proper.

3. Damages ☞161 — Mental suffering held within the issues framed.

In personal injury action, where, although the complaint did not directly mention mental suffering, it did allege that plaintiff suffered serious and lasting injury to his nervous system, mental suffering was a proper element of damages in the issues as framed.

Appeal from Superior Court, Los Angeles County, Louis W. Myers, Judge.

Action by Thomas L. Jones against Alvin E. Key, doing business under the fictitious name and style of the Key Motor Transfer Company, and another. From judgment for plaintiff, defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles, for respondent.

CONREY, P. J. Pursuant to the verdict of a jury, the plaintiff has recovered damages in the sum of \$5,000 for personal injuries resulting from a collision between the plaintiff and an automobile owned by the defendant Key, and driven by the defendant Satterfield. The defendants appeal from the judg-

ment. The points relied upon by appellants are: First, that the respondent, as shown by all of the testimony, was guilty of negligence in failing to maintain a proper lookout or to exercise ordinary care while he was crossing the street where the accident occurred, and that this negligence contributed directly and proximately to his injury; second, that the court erred in admitting in evidence testimony of the respondent to the effect that he did not believe that he would ever recover the full use of his arm and hand. In overruling the objection to this testimony, the court limited the testimony to the single purpose of showing the mental suffering which resulted to him from the injuries received.

[1] Respondent was hit by the automobile while he was passing from the south side to the north side of Third street, in the city of Los Angeles, at a point between Spring street and Broadway. The automobile was moving in an easterly direction, a part, if not all, of the automobile being on the north side of the street, which was the wrong side of the street for an automobile traveling in an easterly direction. Respondent was north of the center of the street when the collision occurred. Before leaving the curb of the sidewalk, respondent saw the automobile of the defendants, and saw that it turned in behind a line of automobiles which were moving slowly toward him on the south side of the street. Seeing that he was safe with respect to that line of automobiles, he approached the center of the street and turned his attention toward the east, that being the direction from which danger might be apprehended on the north side of the street. At that instant the driver, Satterfield, left the line in which he was moving and drove rapidly toward Spring street. According to his own statement, "when I swung out around these cars in front of me, my idea was to get in front of them and beat them to the Spring street crossing." It is not necessary to state further particulars of the evidence. The facts are very similar to those existing in the case of *Lewis v. Tanner et al.*, 193 Pac. 287, recently decided in this court. For like reasons as those given in that decision, we are satisfied that the jury in this case was well warranted in finding that the plaintiff was not chargeable with negligence.

[2] The court did not err in receiving the testimony of respondent, stating his belief concerning the probable permanency of his injuries. The question is analogous to that which was under consideration in *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2. In that case appellant claimed that the court erred in receiving in evidence statements to the plaintiff by certain physicians as to the possibility of the permanency of the plaintiff's injuries. The court said:

"Unquestionably the physical and mental condition of plaintiff resulting from the accident was material, and mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from her injury was a proper element to be considered by the jury in assessing the damages. *Sedgwick on Damages* (9th Ed.) § 44, and cases cited. The disability apprehended was one arising from the blow occasioned by defendant's car and cannot be considered in any sense remote. It follows that plaintiff had a right to testify as to her belief at the time of the trial that she would be a permanent invalid."

[3] Appellants contend that mental suffering was not a proper element of damages in the issues as framed, for the reason that the damages as alleged in the complaint were confined to physical injuries and loss of earnings. It is true that the complaint does not directly mention mental suffering, although it does allege that the plaintiff suffered serious and lasting injury to his nervous system. But the same criticism might have been made upon the complaint in *Boa v. San Francisco, etc., Rys.*, supra. The complaint there did not directly mention mental suffering, but only alleged that the plaintiff's nervous system was shattered and unstrung, and that she suffered, and would continue to suffer, pain and anguish. Nevertheless the court decided the matter as hercinabove stated.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

54 Cal. App. 628

PARKER et al. v. HARDISTY et al.
(Civ. 2357.)

(District Court of Appeal, Third District, California. Oct. 21, 1921. Hearing Denied by Supreme Court Dec. 19, 1921.)

1. Judgment $\S$ 379(1)—For plaintiff not annulled in absence of substantial defense.

A judgment for plaintiff will not be annulled for fraud in its procuring it at the instance of defendants, unless the defendants had a substantial defense to the action in which the judgment was rendered.

2. Reformation of instruments $\S$ 26—Grantee in deed held entitled to reformation.

Where a husband intended to convey certain land in a deed of gift to his wife, but by reason of interpolation of the word "of," the deed only conveyed a part thereof, and the wife attempted to convey the entire tract to a third person, who paid consideration therefor, her grantee was entitled to reformation of the husband's deed as against his heirs, whose claim was not founded upon any consideration, and not asserted during 14 years.

3. Judgment ☞624—Administratrix cannot confess judgment and set it up as bar in her own favor.

A party ought not to be permitted to urge in bar of an action against her personally a judgment that she has confessed to as an administratrix and defendant in a former action.

4. Limitation of actions ☞82—Held to run against heirs.

The statute of limitations, pending administration, runs against heirs in favor of one claiming the land adversely under a deed from the ancestor.

5. Judgment ☞237(1)—Judgment for one defendant and further hearing for another held proper.

In action by heirs against two defendants claiming two tracts of land separately to set aside a judgment reforming a deed of the ancestor in favor of one of the defendants, where judgment was rendered in favor of the latter defendant, court properly permitted the other defendant to amend her answer so as to set up claim by adverse possession or otherwise, in order that the conflicting interests of all the parties might be determined in one action, under Code Civ. Proc. § 578.

Appeal from Superior Court, Calaveras County; Fred V. Wood, Judge.

Action by Emma Parker and others against Etta Hardisty and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. P. Snyder and A. H. Carpenter, both of Stockton, for appellants.

R. L. Beardslee and Nutter & Hancock, all of Stockton, for respondents.

BURNETT, J. The opinion of the trial judge, which is set out in respondents' brief, seems to us to be a clear and satisfactory exposition of the facts and of the legal principles involved in the case, and we hereby adopt it, as follows:

"This is an action to vacate a judgment of this court heretofore rendered by Judge McSorley and entered on January 24, 1910. The facts upon which plaintiffs seek relief are, in substance, as follows:

"On March 29, 1895, one Robert Reed Jenkins was the owner of 1,350 acres of agricultural land in Calaveras county, one lot in Camp Seco, and four lots in the city of Stockton. Upon that day he executed a gift deed whereby he apparently attempted to convey all of this property to his wife, Julia. The deed refers to the land conveyed as 'containing 1,350 acres.' Jenkins was the owner of the south half ($\frac{1}{2}$), the fractional northwest quarter ($\frac{1}{4}$) and the fractional southwest quarter ($\frac{1}{4}$) of the northeast quarter of section 16, but in the deed to his wife the word 'of' was interpolated after the words 'the south half ($\frac{1}{2}$),' which had the effect of eliminating from the description the south half, and the north one-half of the northwest quarter of the section. Of the property thus omitted from the description in the deed, the defendant Etta Hardisty claims to be the

owner of about 235 acres by virtue of a conveyance from her mother, Julia A. Jenkins, bearing date January 18, 1896; and as to the remaining 125 acres of the omitted property it appears that on said January 18, 1896, for a valuable consideration the said Julia A. Jenkins executed a deed therefor to Hiram Tyrer, who entered into possession under said deed, and thereafter, on June 5, 1905, executed a deed of the property to one Frank Sanborn. The latter, for a valuable consideration, on September 15, 1909, executed a conveyance of the property to W. S. Dennis, one of the defendants in this action. The following month the attorneys for Dennis discovered that the description in the deed from Jenkins to his wife did not include the property that had been purchased by Dennis, which seems to have been the first discovery made by any one that word 'of' had been interpolated in the deed.

"At the request of Dennis, Mrs. Etta Hardisty procured letters of administration upon the estate of her father, Robert Reed Jenkins, to be issued to her, and on January 10, 1910, Dennis commenced an action in this court against Mrs. Hardisty, as such administratrix to reform the gift deed from Robert Reed Jenkins to his wife, Julia A. Jenkins, upon the ground of the mutual mistake of Jenkins, his wife, and the scrivener who drew the deed, said mistake being the insertion of the word 'of' heretofore referred to. By said action Dennis also attempted to obtain a decree quieting title upon the ground of his predecessor's adverse possession for more than five years. Mrs. Hardisty as administratrix filed an answer consenting to a judgment in favor of Dennis in said action. All of the expenses of Mrs. Hardisty and her attorney in procuring letters and appearing in said action were paid by Sanborn, the grantor of Dennis. Judge McSorley took evidence in said action, and by his decree not only adjudged the reformation of said deed by striking out the word 'of,' but as well found and decreed that Dennis and his predecessors had been in the actual, open, and continuous occupation of the land, and paid all taxes levied and assessed thereon ever since the execution of the deed to Julia A. Jenkins.

"The defendant, Etta Hardisty, and the three plaintiffs in this action are the surviving children of Robert Reed Jenkins and his heirs at law, the wife, Julia A. Jenkins, having died February 5, 1907. For nearly 15 years it was assumed by all of these persons that by the deed of conveyance from Robert Reed Jenkins the whole of his property had been vested in his wife Julia A., and it was not until the rendition of the judgment by Judge McSorley that the plaintiffs discovered the error in the description, whereupon they commenced this action to vacate and annul that judgment.

"While it is claimed by the plaintiffs that the judgment heretofore rendered was made in pursuance of a conspiracy to cheat and defraud plaintiffs, and while the said acts complained of may be such as to constitute legal and actionable fraud, yet it is but fair to the defendants to say that there is not a particle of evidence to indicate that they were intentionally endeavoring at any time to wrong or defraud any person, but, on the contrary, they were acting from honest motives in an attempt to correct the pa-

per title of the property of the defendant Dennis.

[1] "Consideration will be first had of the plaintiffs' asserted cause of action against the defendant Dennis. The rule is well established that in order for the plaintiffs to prevail in an action of this character, they must show, not only that the former judgment was procured by fraud, but also that they had a substantial defense to the action in which the judgment was rendered, for equity will not annul a judgment if it is a correct and just determination of the rights of the parties thereto. See *Reed v. Bank of Ukiah*, 148 Cal. 97, 82 Pac. 845; *Parsons v. Weis*, 144 Cal. 417, 77 Pac. 1007; *People v. Perris Irrigation Dist.*, 142 Cal. 606, 76 Pac. 381; 23 Cyc. 1039 and 1040.

"The facts in this case in reference to the error in the deed are quite similar to those appearing in *Hart v. Walton*, 9 Cal. App. 504, 99 Pac. 719. There the court adjudged a reformation of a deed, because through the carelessness of the scrivener in writing the word 'of' instead of 'and' the grantee received 115 acres of land less than she bargained for. In that case, however, the grantee had paid a valuable consideration for the conveyance. It is here urged that as the conveyance from Jenkins to his wife was a mere voluntary transfer without any consideration, the former judgment of this court in reforming the deed was erroneous, citing *Enos v. Stewart*, 138 Cal. 112, 70 Pac. 1005. That was a suit against the husband as administrator of his wife's estate, brought by her mother to correct a description in a deed of gift executed to the mother by the daughter prior to her death. It was there said: 'It is a universal principle of courts of equity that in all cases where relief is asked by aiding and correcting mistakes in the execution of instruments and powers the party seeking such relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, the law must prevail, and the court will remain silent and passive. The equities of respondent are, at least, equal to those of the appellant. It is the dictate of equity and natural justice that the property of a wife dying without issue should go in part to her surviving husband. * * * By refusing to correct the deed no fraud nor injustice is done to appellant. She has lost nothing because she paid no consideration for the deed.'

"The statement, often made, that 'courts of equity will not aid voluntary conveyances,' cannot be accepted as an inflexible rule, for like most others it is subject to exceptions. Thus in *Dawson v. Dawson*, 16 N. C. 101, 18 Am. Dec. 573, cited in *Enos v. Stewart*, supra, we find the court saying, 'Where, however, the conveyance is complete and property passes, or rights are vested by it, that property or those rights are guarded and protected, notwithstanding there was no consideration for passing or raising them.' So too, in *Cummings v. Freer*, 26 Mich. 128, which was an action for the reformation of a deed of gift, brought against the heirs of Freer by a mortgagee who had loaned money to the son of Freer after he had gone into possession under the deed and made improvements upon the property, it is said by the court that if 'before its execution he [the father] may have been under no legal obligation to execute it, and a mere agreement to ex-

ecute such deed as a gratuity, though in consideration of natural love and affection to a son, where the grantee had not gone into possession, or done, given up, or expended anything on the faith of it, and no equities of other parties had intervened, would not, perhaps, be enforced by a decree for a conveyance.'

[2] "The case presented before Judge McSorley was radically different from that of *Enos v. Stewart*, upon which plaintiffs rely, and there can be little question but that Dennis stood upon an equity superior to that of the heirs of Robert Reed Jenkins, who are the plaintiffs in this action. Dennis paid full value for the land, and his predecessors in interest, including Julia Jenkins, had been, for over 14 years in the open, notorious, actual, and continuous possession of the same, and paid all the taxes thereon. Plaintiffs' claim to the property is not founded upon any consideration, and was never asserted during the 14 years mentioned.

[3] "Consideration now will be had of this action as it affects the 235-acre tract claimed by Mrs. Hardisty. The first question that arises is as to whether, even assuming the legality in every respect of the judgment rendered by Judge McSorley, can it be urged by Mrs. Hardisty in bar of the claim now made by these plaintiffs against her? In 23 Cyc. at page 1237, it is said: 'To constitute a judgment an estoppel, there must be an identity of parties as well as the subject-matter; that is, it is necessary that the parties as between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered, in the same capacities and in the same antagonistic relation, or else they must be in privity with the parties in such former action.' However, in *City of El Reno v. Cleveland-Trinidad Paving Co.*, 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) at page 650, in the footnote, will be found a line of authorities holding that a judgment is res adjudicata between codefendants as to matters which were or even might have been adjudicated in a former suit.

"It may be assumed that, if the judgment rendered before Judge McSorley was regular and unimpeachable, then these plaintiffs cannot now, in an action against Mrs. Hardisty, question the fact that there was an error in the deed caused by mutual mistake as alleged, but as the 235-acre tract of land was not involved in the former action, nor any person claiming it under the conveyance to Julia A. Jenkins made a party thereto, no opportunity was there afforded to these plaintiffs represented by an administratrix to obtain a judicial determination as to whether Mrs. Hardisty was entitled to a reformation of the deed to perfect her title to the 235 acres. Indeed the defendants in the former action may have not denied the error in the deed as alleged, but they did not thereby confess that Mrs. Hardisty was entitled to a reformation to clear her title, nor could that question have been involved without placing Mrs. Hardisty in the anomalous position of individually suing herself as administratrix. Furthermore, upon general equitable principles a party ought not to be permitted to urge in bar of an action, a judgment that she has confessed to as an administratrix and defendant in a former action. Believing as I do that the decree of Judge McSorley was not an adjudi-

cation of any claims to the 235-acre tract, it follows that under the pleading and evidence before the court Mrs. Hardisty has shown no legal claim to property, for as she cannot rely upon the former decree, it was incumbent upon her by proper pleading and legal evidence to show that there was a mutual mistake in the execution of the deed, and that she had a superior equity to that of plaintiffs to the property, or that she had acquired ownership by 5 years' adverse possession, but in both these particulars she has failed. Certain statements of counsel made during the trial, together with certain evidence, lead to the inference that Mrs. Hardisty may be able to produce evidence that she has acquired title by adverse possession, and that the deed under which she claims was acquired by virtue of a division and settlement of the estate of Julia A. Jenkins among her children. Under such circumstances justice and equity seem to dictate that the rights of Mrs. Hardisty shall not be finally cast without an opportunity to amend her pleadings and produce further evidence.

[4] "In this connection it may not be amiss to notice the claim made by the plaintiffs that the statute of limitations cannot run against them as heirs of their father, Robert Reed Jenkins. In support of this contention they rely upon the case of *Blair v. Hazzard*, 158 Cal. 722, 112 Pac. 298. There is nothing in that case that would militate against the acquirement of title by adverse possession by either Dennis or Mrs. Hardisty. All that was involved there is stated at the top of page 725, and is as follows: "The question is, Can a devisee of an estate or a grantee of a devisee entering into possession of realty by virtue of title actually or colorably derived from the estate and asserting title from no other independent source acquire, under the circumstances, a title against the estate by adverse possession so as to relieve the property from the statutory requirement that it shall be subject to the demands of administration?" The question was answered in the negative because real property, whether in possession of administrator, the heirs or devisees, until the close of administration, is always subject to the condition that it may be sold to pay debts and expenses of administration, and because everything that an heir or devisee in possession may do by way of ownership of exclusive control he has a perfect right to do so far as the estate is concerned.

"It is obvious here that neither Dennis, Mrs. Hardisty, or their predecessors ever asserted any title as heirs, devisees, or grantees of any heirs or devisees under the estate of Robert Reed Jenkins, but that since the execution of the deed by Jenkins they or their predecessors have asserted their claim of title in opposition to that of Jenkins or his estate.

"The prayer for the annulment of the decree made by Judge McSorley will be denied, and within 20 days after notice hereof the defendant Mrs. Hardisty is allowed to amend her answer and plead title by adverse possession and any equitable right she may have."

[5] It appears that, after said opinion was rendered, the defendant Mrs. Hardisty filed an amended answer, and the action as to her is still pending in the superior court. For the reasons stated in said opinion it was proper to award judgment in favor of defendant Dennis and to continue the cause for further hearing as to defendant Hardisty. Section 578, Code Civ. Proc. As stated, the action related to two different tracts of land claimed separately by the defendants, but since they were both made parties by the plaintiffs, the latter cannot complain that the court permitted said amendment in order that the conflicting interests of all the parties might be determined in one action.

Several specific objections to the judgment are urged by appellants, but they are substantially covered by the opinion of the trial judge, and it seems hardly necessary to make any further suggestions.

To conclude, we are entirely satisfied that the judgment is supportable upon the two grounds mentioned by the trial court: First, that the matter was *res adjudicata*; and, second, that respondent Dennis acquired a prescriptive title. We may add that, in our opinion, it would be a just inference from the evidence received that it was the intention of the grantor in said deed to convey the entire 1,350 acres, including the land in controversy. As to this last consideration we may state that at the oral argument herein said deed was exhibited and its appearance would indicate that the word "of" was interpolated or inadvertently used without any intention on the part of the grantor to qualify the extent of the property conveyed. The deed itself in connection with the practical construction placed upon it by the parties in interest and their acquiescence therein for so many years leaves scarcely any doubt that no mistake was made in the judicial determination of the intention of the grantor.

We find no merit in the appeal, and the judgment is affirmed.

We concur: FINCH, P. J.; PREWETT, Justice pro tem.

54 Cal. App. 659

(202 P.)

HART v. CAPITAL FILM CO., Inc.
(Civ. 3554.)

(District Court of Appeal, Second District, Division 2, California. Oct. 25, 1921.)

1. Appeal and error ⚡518(4)—**Order held not to be considered on appeal from judgment roll alone.**

On appeal on the judgment roll alone the appellate court could not look to or consider part of an order fixing time to file an amended answer or an answer to an amended and supplemental complaint after answer stricken out, in view of Code Civ. Proc. § 670, making provision for contents of judgment roll.

2. Appeal and error ⚡934(3)—**Judgment roll held not to show error in entering default.**

On appeal upon judgment roll alone, record did not show error in that it showed that a default was entered against a defendant without allowing the ten days within which to answer a pleading of its opponent, such judgment having been entered by the clerk and reciting, "legal time for answering having expired" the judgment against it is "hereby rendered" etc., under Code Civ. Proc. § 407, subd. 2, sections 432, 472 providing that defendant has ten days to answer but that court may direct a shorter time.

3. Appeal and error ⚡901—**Appellant must affirmatively show error.**

On an appeal from a judgment on the judgment roll alone, the appellant must make an affirmative showing of error.

4. Evidence ⚡83(6)—**Presumed that official duty has been legally performed.**

While a clerk of a superior court acts in a ministerial capacity in entering a default and in rendering default judgments, and while his acts are not supported by the presumptions to be indulged in connection with the judgments of courts of superior jurisdiction, he is yet a public officer, and his solemn acts done in the discharge of his official duty cannot be set absolutely at naught except upon some affirmative showing that they have been incorrectly performed, in view of Code Civ. Proc. § 1963, subd. 15.

Appeal from Superior Court, Los Angeles County.

Action by Neal Hart against the Capital Film Company, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter E. Burke, of Los Angeles, for appellant.

Wetherhorn, Hoyt & Jones, of Los Angeles for respondent.

WORKS, J. This is an appeal from a judgment entered pursuant to default. The printed transcript on appeal shows, among others, the following papers and minute orders: The complaint; a demurrer to the complaint; an order overruling that demurrer; the answer; an order striking the an-

swer from the files, with which is incorporated an order granting leave to file a supplemental complaint and an order granting leave to file an amended answer; an amended and supplemental complaint; the entry of default; and a judgment by default, by the clerk of the court. The amended and supplemental complaint, which was filed June 2, 1920, was introduced by the statement that its filing was upon leave of court. Included with the order giving leave to file a supplemental complaint, there was, as we have observed, an order granting leave to file an amended answer. The time allowed for that purpose by the order was three days. The defendant having filed no answer to the amended and supplemental complaint, his default was entered on June 7, and a judgment on the default was rendered June 8, and was entered June 10. If we are to take all these matters as they appear in the printed transcript, and are to construe the leave to file an amended answer within three days as an order shortening the time to answer the amended and supplemental complaint, it is apparent that defendant's time to answer had expired when the default was entered.

[1] It is contended that we may not look to that part of the order fixing three days' time within which an amended answer might have been filed, the appeal being prosecuted on the judgment roll alone, and there being no bill of exceptions. This point is based on section 670, Code of Civil Procedure, making provision for the contents of the judgment roll, and it is well taken, for in the description in that section of the papers and orders to be included in the judgment roll there is nothing which would permit the incorporation therein of an order fixing the time to file an amended answer, or an answer to an amended and supplemental complaint, after answer stricken out. By the terms of the enactment the judgment roll is to consist, under such a situation as is here presented, of "the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment."

[2, 3] Disregarding, then, the order printed in the transcript allowing appellant three days within which to file an amended answer, the record shows that the default was entered on the fifth day after the service and filing of the amended and supplemental complaint, while the judgment was rendered the sixth day and entered the eighth day after that event. Appellant insists that this state of the record shows that the default was erroneously entered and the judgment erroneously rendered, and in doing so places its reliance on *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442 and *Johnston v. Southern Pacific*

Co., 150 Cal. 535, 89 Pac. 348, 11 Ann. Cas. 841. In the first of these cases—and the second is in no way different from the first—it is said:

"When an appeal from a judgment is heard upon the judgment roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. If that discloses error, we can no more assume that it was cured by some matter which does not appear therein than we can consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. In each case the record must be judged by itself alone."

It is to be noted, however, that this language was used concerning a judgment roll which contained a bill of exceptions as one of its component parts, and it was employed, moreover, in refutation of an argument of counsel to the effect that, where a bill of exceptions fails to disclose that it contains the entire evidence, a court of review will assume that evidence was given which would support a contested finding. However, if we take the broad language which we have quoted from the opinion in *Bedan v. Turney*, without explanation, it does not fit the situation here. This record does not show error. It merely shows that a default was entered against a defendant without allowing it 10 days within which to answer a pleading of its opponent, a thing which, under a section of the code cited below, may be done with perfect propriety. A defendant is allowed 10 days' time within which to answer a complaint (Code Civ. Proc. § 407, subd. 2); he may have a like period within which to answer an amended complaint interposed before answer or demurrer filed, or after demurrer, and before the trial of the issue of law thereon (Id., § 472); or, to state the rule which governs the present case, where an amended complaint is filed under circumstances different from those specified in the section last cited, a defendant is to answer within 10 days after service, or within "such other time as the court may direct" (Id., § 432).

In saying, as we have said already, that the record here does not show error on this question, we are indulging in no assumption in opposition to the record for on the subject which we now consider there is nothing in the record to be opposed. As far as we have recited it, the record is devoid of any showing concerning the time within which defendant might have answered the amended and supplemental complaint, always remembering that for the reasons already stated we must disregard the order printed in the transcript. If the judgment appealed from were one which had been rendered by the court, we should be sure that we have now disposed of the question presented as, in the case of an appeal from such a judgment it is always incumbent on the appellant to

make an affirmative showing of error. In default of that showing every such judgment appealed from must be affirmed. Does this rule apply in the case of a judgment rendered by the clerk under the circumstances here shown to exist? This point may be considered, with profit, in connection with what we say at the outset of the paragraph next following.

[4] There is a feature of the record to which we have not referred in our statement of its contents. The judgment rendered by the clerk recites that, among other things, defendant's "legal time for answering having expired," the judgment against it is "hereby rendered," etc., and the statement showing the entry of default also recites that the time for answer had expired. In the case of a judgment by the court, such a recital would be conclusive on appeal (*Catnich v. Hayes*, 52 Cal. 338; *McCauley v. Fulton*, 44 Cal. 355; *Whitney v. Daggett*, 108 Cal. 232, 41 Pac. 471); but appellant, citing *Providence Tool Co. v. Prader*, 32 Cal. 634, 91 Am. Dec. 598, and *Farrar v. Steenbergh*, 173 Cal. 94, 159 Pac. 707, insists that no such sanctity surrounds that recital when contained in a judgment rendered by the clerk. These decisions go no further than to state the well-recognized rule that, in entering a default, and in rendering judgment upon it, the clerk acts in a ministerial, and not in a judicial, capacity, making application of it to the facts presented in each of the cases. The two citations are but parcel of a long line of decisions on the same subject running at least from *Stearns v. Aguirre*, 7 Cal. 443, to *Landwehr v. Gillette*, 174 Cal. 654, 163 Pac. 1018. In none of this line of cases, however, is there presented such a situation as is evident in the present litigation. In none of them was there before the court the question of the effect of a recital by a clerk such as appears in the judgment here. In considering that question, then, for the first time, we are to remember that there is nothing in the record in this cause to instill a doubt as to the truth of the recital. Moreover, in such a case as this the judgment roll can never be made to speak in such a manner as either to justify or to confound such a recital. The statute (Code Civ. Proc. § 432), we are to observe, allows a defendant 10 days within which to answer an amended and supplemental complaint filed under the conditions which obtain here or within "such other time as the court may direct."

We have already seen that an order of court directing the filing of an answer to such a pleading in a shorter time has no place in the judgment roll. Under the contention now made the consequences of such a situation are startling. If the judgment before us is not to stand, it is not possible for a clerk to render one which will stand in a case in which an amended complaint

has been filed after answer to the complaint, and in which less than 10 days has been allowed by the court for the filing of answer to the amended pleading unless the clerk awaits the expiration of 10 days from the service and filing of the amended complaint. This, of course, would allow the defendant 10 full days to answer, would nullify the practical operation of the portion of the statute allowing the court to fix less than 10 days for that purpose and, in effect, would nullify any order made under it. An order shortening the time to answer under the section can be preserved for use on appeal only by a bill of exceptions. The party in whose favor such a judgment is rendered could file no such bill, because there is nothing to which he is to except. The other party will make no effort thus to preserve such an order, for he may sit quietly beside the trap the law has laid, and, if the clerk should enter default under the order and in less than 10 days, he may prosecute an appeal the outcome of which is bound to satisfy his most sanguine expectations. Such a condition of affairs would be intolerable if there were no remedy at hand, which, happily, there is.

While a clerk acts in a ministerial capacity in entering defaults and in rendering default judgments, and while his acts are not supported by the presumptions to be indulged in connection with the judgments of courts of superior jurisdiction, he is yet a public officer, and his solemn acts, done in the discharge of his official duty, cannot be set absolutely at naught except upon some affirmative showing that they have been incorrectly performed. It is to be presumed that official duty has been regularly performed. Code Civ. Proc. § 1963, subd. 15. Where a default is entered for a failure to answer the complaint, the summons and proof of service are part of the judgment roll, and the default, or any recital made in entering it or in the clerk's judgment rendered pursuant to it, may be measured accordingly. If the judgment roll, so constituted, shows that the default has been entered too soon, the presumption that the clerk's duty has been properly performed is overcome. In such a case as this, however, where the judgment roll does not show and cannot show whether the statutory time has been shortened, the situation is quite different. Here, without the aid of any showing in the judgment roll, we are bound to assume either that the clerk violated his duty by entering default before the expiration of the statutory time within which an answer might have been filed, or that he properly performed it pursuant to some order of the court shortening that time. We have no doubt as to which of these assumptions we shall indulge. The case presents a clear opportunity for the operation of the presumption that official duty has been prop-

erly performed. It appears, then, that this is an instance in which it is incumbent on the appellant to make an affirmative showing of error. This it might have done through the medium of a bill of exceptions, if, in fact, it were true that the statutory time was not shortened and that, therefore, the clerk entered the default before the time to answer had run out. No such showing being made, and no error appearing in the rendition of the judgment, it must stand.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

54 Cal. App. 668

HOOPER et al. v. STONE et al. (Civ. 4006.)

(District Court of Appeal, First District, Division 1, California. Oct. 27, 1921.)

1. Charities ☞39—Religious societies ☞4—Exclusive proprietary right in a name extends to charitable and religious societies.

An exclusive proprietary right may be acquired in the name under which a business has been conducted, and such right may not be lawfully interfered with or obstructed, and it extends to charitable, religious, and other societies.

2. Religious societies ☞23(1)—Seceding body from religious society cannot by incorporation acquire use of name of parent body.

A seceding body from a religious society cannot by incorporating under the name of the parent body, acquire a right to the use of the name, although the parent body was not incorporated.

3. Religious societies ☞12(2)—Dispute with seceding body as to name not exclusively under jurisdiction of ecclesiastical courts.

The dispute between the seceding body from a religious society and its parent society concerning the use of the society's name is not a matter exclusively under the jurisdiction of the ecclesiastical courts, especially when there is no ecclesiastical tribunal to which an appeal could be taken.

4. Appeal and error ☞1010(1)—Findings of trial court based on sufficient evidence conclusive.

The findings of the trial court, based upon sufficient evidence, are conclusive on appeal.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Suit by William J. Hooper and others against Philip M. Stone and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

E. W. Taylor, of San Francisco, for appellants.

E. J. Sinclair and Henry E. Ashmun, both of Berkeley, and Sloss, Ackerman & Bradley, of San Francisco, for respondents.

KERRIGAN, J. This is a suit in equity brought to determine the right to the use of a name.

It appears from the complaint that plaintiffs are members of the Christian Science Society of the University of California. It is alleged that this society was founded and organized in 1907, and continuously since said time has been and now is an association formed for the purpose of uniting the Christian Scientists in the University of California in closer bonds of Christian fellowship; of affording to the faculty and students of that institution so desiring opportunities to become familiar with Christian Science as taught by Mary Baker Eddy, the founder of the faith, by providing authorized Christian Science literature in the library, and by the doing of other acts to aid its members in becoming familiar with the teachings of the mother church. By further allegation it appears that since the time of its inception in 1907 the association had appropriated and assumed the name "Christian Science Society of the University of California," and that said association and the members thereof have been and now are the sole and exclusive owners and solely and exclusively entitled to the use of such name. It is claimed that the members of the association by diligent and continuous effort have built up from a small beginning a strong society widely known, the meetings of which are well attended, and that the Christian Science Society of the University of California is recognized by all Christian Science churches and organizations throughout the world as the authentic representative of the Christian Science movement in the University of California, and that it receives financial recognition and support from the mother church and other Christian Science organizations. It is charged that notwithstanding the long and quiet use and enjoyment of the claimed name the defendants, with the exception of Frank C. Jordan, as secretary of state of the state of California, well knowing such facts, did willfully and wrongfully and in utter disregard of the rights of said association assume and attempt to appropriate to their own use the same and identical name used by said association with intent to deceive and defraud the public and particularly the students, faculty, and alumni of said university, and to discredit the association of which plaintiffs are members, to its great damage and detriment. It is further charged that the defendants signed and filed articles of incorporation in the office of the county clerk of Alameda county under the claimed name, and subsequently presented a certified copy thereof to defendant Jordan, as secretary of state, and requested him to file the same. By further allegation the plaintiffs allege that as members of said society they have accumulated a large sum of money and securities,

and that defendants will attempt to appropriate the same to their own use by their assumption and use of the name. The commission of other unlawful acts is charged, and equitable interposition for relief is prayed for.

By a second cause of action plaintiffs allege that they also presented to defendant Jordan, as secretary of state, articles of incorporation under the claimed name, but that he refused to file the same on the ground that as the two different instruments were presented simultaneously a proceeding should be instituted to determine the relative rights of the parties to the name. Injunctive relief is asked restraining defendants from the use of the name, and a mandatory injunction is prayed for, directing defendant Jordan to file the plaintiffs' articles of incorporation, and that he be directed to issue a certificate of incorporation to said plaintiffs under the name "Christian Science Society of the University of California."

Defendants interposed demurrers to each count of the complaint upon general grounds, among others, that such count does not state facts sufficient to constitute a cause of action against the defendants, or any of them, and on the further ground that the court had no jurisdiction of the subject of the action attempted to be set up in either count of the complaint, as the matter so set up is solely one for the jurisdiction of the tribunals of the church named in the complaint.

The demurrers were overruled, and defendants, answering, alleged, in substance, that they were for a long time prior to the date of the commencement of the action members of said society, and entitled to all the rights and privileges of such membership, including the use of the name contended for. They then allege facts regarding the existence of a controversy in the society, the removal of one of its officers, the expulsion of three of its members, the abandonment by the majority faction, to which plaintiffs belong, of the objects and purposes for which the society had been formed, and an attempt to coerce the minority faction into a like abandonment of such objects and purposes. It is further recited that the minority faction, composed of defendants and others, called and held a meeting to reconstruct and re-establish the society as originally formed, and had elected directors to form a corporation under the contested name, to which they claim they are entitled. Denial is made that defendants will attempt to appropriate the property accumulated by the plaintiffs.

No question is here presented as to accumulated property or the regularity of the removal or suspension of defendants; the sole question involved being which of the two factions is entitled to the use of the designated name.

It appears from the record that the par-

ties hereto are members of the Christian Science faith, and that all of them were members of the Christian Science Society of the University of California, an unincorporated religious association, founded and organized in 1907 under authority of the by-laws of the mother church, the First Church of Christ, Scientist, in Boston, Mass. The provision of the by-laws authorizing the formation of such a society provides that members in good standing with the mother church who are members of the faculty, instructors, or students in any university or college can form and conduct a Christian Science organization at such university or college, provided its rules so permit. The object of such societies is for the purpose heretofore recited. The literature of such societies consists of the Bible and all the books written by Mrs. Mary Baker Eddy, and the literature which she founded and authorized. These various publications are exclusively issued and sold by the Christian Science Publishing Society. This society instituted an action in Massachusetts against the mother church, and in consequence the controversy in the society here involved arose. The majority faction, to which plaintiffs and respondents belonged, instituted in the society what may be termed a boycott against the periodicals issued and sold by the Christian Science Publishing Society for its action in suing the mother church. It also instructed its secretary to send out to the Christian Science churches and societies in California notice of its action in this regard. The secretary declined to do so, and resigned his office. The majority faction then requested the officer known as the reader to resign her office, for the reason that she continued to distribute the periodicals issued by the publishing company. This she refused to do, and she was removed from office. Subsequently certain members were expelled from the society by reason of the controversy. Thereafter these members, who may be denominated as the minority faction, met for the purpose of organizing another society, and incorporating the same under the same name as the society of which they were formerly members, claiming that the majority faction by its action had ceased to carry out the purposes for which such societies were organized.

Upon sufficient evidence the court found that the plaintiffs had not changed, or attempted to change, the society into an organization different from that which was originally formed; that plaintiffs constitute the majority faction in the society, which faction is continuing to hold meetings under the name "Christian Science Society of the University of California," and is holding itself out as the original and authentic society formed in 1907 and operated and conducted since that date for the objects and purposes as stated in the original by-laws of the or-

ganization and in accordance with the manual of the mother church.

As conclusions of law it is found that plaintiffs have the legal right to the exclusive use of the name contended for, and to an injunction restraining the defendants from using the same, and to a further injunction enjoining the filing by defendant Jordan as secretary of state of the defendants' articles of incorporation under the claimed name, and directing him to file plaintiffs' articles and to issue to them a certificate of incorporation under such name.

[1] Appellants here claim that their demurrer to the complaint should have been sustained. With reference to the general grounds relied upon in support thereof, it is sufficient to say that it is a well-established rule that an exclusive proprietary right may be acquired in the name under which a business has been conducted, and that such right may not be lawfully interfered with or obstructed. This protection is not limited to business and trading corporations, but is given to charitable, religious, and other societies. *Salvation Army v. American Salvation Army*, 135 App. Div. (N. Y.) 268, 120 N. Y. Supp. 471; *Grand Lodge K. P. v. Grand Lodge K. P.*, 174 Ala. 395, 56 South. 963; *Benevolent & Protective Order of Elks v. Improved Order, etc.*, 205 N. Y. 459, 98 N. E. 756, L. R. A. 1915B, 1074, Ann. Cas. 1915F, 639; *Int. Com. Y. W. C. A. v. Y. W. C. A. of America*, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888.

[2] Nor does the fact, as suggested by appellants, that plaintiffs never incorporated their society, alter the rule. A seceding body cannot by incorporating under the name of the parent body thus acquire a right to the use of the name; the fact of incorporation being immaterial. *Supreme Lodge K. P. v. Improved Order K. P.*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658; *Modern Woodmen v. Hatfield* (D. C.) 199 Fed. 270.

[3] Nor do we see any merit in the remaining objection that the question is one exclusively under the jurisdiction of the ecclesiastical courts. It is admitted that there is no tribunal within the Christian Science denomination to which an appeal could be taken, the manual of the mother church providing for local self-government.

[4] And, finally, appellants insist that the evidence shows that respondents have abandoned the method for disseminating the teachings and promoting the tenets of the faith by their act in withdrawing their support from certain publications, and for that reason they are no longer entitled to the use of the claimed name. The findings of the court based upon sufficient evidence are otherwise, and concludes this question.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

54 Cal. App. 392

COLE v. MERCHANTS' TRUST CO. et al.
(DE JERSEY, Intervener). (Civ. 3538.)

(District Court of Appeal, Second District, Division 1, California. Sept. 27, 1921. As Modified Oct. 24, 1921. Hearing Denied by Supreme Court Dec. 22, 1921.)

1. Appeal and error ⇨1099(4) — **Construction of contract on former appeal held the law of the case.**

The holding on a former appeal that a provision of a contract giving defendant an exclusive right to sell plaintiff's lots on monthly installments for a period of 18 months, later extended for 6 months longer, that time should be of the essence, did not require the payment to plaintiff of the full sum which he was to receive within the 18 months, but merely the procuring of sufficient contracts within that time, was the law of the case on a subsequent appeal.

2. Brokers ⇨9—**Contract for sale of lots making time of the essence held to apply to time of procurement of contracts for amount to which owner entitled.**

Under a contract whereby plaintiff gave defendant the exclusive right for 18 months to sell plaintiff's lots for prices payable in monthly installments, and which provided that all proceeds in excess of \$27,640 should go to defendant, and that time was of the essence of the agreement, and a declaration of trust extending the life of the contract for 6 months, the provision making time of the essence did not apply to the time within which plaintiff was to receive the \$27,640, but to the time within which defendant should procure contracts for the sale of lots under which plaintiff's share would be sufficient to aggregate that sum.

3. Brokers ⇨37—**Under contract for sale of building lots amount expended for improvements held not chargeable to selling agent.**

Where a contract giving defendant the exclusive right for 18 months to sell plaintiff's lots required plaintiff to make certain improvements, and provided that he should receive a specified amount from the proceeds of sales, plus interest, and expenditures for improvements, but a declaration of trust conveying the unsold lots and contracts of sale to a trust company and extending the life of the contract for six months authorized the trustee to pay plaintiff any sums expended in further improvement of the property, if necessary in the opinion of defendant, an amount paid by the trust company by plaintiff's direction for further improvements without defendant's knowledge or consent was properly chargeable against plaintiff, especially where defendant had then procured a sufficient number of contracts for the sale of lots, so that plaintiff had no interest in their further improvement.

4. Brokers ⇨37—**Amount paid to remove liens on property held properly chargeable against selling agent.**

Where plaintiff gave defendant the exclusive right for 18 months to sell plaintiff's lots, and thereafter a declaration of trust was ex-

ecuted placing title to unsold lots and contracts of sale in the trustee, and providing that the trustee might pay any sums necessary to remove liens, an amount paid by the trust company to satisfy liens for street work, though paid after plaintiff's interest had terminated by reason of procurement of sufficient contracts to insure the amount to which he was entitled and without the knowledge of defendant or his assignee, held properly chargeable against defendant.

5. Appeal and error ⇨1073(7) — **Error in charging amount against one party harmless where he had received an amount more than sufficient to offset it.**

In an action to terminate a trust and procure a conveyance of lots which another party to the trust had been given an exclusive right to sell, the error in charging plaintiff with an amount properly chargeable to such other party was not prejudicial where there had been wrongfully paid to him by the trustee an amount to which he was not entitled and more than sufficient to offset that which was properly charged against him.

6. Trusts ⇨147(1)—**Party to declaration of trust held authorized to assign interest.**

Where plaintiff gave defendant an exclusive right for 18 months to sell building lots, and thereafter for the purpose of extending and carrying out the contract a declaration of trust was executed placing title to the unsold lots and contracts of sale in a trust company, where the declaration of trust contained no prohibition against the making of assignments, defendant might assign his interest in the trust, especially where he and the trustee had then fully performed their part of the contract.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Cornelius Cole against the Merchants' Trust Company and others. From a judgment in favor of the intervener, B. H. De Jersey, plaintiff appeals. Affirmed.

See, also, 34 Cal. App. 82, 166 Pac. 871.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, Robert B. Murphey, Benjamin E. Page, and Arthur C. Hurt, all of Los Angeles, for respondents.

SHAW, J. Plaintiff was the owner of 27.64 acres of land which he was desirous of selling for \$27,640 net. With this object in view he on February 1, 1905, executed a written contract with F. W. Armitage wherein he agreed to subdivide the tract into lots as per map attached; grade all of said streets delineated on said map other than Marathon street, and grade and gravel the sidewalk on all streets graded; execute contracts of sale for all lots sold by Armitage, the price of which should not be less than \$250 each and upon terms of sale which required the payment of not less than \$25 cash and the balance of the purchase price at the rate of not less than \$10 per

month, which deferred payments should bear interest, commencing one year from date of sale, at 7 per cent. per annum; and execute deeds to the purchasers to whom certificates of title should be delivered as each lot was paid for. Armitage on his part agreed to advertise the lots for sale, maintain an office on or near the tract, use due diligence to complete the sale of said lots during the life of the agreement, which gave to the agent the exclusive right for 18 months for the performance of the contract, pay the cost of subdividing, recording map, and procuring certificates of title, sell no lot for less than \$250, nor on more advantageous terms to buyers than \$25 down and \$10 per month, with interest at 7 per cent. on balance, commencing after one year from sale. It was agreed that the compensation of Armitage should be: First, 10 per cent. of the amount of each sale, payable out of the first moneys received thereon; second, all of the purchase money for each lot in excess of \$250; and, third, all moneys received in the aggregate from sale of lots in excess of \$27,640, added to the interest on deferred payments, and money expended by first party in improving said land (consisting of the grading of streets and grading and graveling of sidewalks)—in addition to which it was provided that, when Cole received the amounts specified to be paid to him, all of the lots remaining unsold, together with contracts upon which payments were not fully made, were to be conveyed and transferred to Armitage. It was further provided that "time is of the essence of this agreement, and upon the failure of the second party (Armitage) to keep the covenants on his part herein contained, this agreement shall, at the option of the first party (Cole), become null and void, and all right" of Armitage shall end.

Immediately upon the execution of the contract the parties entered upon the performance of their respective covenants, and prior to April 4, 1906, prior to which Cole graded the streets and sidewalks, Armitage sold 23 of the lots for \$7,945.70, cash, for which Cole executed deeds to the purchasers, and likewise executed contracts to purchasers of 73 lots sold on time, and at prices largely in excess of \$250 each. Of the money so received up to April 4, 1906, Cole had received \$9,362.50 in cash, and held contracts upon which there was unpaid the sum of \$25,650. At this time an account stated was had between the parties showing a balance to be paid to Cole of \$19,948.30. Thereupon and although several months must elapse before the expiration of the terms of the exclusive agency so granted to Armitage within which he might continue selling lots and procuring contracts from which Cole should be paid the balance of the \$27,640, being the agreed price of the land, together with other sums specified to be paid him under the terms of the con-

tract, a declaration of trust was executed under which all of the unsold lots and the 73 contracts upon which balances were due from the purchasers of lots should be and were conveyed and transferred to the Merchants' Trust Company, which company was authorized to collect the moneys due upon said contracts as the same became due and payable, and, when entitled thereto, execute deeds to purchasers of lots, and execute contracts of sale to purchasers of unsold lots upon the unqualified order of Armitage, or upon the order of Cole, whose right to sell, however, was subject to a specified price being obtained largely in excess of \$250, and pay and distribute the money collected and received by said trust company from the contracts assigned to it, as well as from sales and contracts of sale to be executed by it, in the following manner, to wit: To Armitage, any balance of 10 per cent. due him as commissions on assigned contracts, together with 10 per cent. of the purchase price of all lots sold by the trust company upon the order of Armitage or Cole; and next pay to Cole the sum of \$19,948.30, and also pay any sums expended in the further improvement of the property, provided such improvement was necessary, in the opinion of Armitage, and also any sums necessary to remove any liens, including taxes, which payments, however, for liens, taxes, or further improvement of the property required by Armitage were not to be deemed any part of the \$19,948.30 and interest collected on contracts due to Cole. It was further provided that—

"This declaration of trust is intended to carry out the contract made February 1, 1905, between C. Cole of the one part and * * * F. W. Armitage, * * * of the other part, as modified by extending the life of said contract to February 1, 1907, and by directing the payment to C. Cole of all money arising out of the sale of lots above 10 per cent. until he shall be fully paid."

It thus appears that the declaration of trust not only extended for a period of six months the time within Armitage might sell the lots, but modified the agreement in that no charge should be made against Armitage for further improvements of the property (that is, other than improvements theretofore made pursuant to the terms of the agreement in regard to grading streets and sidewalks), unless the same were, in his opinion, necessary, and for the provision in the agreement under which Armitage, in addition to his 10 per cent. commission, was given the right to all of the money received on the sale of a lot in excess of \$250, there was substituted the provision that, other than the 10 per cent. commission to be paid to Armitage, all of the money derived from the sales of lots, less the 10 per cent. commission, should by the trustee be applied in liquidation of the amounts due to Cole. During the period between April 4,

1906, and February 1, 1907, the trust company sold 10 lots upon contracts for the aggregate sum of \$5,525, which, together with the aggregate amount due upon the 73 contracts so transferred to the trust company, and after deducting the 10 per cent. due Armitage, left a sum largely in excess of that to which Cole was entitled, and which, after being paid, also left in the hands of the trustee certain unsold lots.

On February 6, 1913, and after all of the lots save and except 32 of those so conveyed to the trust company had been disposed of, and the moneys collected upon the contracts, and from the proceeds of which plaintiff, Cole, had been paid the full balance of the \$27,640, together with interest and costs of improvements, all as called for by the agreement made with Armitage on February 1, 1905, he brought this action against the Merchants' Trust Company to terminate the trust and procure a reconveyance of the 32 lots constituting the trust property. In its answer the trust company admitted the existence of the trust, but denied that plaintiff was the sole beneficiary thereunder, alleging that it held the property in trust, for plaintiff and F. W. Armitage. As assignee of Armitage, Basil H. De Jersey filed a complaint in intervention, setting forth the facts in relation to the trust and asking for an accounting and conveyance to him of the unsold lots. Plaintiff answered the complaint in intervention, as likewise did Armitage; the latter admitting the truth of all the allegations contained in such complaint. A trial was had upon the issues raised by plaintiff's answer to the complaint in intervention, as a result of which the court denied any relief to the intervener and rendered a decree terminating the trust and ordering the trust company to convey the trust property to plaintiff. From this decree De Jersey, as intervener, and the Merchants' Trust Company appealed, and the judgment so rendered was reversed by this court in an opinion reported in 34 Cal. App. 82, 166 Pac. 871. Thereupon a retrial of the case was had upon the same pleadings, with the result that a judgment was rendered terminating the trust and ordering a conveyance of the property remaining in the hands of the trustee to B. H. De Jersey, assignee of F. W. Armitage. From this judgment plaintiff has appealed.

[1, 2] On the former appeal, as in this, the chief contention of plaintiff was that the provision in the agreement dated February 1, 1905, making time the essence thereof, was intended to and did require the payment to plaintiff of the full sum of \$27,640 within the 18 months as extended for a period of six months by the declaration of trust. To quote counsel for appellant:

"The bald proposition is: Did the parties contemplate the payment to Cornelius Cole of \$27,640, together with costs of improvements

and interest paid in on deferred payments, within 18 months from the 1st day of February, 1905, and the additional 6 months' extension granted under the declaration of trust, making the full time limit 24 months, or was it the intention of the parties that all that the declaration of trust required was that the selling agent, Armitage, procure contracts of purchase for lots in the tract in question, sufficient in number or amount, regardless of the time within which the payments on said contracts should be completed, sufficient to pay Cole \$19,948.30, provided said contracts be obtained within the 24 months limit as found by the court?"

This was the identical question involved on the former appeal, and the adverse decision made in construing the instruments must be deemed the law of the case on this appeal. We may add that, in view of the fact that under the contract payment to Cole was to be made out of the proceeds arising from the sales of lots at not less than \$250 per lot, upon terms of \$25 cash and \$10 per month, it is apparent that by the agreement the parties contemplated, not the full payment to Cole of the amount due him within such specified time, but that Armitage, under his exclusive agency, should, within the time so fixed and as extended by the declaration of trust, negotiate a sufficient number of contracts from which, as paid, a sufficient sum over and above commissions would be derived to liquidate the amount due to Cole as provided under the terms of the contracts. Any question as to this being the proper interpretation of the agreement disappears when the contract is construed with the declaration of trust under which the trustee was authorized to execute contracts for the continued sale of property upon the terms mentioned in the agreement of February 1, 1905, and which necessarily carried the time of full payment years beyond February 1, 1907, when the term of the agency expired. The findings upon this point are based upon the evidence taken in the first trial, and also new and additional evidence touching the intention of the parties and circumstances under which the agreements were made. The character of the new evidence is conflicting, and it is not of a nature which would warrant any interpretation of the instruments other than that which was accorded them upon the hearing of the former appeal, and in accordance with which decision a retrial was had. We again hold that the provision of the contract making time of the essence thereof applies, not to the time within which Cole was to receive the \$27,640, but to the time within which Armitage should procure contracts for the sale of lots wherein Cole's share thereof would, when collected in accordance with the terms of the contract of sale as modified by the trust, be sufficient in the aggregate to secure to him payment of the agreed purchase price.

[3] Under the declaration of trust, as we have seen, Cole's interest in these contracts

covered all of the purchase price over and above 10 per cent. of the sales price specified therein. While it appears that at the expiration of the 6 months specified in the declaration of trust sales of property had been made for cash and upon contract, the proceeds of which in the aggregate were largely in excess of the sum due Cole under the terms of the contract and declaration of trust, nevertheless the trust could not be terminated until Cole, as one of the beneficiaries therein, had received the full amount due to him. It is conceded that this sum consisted of \$22,461.68 made up of the sum of \$19,948.30 specified in the trust agreement, together with \$1,776.91, covering all interest paid in upon lot contracts, and \$736.47 advanced by Cole in 1911. He was paid \$20,355.82, leaving a balance of \$2,105.86. It appears, however, that in 1909, long after February 1, 1907, to which the time for performance of the agreement was extended, Cole entered into a contract for the further improvement of the streets, under which contract the trust company, upon his order and direction, paid for such work the sum of \$4,263.57. The court found that this sum was not an expenditure provided for under the contract of date February 1, 1905, nor under the trust agreement dated April 4, 1906, and was made without the knowledge, approval, or consent of Armitage, and was properly chargeable against the plaintiff, Cornelius Cole. Appellant attacks this finding, claiming that it is contrary to the evidence. We cannot assent to his contention. When the contract of date February 1, 1905, was entered into it provided that Cole should grade certain streets and grade and gravel the sidewalks thereon. It appears that this work was promptly done under a contract with one Crandall. Under the trust agreement Cole had no authority to further improve the streets at the expense of Armitage, and particularly so since at the time he entered into the contract Armitage had procured a sufficient number of contracts for sale of lots from which Cole, as the money was paid thereon, would be fully paid, and therefore he had no interest in the further improvement of the lots. Moreover, in the trust agreement it was provided that the trustee should not use any sum of money in its possession "to further improve the property" so conveyed to it unless Armitage deemed such improvement necessary. It is therefore clear that under our interpretation of the contracts, and that heretofore made by this court on the former appeal, the money, to wit, the sum of \$4,263.57, so paid out at the request of Cole for the improvement of the streets, should, as found by the trial court, be charged to him as a part of the amount due to him as beneficiary in said trust.

[4] The court further found:

"That the sum of \$2,562.51, paid out by the Merchants' Trust Company in 1909 with the knowledge and consent of the plaintiff, Cornelius Cole, to satisfy liens arising under the Vrooman Act, for public street work done in said tract, was made after all interests of the plaintiff in said tract had terminated, and was made without the knowledge of the defendant Armitage or of the intervener, and was not an expenditure properly chargeable against the trust fund held by the defendant Merchants' Trust Company."

This finding, in our opinion, is not supported by the evidence. The declaration of trust provided that—

"Should it be necessary to remove any liens, * * * now existing, or hereafter to exist on the said property, * * * the trustee shall use any funds in its possession for this purpose, provided, however, that money so used shall not be deemed a payment to the said Cole."

It therefore appears that it was the duty of the trust company, independently of Cole or any request therefor made by him, to apply the sum of \$2,562.51 of the trust funds in satisfaction of the liens created by assessments made upon the lots for street improvement due to action had and taken under the Vrooman Act (St. 1885, p. 147, as amended). In the accounting had the trial court therefore erred in finding that this sum should be chargeable to plaintiff Cole.

[5] The error, however, was not prejudicial to plaintiff for the reason that, as properly found by the trial court, he had received the sum of \$4,263.57, wrongfully paid to him by the trustee and to which he was not entitled, which sum, conceding that he was erroneously charged with the \$2,562.51, was much more than sufficient to offset that to which he was entitled. Indeed, it appears that he was overpaid by the difference between the two sums stated.

[6] We attach no importance to appellant's contention that Armitage was prohibited by the agreement of February 1, 1905, from assigning his interest in the contract. Conceding that he did, prior to the commencement of the action, assign to De Jersey all his right, title, and interest as a beneficiary under the declaration of trust, it was at a time when Armitage and the trustee had fully performed their part of the contract. Moreover, there is nothing in the declaration of trust prohibiting the making of such assignment. Cole had parted with the legal title to the property and his rights and those of Armitage were only such as existed under the trust; hence either might assign his interest therein. *Tyler v. Granger*, 48 Cal. 259.

The judgment as rendered is affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 681

HOOKE v. GREAT WESTERN LUMBER CO.
(Civ. 3965.)

(District Court of Appeal, First District, Division 2, California. Oct. 27, 1921. Rehearing Denied Nov. 23, 1921.)

1. Evidence $\S$ 445(1), 466—Written contract may be modified or discharged by oral agreement.

A written contract, as well as one not in writing, may be discharged, canceled, or modified by a subsequent oral agreement, and the parol evidence rule does not exclude oral evidence thereof.

2. Appeal and error $\S$ 995—Weight of evidence not considered.

An argument on the weight of the evidence is not properly addressed to the appellate court.

3. Contracts $\S$ 255—May be canceled by mutual agreement when supported by consideration.

Under Civ. Code, $\S$ 1541, and under general principles of law it is necessary that there be a consideration for an oral rescission of a written contract, but there is a sufficient consideration where there is a mutual oral agreement to cancel a contract; each releasing the other from his obligations thereunder.

Appeal from Superior Court, City and County of San Francisco; George H. Caba-niss, Judge.

Action by George H. Hooke against the Great Western Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Fabius M. Clarke and William H. Bryan, both of San Francisco, for appellant.

Frank E. Hinckley, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment in favor of plaintiff in an action to recover damages for breach of an agreement to deliver spruce cannery shook. With reference to this agreement the court found:

"That plaintiff and defendant entered into a mutual agreement in writing in words and figures as follows:

"San Francisco, Cal., April 11, 1917. Mr. G. H. Hooke, San Francisco, Cal.—Dear Sir: This will confirm our acceptance of an order for approximately 160,000 6/1 gallon spruce cannery shook at \$11.75 per 100 F. O. B. Watsonville. It is further understood and agreed that we will furnish as many 12/1 gallon standard cases as we can get from our normal run of box lumber at 19c F. O. B. Watsonville. These prices are subject to a 2% cash discount if paid within 10 days after arrival or 30 days net.

"Yours truly, Great Western Lumber Co.,

"By G. P. Smith.

"Approved: Geo. H. Hooke."

The trial court further found:

"That the reasonable time for delivery of said spruce cannery shook was within the season for canning of summer fruit in the year 1917 at said Watsonville, which season was approximately from the 16th day of May to the 15th day of October in said year."

It was also found that only 13,000 of said shook were delivered by the defendant, and that defendant refused to deliver to the plaintiff, after demands therefor, the balance of said shook called for by the said agreement.

[1, 2] One of the defenses pleaded by the defendant in its answer was that the contract between the parties had been, by mutual agreement between plaintiff and defendant, duly canceled, and the delivery of said 147,000 shook was waived by plaintiff. The defendant offered to prove by oral testimony that performance of the contract had been waived by the plaintiff, and that the contract had been, by mutual agreement, abandoned. The court refused to hear evidence upon these questions upon the ground that, the contract being in writing, a waiver or abandonment thereof could only be shown by a writing. It is a general rule that a written contract, as well as one not in writing, may be discharged or modified by a subsequent oral agreement, and that the parol evidence rule does not exclude oral evidence thereof. Elliott on Contracts, $\S$ 1861; 13 Corp. Juris. 601; 25 R. C. L. 712; Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237; Beach v. Covillard, 4 Cal. 315; Gardiner v. McDonogh, 147 Cal. 313, 322, 81 Pac. 964; Guiderly v. Green, 95 Cal. 630, 634, 30 Pac. 786; Arsenio v. Smith, 194 Pac. 756. The trial court, after refusing all testimony offered by the defendant upon this subject, found that the allegations of the answer regarding waiver and abandonment were not true. Respondent meets this objection by stating that the testimony offered by the appellant and rejected by the court upon this point was not such as in itself to show a waiver or abandonment. In the first place, this is an argument upon the weight of the evidence, and is not properly addressed to this court, and, furthermore, under the ruling of the court, we have not before us the evidence which the defendant may have wished to offer. The ruling of the court was a broad one, to the effect that no mutual oral agreement between the parties to abandon the contract would be permitted because such evidence "would be contrary to the rule that you cannot modify or prove a termination by agreement between the parties thereto of any sort or kind of written agreement except the agreement whereby you seek to prove that fact be itself in written form." Such a ruling is contrary to the authorities heretofore cited, and is clearly

(202 P.)

erroneous. The offer made by counsel was to show that after certain conversations between the plaintiff and the representative of the defendant plaintiff stated that he had purchased fiber board containers, and that the defendant company need not consider itself under any further obligation to furnish shook to him, and that thereupon by mutual oral agreement between the parties the performance was waived and the contract orally canceled.

[3] While respondent is correct in his position that under section 1541, Civil Code, as well as under the general principles of law applicable to contracts, it is necessary that there be a consideration for the oral rescission of the contract, nevertheless, the offer of the defendant at the trial covered this element. He offered to prove a mutual oral agreement to cancel the contract. The release of the plaintiff from his obligation to accept and pay for the shook would have been a sufficient consideration for his release of the defendant from its obligation to deliver the shook. The broad ruling of the court excluded all evidence not in writing, and we are uninformed as to what evidence the defendant might have produced to show a mutual oral agreement for abandonment of the contract. As the allegations of the answer upon this question would have been a complete defense to this action if they had been proven, and as the defendant was prevented from introducing proof thereof by the ruling of the court, the judgment must be reversed upon this ground. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

187 Cal. 454

In re ROSS' ESTATE. (S. F. 9573.)

{Supreme Court of California. Dec. 2, 1921.
Rehearing Denied Dec. 29, 1921.}

1. Descent and distribution ⚡34—"Next of kin" entitled to estate where no issue, spouse, parent, or brother or sister survived.

A deceased widow's separate estate, where she left no issue, father, mother, brother or sister, was distributed to the children of her deceased sister, as "next of kin" under Civ. Code, § 1386, subd. 5, to the exclusion of grandchildren of another deceased sister, as subdivision 3, giving right of representation, does not apply unless a brother or sister of decedent survives.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Next of Kin.]

2. Husband and wife ⚡274(1)—Statute controls succession of community property of widow, although husband willed her the property.

Civ. Code, § 1386, subd. 8, controls the succession to property left by the widow, dying intestate, which was community property of herself and her husband at the time of his death, though he devised all or any part thereof to her by will.

3. Husband and wife ⚡274(1)—Descent of community property on death of surviving wife not affected by her not being survived by parent or brother or sister.

Where a widow dies leaving community property, the interests of the heirs of the widow and the heirs of her deceased husband each to one-half, under Civ. Code, § 1386, subd. 8, vest independently of each other, and the heirs of the deceased husband are entitled to one half irrespective of whether the other half vests in a father, mother, brother, or sister of the widow.

4. Husband and wife ⚡274(1)—Not necessary for brother or sister of widow leaving community property to survive for descendants of deceased brother or sister to inherit.

Under Civ. Code, § 1386, subd. 8, providing that one-half of community property of deceased widow shall descend, if no issue or parent survive her, "in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation," there need be no brothers or sisters of decedent surviving in order that descendants of deceased brothers and sisters may inherit.

5. Executors and administrators ⚡314(7)—Petition for partial distribution showing claim not allowed held not demurrable.

A petition for partial distribution, under Code Civ. Proc. § 1663, as added by St. 1917, p. 575, was not demurrable in that it showed an outstanding claim not allowed, where it appeared that sufficient property had been set aside to cover it; for the section requires only allowed claims to be paid before petitioning, and does not require, as a condition precedent,

that all claims shall have been allowed or disallowed, but only that the court satisfy itself that no injury can result to the estate by reason of the distribution.

6. Executors and administrators ⚡314(7)—Petition for partial distribution not demurrable as seeking determination of heirship.

Petition under Code Civ. Proc. § 1663, as added by St. 1917, p. 575, for partial distribution, was not demurrable because, although seeking determination of heirship, it did not conform to the requirements of section 1664, as to proceeding to determine heirship; determination of heirship being but incidental to distribution.

7. Executors and administrators ⚡314(7)—Petition for partial distribution not demurrable because showing inheritance tax not paid.

Petition for partial distribution under Code Civ. Proc. § 1663, as added by St. 1917, p. 575, which stated it was impossible to pay all the inheritance taxes until it was determined who were the heirs, was not demurrable because affirmatively showing that the inheritance tax had not been paid, it being sufficient, to satisfy the requirement of section 1669 that "before any decree of distribution of an estate be made" the court must be satisfied that all taxes, including inheritance tax, have been fully paid, that the order granting the petition direct that "out of the properties of the estate so distributed there shall be deducted and paid the inheritance taxes due * * * from each of the distributees."

8. Witnesses ⚡37(1) — Any person with knowledge may testify as to pedigree.

Proof of pedigree is not limited by Code Civ. Proc. §§ 1852, 1870, subds. 4, 11, to acts or declarations of members of decedent's family or acts or declarations of decedent himself; but any person having knowledge of the facts may testify concerning matters of pedigree.

9. Executors and administrators ⚡314(11)—Special finding controls general finding.

Where there was a finding that all the allegations of the petition were true, and one of the allegations so found to be true was that the heirs of decedent included the descendants of B. and in the specific findings that certain named persons were heirs and in the conclusions of law the descendants of B. were excluded, there was no contradiction in the findings, as the special finding controlled the general finding.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Catherine Ross, deceased. From an order granting administrator's petition for partial distribution, certain relatives of decedent appeal. Affirmed as modified.

George D. Collins, Jr., of San Francisco, for appellants.

Thomas G. Crothers, Wm. M. Abbott, Wm. M. Cannon, Kingsley Cannon, and I. M. Golden, all of San Francisco, for respondents.

LAWLOR, J. This is an appeal by certain relatives of Catherine Ross, deceased, from an order granting a petition by the administrator for a partial distribution of the estate of the said Catherine Ross.

Catherine Ross died intestate March 22, 1916, leaving an estate amounting to upwards of \$50,000. At her death she left neither issue nor surviving father, mother, brother, or sister. She did leave surviving her six nephews and nieces, the children of a deceased sister, Elizabeth H. Donohue, and thirteen grandnephews, grandnieces, great-grandnephews, and great-grandnieces, descendants of another deceased sister, Bridget H. Quinn. At the time of her death there were living also two sisters of John Ross, her predeceased husband, and certain descendants of a deceased brother and three deceased sisters of the said John Ross.

The estate of Catherine Ross consisted partly of her separate property and partly of property alleged to have been community property of herself and her deceased husband. The community property came to her through a decree of distribution of the estate of John Ross. James R. Carrick, the petitioner and one of the respondents herein, and a relative of John Ross, and Katherine H. Nicholson, one of the appellants and a relative of Catherine Ross, were appointed and qualified as administrator and administratrix, respectively, of the estate of Catherine Ross.

The petition for partial distribution was filed October 23, 1919, by James R. Carrick, as administrator of the estate. It related that notice to creditors had been duly given; that the time within which claims against the estate might be presented had passed; that all claims which had been presented had been paid save one for \$2,442.40, which had been rejected, and for the establishment of which an action was at that time being prosecuted; that an inventory of the estate had been filed; and that the estate was not in a condition to be finally distributed. Then followed a recital of the items of the estate and a list of the surviving relatives of John and Catherine Ross. It further stated:

"That it has not been determined what inheritance tax is due to the state of California out of said estate, and a determination of that matter cannot be made until this court determines what part of the properties of said estate was the separate properties of said Catherine Ross, deceased, and what part of said properties was the community property of said deceased and her predeceased spouse, John Ross."

Petitioner's prayer was that the court ascertain and determine the rights of all persons interested in or claiming a portion of

the estate, and the proportion to which each was entitled, and that petitioner have such other relief as might be proper. A demurrer was interposed on behalf of Katherine H. Nicholson on the ground that the petition did not state facts sufficient to entitle James R. Carrick to a partial distribution of the estate, which was overruled. Thereupon she filed an answer to the petition, wherein she alleged that all the property was the separate property of Catherine Ross; that Catherine Ross died testate, and that certain named persons were her only beneficiaries; that the only heirs of Catherine Ross were certain named persons who were the descendants of her two predeceased sisters. The answer further denied all the allegations of the petition.

The court found that all the allegations of the petition were true, and those of the answer were untrue; that certain designated property in the estate came to Catherine Ross by decree of distribution from the estate of John Ross, which property was community property; that certain other designated property was her separate property; and that certain named persons were the relatives of John Ross and Catherine Ross. As conclusions of law the court found:

"That all of the community property of said deceased * * * was succeeded to at the death of said Catherine Ross, deceased, and should be distributed, on final or partial distribution, in the following manner: One-half thereof to the said sisters of the said John Ross, deceased, and to the said descendants of the said deceased brother and sisters of said John Ross, deceased, by right of representation, the heirs, administrators or assigns, and one-half thereof to the said next of kin of said Catherine Ross, deceased, to wit, to the said children of said Elizabeth H. Donohue, deceased, their heirs, administrators, or assigns."

It was further found as a conclusion of law that the separate property should be distributed to the heirs of Catherine Ross, namely, to the children of Elizabeth H. Donohue.

A portion of the estate amounting to \$28,000 was ordered distributed in accordance with the findings of the court. From this order one grandnephew and four grandnieces of Catherine Ross take this appeal. They are grandchildren of Bridget H. Quinn, one of the deceased sisters of Catherine Ross, whose descendants by the terms of the order of distribution are not entitled to share in the estate.

[1] 1. In considering the distribution of the estate we shall first dispose of the question of the separate property. In this connection respondents assert:

That "these nieces and nephews are 'the next of kin' of Catherine Ross, and the facts of this case bring it precisely within the provisions of subdivision 5 of section 1386 [of the Civil Code], which provides that, 'If the dece-

dent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree;" that "It is well established that under the circumstances of this case, subdivision 3 has no application because no brother or sister of deceased survived her."

Subdivision 3 of section 1386 is as follows:

"If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation."

Respondents further state:

"If there be no brother or sister of deceased living at the time of death, then the succession is not governed by subdivision 3, but is controlled by subdivision 5, which specifically provides for that precise case."

Appellants contend that—

"Subdivisions 2, 3, and 4, so far as they relate to inheritance by children and grandchildren of a deceased brother or sister, were all adopted at the same time and as amendments to the pre-existing statute, for the sole purpose of overturning the doctrine of the Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, on which doctrine rests entirely the ruling in the Estate of Nigro, 172 Cal. 474, 156 Pac. 1019, relied upon by respondents to sustain the decree we have appealed from."

* * * Of course, if the deceased never had a brother or sister, there could be no child or grandchild of a deceased brother or sister."

* * * Subdivision 5 makes no provision whatever for vesting the inheritance in a brother or sister of the decedent, and hence the absence therein of any reference to the children or grandchildren of a deceased brother or sister. The entire subject of inheritance by the brothers and sisters and by the children or grandchildren of a deceased brother or sister is manifestly left by subdivision 5 to subdivisions 2 and 3 of section 1386."

Appellants further assert:

"By statutory enactment in 1905, and reaffirmed in 1907, the Legislature amended sections 2, 3, and 4 of section 1386 of the Civil Code by granting the right of inheritance to children and grandchildren of a deceased brother or sister, in equal shares and by right of representation, irrespective of whether the decedent left surviving a brother or sister. The purpose of this statutory amendment was to abolish the interpretation of the law as given by the Supreme Court in Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80. This fact is pointed out by the court in Estate of Jepson, 174 Cal. 684, 164 Pac. 1."

Respondents further claim that—

"The Estate of Jepson is a clear holding to the effect that, where particular conditions or facts are provided for by a particular subdivision or clause, that particular subdivision or clause must govern. The particular facts existing in the case at bar are specifically provided for by subdivision 5. The Estate of Jep-

son is clearly inapplicable and the Nigro Case is undoubtedly apposite and controlling."

The position of appellants is untenable. Estate of Jepson, supra, relied on by them, was decided on the authority of subdivision 2, there having been in that case a spouse and several children of predeceased brothers and sisters who survived the decedent. That case held that the amendments to subdivision 2 adopted in 1905 altered the meaning of that subdivision, and overruled Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, Estate of Carmody, 88 Cal. 616, 26 Pac. 373, and Estate of Fabricio Nigro, 149 Cal. 702, 87 Pac. 384. These cases had held that, under subdivision 2, the children of deceased brothers and sisters could not inherit from the decedent unless the latter left surviving a brother or sister. Estate of Jepson, supra, held that under subdivision 2, as it was amended, the survival of a brother or sister was not necessary in order that children of a deceased brother or sister should inherit.

In Estate of Ellen Nigro, supra, the decedent left neither husband, father, mother, brother, nor sister. The only relatives claiming as heirs were the children and grandchildren of a deceased brother and two deceased sisters. It was claimed the case fell within the provisions of subdivision 3 of section 1386. The court said:

"The rights of the parties here are governed by subdivision 5 of said section. That subdivision is as follows: '5. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.'"

"This subdivision applies, as its language shows, to cases where the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister surviving. This is the condition here presented. * * * Under its terms, therefore, the only persons in equal degree of kindred to Ellen Nigro who could inherit from her were the surviving children of the deceased brother and sisters. The grandchildren of such deceased brother and sisters were not in equal degree with such surviving children."

This case was not overruled by Estate of Jepson, supra, as appellants claim, for there was no contention in Estate of Jepson, supra, that the facts were the same as in Estate of Ellen Nigro, supra, and in Estate of Jepson, supra, it was declared:

"Estate of Nigro, 172 Cal. 474, 156 Pac. 1019, contains nothing in opposition to what has been here said. In the Estate of Nigro this court simply laid down the unimpeachable proposition that children and grandchildren of a deceased brother or sister were not grouped in the law as forming together one class but as

forming two distinct classes, so that grandchildren were entitled to the inheritance only in the event that there were no living children."

In the case at bar, as pointed out, the deceased left neither husband, father, mother, brother, nor sister, and did leave children and grandchildren of deceased sisters. It is therefore similar to *Estate of Ellen Nigro*, supra, and is such a case as is contemplated by subdivision 5.

Appellants also claim that, even if the case at bar does fall within the provisions of subdivision 5, still the amendments to subdivisions 2 and 4 should be read into subdivision 5, and the children and grandchildren of the deceased sisters be allowed to inherit the property. That this is not the case is shown by the statement in *Estate of Ellen Nigro*, supra, that—

"These amendments obviously have no bearing whatever on the rule of interpretation here involved. They do not change the effect of the section [1386] as applied to the facts of this case."

There is no question but that the distributees of the separate property named in the order of distribution are the next of kin of Catherine Ross, they being the children of a deceased sister. As such they are entitled to the property by virtue of subdivision 5 of section 1386. It follows that the order of distribution of the separate property conformed to the statutory provision.

[2] 2. Touching the distribution of the community property, appellants 'make the contention that—

"Subdivision 8 of section 1386 of the Civil Code has no application, for in the first place that provision is a constituent part of the statute of succession, and is, of course, confined to estate not disposed of by will; and as all the property of the community estate that Mrs. Ross, the decedent, received, other than as surviving wife and pursuant to section 1402 of the Civil Code, came to her under the will of her predeceased husband, it is not within the statute of succession, to wit, section 1386 of the Civil Code."

Respondents, on the other hand, maintain that—

"It is utterly immaterial whether one-half of the community property vested in Catherine Ross by operation of law or under the terms of the decree in the husband's estate. Under the express language of section 1386 of the Civil Code, subd. 8, the test is: 'What is common property of such decedent and his or her deceased spouse while such spouse was living?'"

In *Estate of Davidson*, 21 Cal. App. 118, 122, 131 Pac. 67, 69, it was said:

"Subdivision 8 of section 1386 of the Civil Code controls the succession to property left by the widow, dying intestate, which was community property of herself and her husband at the time of his death, though he devised all or any part thereof to her by will."

All the community property in the case at bar is therefore to be distributed in accordance with the provisions of subdivision 8 of section 1386. That section reads:

"If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation."

[3] Appellants argue that subdivision 8 of section 1386 makes the vesting of any interest in the heirs of John Ross dependent on the vesting of a one-half interest in a surviving father or mother, or, if none, in a surviving brother or sister of Mrs. Ross, the decedent. In support of this position is cited *Estate of Ingram*, supra, but that case is not in point, for the property there was separate property and the order of descent was regulated by subdivision 2. Besides, in *Estate of Jepson*, supra, upon which appellants rely, *Estate of Ingram*, as has been shown, was declared to have been overruled by the amendment of 1905. In *Estate of Brady*, 171 Cal. 1, 151 Pac. 275, the wife had died before the husband, leaving brothers and sisters and descendants of deceased brothers and sisters. The husband died later leaving no kin. One-half of the community property was declared escheated to the state. The state appealed from the decree of distribution, contending that the whole estate should have escheated. While the principal question to be decided in that case was whether the estate was community property, it was held that the relatives of the predeceased wife were entitled to inherit one-half of the community property, although the deceased husband left no kin to inherit his half. In *Estate of Hill*, 179 Cal. 683, 178 Pac. 710, the husband, Stephen Hill, predeceased his wife, Isabella Hill, and left surviving him a sister, two brothers, and the descendants of a deceased sister and two deceased brothers. Isabella Hill, upon her death, left only descendants of deceased brothers and sisters. Although the principal question in that case was the constitutionality of subdivision 8 of section 1386, the court affirmed a decree distributing one-half of the property among the relatives of the wife

and one-half among those of the husband, although the wife, at her death, left neither father, mother, brothers, nor sisters. See, also, *Estate of Wenks*, 171 Cal. 607, 154 Pac. 24. It appears from these cases that the interests of the heirs of the two deceased spouses vest independently of each other, and that the heirs of John Ross are entitled to the one half without regard to whether the other half vests in a father, mother, brothers, or sisters of Catherine Ross. The heirs of John Ross were therefore properly included in the order of distribution as entitled to one-half of the community property.

[4] Appellants insist they are entitled to share that portion of the community property which was distributed to the heirs of Catherine Ross. Respondents assert:

"It will be noted that the language just quoted [subdivision 8] is similar to the language of subdivision 3 of section 1386, which was construed in the *Estate of Nigro*, 172 Cal. 474, 156 Pac. 1019, wherein it was directly held that, under the said language of section 3, neither the children nor the grandchildren of a deceased brother or sister are entitled to inherit, unless a brother or sister of the deceased be living."

Appellants state that—

"There is no merit in the point urged by respondents that, as Mrs. Ross left no surviving brother or sister, appellants, as grandchildren, have no right to inherit. This is an attempt on the part of respondents to apply to subdivision 8 the doctrine of the cases of *Ingram* and *Nigro*, whereas it has been explicitly held by the Supreme Court that the doctrine never had any relevancy to a case coming within subdivision 8."

Estate of McCauley, 138 Cal. 546, 71 Pac. 458, was a case involving the distribution of community property left by a surviving wife. Upon the death of the wife, two nieces of the predeceased husband claimed one-half of the community property left by the wife by virtue of subdivision 9, now subdivision 8, of section 1386. The court said:

"Respondents say that these nieces do not inherit under subdivision 9 of section 1386 of the Civil Code, because no brothers or sisters of the deceased spouse of McCauley were living at the time of Mrs. McCauley's death. This view of the statute is based on an alleged application of the rule laid down in *Re Ingram*, 78 Cal. 586, and in *Re Carmody*, 88 Cal. 616, construing subdivisions 2 and 5 of section 1386. These cases throw no light on subdivision 9. This subdivision plainly provides that in a certain contingency the community property must go to 'the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister, by right of representation.'"

For the purposes of the case at bar subdivision 8 of section 1386 is now worded the same as subdivision 9 was at the time *Estate of McCauley*, supra, was decided. Subdi-

vision 8 provides that the property descends to "the descendants of any deceased brother or sister," whereas at the time of the decision in *Estate of McCauley*, supra, subdivision 9 provided that the property should go to "the lawful issue of any deceased brother or sister." It follows that under this subdivision there need be no brother or sister surviving in order that the descendants of deceased brothers and sisters may inherit under subdivision 8. Therefore the descendants of both Elizabeth Donohue and Bridget H. Quinn are entitled to inherit one-half of the community property by right of representation.

Finally, respondents argue that subdivision 5 is to govern the descent of the community property as well as that of the separate property. They claim that "subdivision 8 is a limitation upon the operation of the previous subdivisions of section 1386. It governs the succession of that particular part of the estate of the decedent which was the community property of himself and the predeceased spouse and controls in so far, and only in so far, as it expressly goes. In other words, it governs the succession only to the extent that its provisions specify. Putting it otherwise, it may be said that we must look to the other provisions of the statute of succession for those instances which subdivision 8 does not cover or for which it does not provide." However, inasmuch as subdivision 8 does control this case, as already appears, subdivision 5 is inapplicable. Furthermore, even if subdivision 8 did not provide a mode of descent for the case at bar, subdivision 9, which provides for escheat in cases of community property not covered by subdivision 8, would apply.

[5, 6] 3. Appellants' next contention is that the court erred in overruling the demurrer to the petition, on the grounds that under sections 1658, 1660, and 1661 of the Code of Civil Procedure an administrator cannot petition for partial distribution of an estate, and that the petition does not comply with section 1664 of the Code of Civil Procedure relative to the determination of heirship. They assert that the outstanding claim for \$2,442.40 prevents the case from falling under section 1663 of the Code of Civil Procedure, added by St. 1917, p. 575, relative to the filing of a petition for partial distribution by an administrator, for the reason that it cannot be said whether the claim is an allowed claim or not until the litigation concerning it is determined. Appellants also insist that—

"The petition is also fatally defective in that it affirmatively shows that the inheritance tax has not been paid. The statute expressly provides that, 'before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county and municipal taxes, legally levied upon property of

the estate, and any inheritance tax which is due and payable have been fully paid.' Code Civ. Proc. sec. 1669."

This petition was presented in accordance with the terms of section 1663 of the Code of Civil Procedure, added in 1917 (St. 1917, p. 575). That section provides that—

"Where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by a mortgage upon real estate sufficient to pay them, and the estate is not in a condition to be finally closed and distributed, the executor or administrator, or coexecutor or coadministrator, may present his petition to the court for ratable payment of the legacies, or ratable distribution of the estate to all the heirs, legatees, devisees, or their assignees, grantees or successors in interest."

The petition in this case, the allegations of which were found to be true clearly shows that a situation exists here which is within the contemplation of this statute. The fact that it has not been determined whether the claim for \$2,442.40 is or is not to be allowed is immaterial, for the Code section refers only to those claims that have been allowed. It is not provided that it shall be requisite to a partial distribution that all claims shall have been allowed or disallowed. All that is required is that the court satisfy itself that no injury can result to the estate by reason of the distribution. None could result by reason of this outstanding claim, for there has been sufficient property set aside to cover it. Inasmuch as the petition conforms to section 1663 of the Code of Civil Procedure, it is immaterial whether or not it conforms to sections 1658, 1660, or 1661, which provide for partial distribution on the application of an heir or legatee. Neither is this a special proceeding to determine heirship, as provided by section 1664, and the petition, not having been presented in accordance with that section, need not comply with it. In *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323, it was said:

"The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the 'proportions or parts' to which each of these persons is entitled; and the 'parts' of the estate so distributed may be segregated or undivided portions of the estate."

Although that case involved a final distribution, the same considerations apply to a distribution under section 1663, for, before the court can make an order for ratable distribution, it is necessary to know who the parties entitled to the estate are. Therefore in such a proceeding the court may determine who the heirs are and to what proportion of the estate each is entitled.

[7] Appellants make no objection to the nonpayment of any taxes except inheritance taxes. The petition states that it was impos-

sible to pay all the inheritance taxes until it was determined who were the heirs. *Estate of Mahoney*, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155, involved the final distribution of an estate. The trial court ordered the estate distributed, and ordered that the administrator retain an amount equal to the inheritance tax claimed by the state. Although the precise point involved there was the validity of the inheritance tax, the case is applicable for the reason that the decree of distribution was affirmed, although the taxes were unpaid; the order for the payment being included in the decree of final distribution. In that case the court declared:

"There is no showing in the bill of exceptions that the taxes in question had been paid by anybody, and the last order of the court, made *nunc pro tunc*, shows that taxes to the amount of \$1.90 on each \$100 are claimed to be due upon said estate, and it is ordered by the trial court that the administrator retain that amount in his possession. It will not be presumed that the taxes have been paid, in the absence of a showing to that effect; and sections 3752 of the Political Code and 1669 of the Code of Civil Procedure make it the duty of the court to see to it that the taxes are paid. On the record before us we can see no error in the action of the court directing the administrator to retain the amount of the taxes claimed."

Here the question involved concerns the claims of various heirs, but the inheritance tax cannot be paid until those claims are settled, as in *Estate of Mahoney*, *supra*, it could not be paid until the validity of the tax was determined. In view of that case we think the order of the court directing that "out of the properties of said estate so distributed there shall be deducted and paid the inheritance taxes due to the state of California from each of said distributees" is sufficient to satisfy the court that the taxes will be fully paid by the time the order is executed.

[8] 4. Another assignment of error is as follows:

"The superior court erred in its ruling admitting in evidence the testimony of petitioner Carrick relative to pedigree. The testimony was clearly incompetent and irrelevant, as Carrick was not and never had been a member of the family of the deceased, John Ross, and gave no testimony concerning the declaration of the decedent on the subject."

In support of this position are cited sections 1852 and 1870, subd. 4, of the Code of Civil Procedure, and several cases, among them *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008, and *Estate of Heaton*, 135 Cal. 385, 67 Pac. 321. Section 1852 provides:

"The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible."

Section 1870, subd. 4, is to the effect that evidence may be given upon a trial of "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person," and by subdivision 11 evidence may be received of "common reputation existing previous to the controversy, * * * in cases of pedigree." Counsel for appellants seems to have fallen into error in assuming that these provisions are exclusive. They are but exceptions to the rule that hearsay evidence is not admissible. They do not prescribe the sole method by which pedigree must be proved, and do not exclude testimony on that subject by one having primary knowledge of the facts and who is competent to testify. In *Estate of James*, supra, there was no question concerning the proof of pedigree by direct testimony of a relative. The question was whether the declarations, concededly hearsay, were of such a character as to be entitled to admission under the exception made in cases of family relationship. In *Estate of Heaton*, supra, certain declarations and statements of common reputation were held to have been improperly admitted for the purpose of proving relationship, and the court cited the rules given above, but nowhere was it intimated that these declarations or evidence concerning reputation were the only means of proving relationship. To so hold would, for instance, prevent a parent from testifying as to the paternity or relationship of his or her own child. We conceive that any person having knowledge of the facts may testify concerning matters of pedigree, as on any other proper subject; his credibility and the weight of his testimony being determined in the trial court. Carrick's testimony was properly admitted.

[9] 5. A further assignment of error is that the findings are contradictory and in that respect do not sustain the decree. One of the findings is to the effect that all the allegations of the petition are true. Among these allegations so found to be true is one to the effect that "the names and residences of the heirs and distributees of said Catherine Ross, deceased, and persons entitled to distribution of said estate are as follows." In the list given appeared the names of all the relatives to whom we have referred, including those of appellants and the other descendants of Bridget H. Quinn. In the specific findings that certain named persons are the heirs, and in the conclusions of law, the appellants and the other descendants of Bridget H. Quinn are excluded. There is no error in these findings, for the special finding that certain named persons are the heirs controls the general finding that all the allegations of the petition are true. It was

said in *McCormick v. National Surety Co.*, 134 Cal. 510, 66 Pac. 741:

"A general finding of the court that certain averments of the complaint were true included the fact that the attached property belonged to both the defendants in the former action; but there was a special finding that it belonged to the defendant the said railroad company alone, subject to certain liens, and that the defendant Rickert had no interest therein. Appellant's contention that the special finding must prevail is correct, and this appeal must be determined upon that theory."

The judgment as to the separate property is affirmed, and, as to the community property, it is modified to include the descendants of Bridget H. Quinn as well as those of Elizabeth Donohue.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; WILBUR, J.; SHURTFLETT, J.

187 Cal. 479

Ex parte KANDARIAN. (Cr. 2421.)

(Supreme Court of California. Dec. 5, 1921.)

1. Guardian and ward ⚭8—Superior court has jurisdiction to appoint guardian.

The superior court of Fresno county has jurisdiction and power to appoint guardians.

2. Guardian and ward ⚭17—Appointment not void because another entitled to appointment.

The appointment of a guardian by a court having jurisdiction was not void, because the mother of the minor children was entitled to be appointed, and was valid as against collateral attack.

3. Habeas corpus ⚭85(1)—Presumed that proper notices and proceedings were had in collateral proceeding.

In habeas corpus by the mother of minor children to obtain their custody from one appointed guardian by the superior court, it is presumed, in the absence of any showing to the contrary, that the proper notices and proceedings leading up to such appointment were had.

4. Contempt ⚭63(1)—Order not void because no copy served.

Where one charged with contempt was regularly cited and duly appeared, the order made at the hearing was not invalid, or void, because no copy was served on her.

5. Habeas corpus ⚭92(3)—Whether contempt was committed not open to inquiry.

On a collateral attack by habeas corpus, the court cannot inquire whether the contempt charged in proceedings for contempt was committed.

6. Habeas corpus ⚭54—Allegation that one was not legally appointed guardian held a conclusion.

In a habeas corpus proceeding to recover the custody of minor children, an allegation

that a person was not the legally appointed, qualified, and acting guardian of the minors was a bare conclusion of law, and insufficient to authorize the issuing of the writ, especially where it was not justified by the facts alleged.

7. Guardian and ward ⚡13(8)—**Appeal from order of appointment not taken in time.**

An appeal from an order made March 7, 1921, appointing a guardian by means of a notice of appeal filed November 25, 1921, was wholly ineffectual to give jurisdiction, or suspend proceedings under the order, as it was taken too late.

In Bank.

Application by Zaroohe Kandarian for a writ of habeas corpus to secure the custody of minor children. Writ denied.

A. M. Drew, of Fresno, for petitioner.

SHAW, C. J. The petition for a writ of habeas corpus herein is denied for the following reasons:

[1] 1. The superior court of Fresno county has jurisdiction and power to appoint guardians.

[2, 3] 2. The fact that the petitioner was the mother of the minor children, and as such would be entitled to their guardianship, does not make the appointment of K. Kandarian as such guardian void. It is presumed, in the absence of any showing to the contrary, that the proper notices and proceedings leading up to the appointment of K. Kandarian were had. This being so, an order appointing a guardian is valid, except on appeal, notwithstanding the fact that some other person may have been lawfully entitled to letters.

[4-6] 3. The petitioner was regularly cited and duly appeared at the hearing of the charge against her of contempt of court on November 9, 1921. The order made at such hearing is not rendered invalid or void by the fact that no copy thereof was served on the petitioner. This court cannot, in a collateral attack of this character, inquire whether the contempt was committed as charged in the affidavit upon which said proceeding was initiated. The mere allegation that K. Kandarian is not the legally appointed, qualified, and acting guardian of said minors is a bare conclusion of law, and is not sufficient to authorize the issuing of a writ of habeas corpus. Moreover, it is not justified by the facts alleged in the petition as above mentioned, nor by any other facts alleged therein.

[7] 4. The appeal attempted to be taken from the order made March 7, 1921, appointing the said K. Kandarian as guardian, by means of a notice of appeal filed on November 25, 1921, is wholly ineffectual to give this court any jurisdiction of the appeal, or to affect in any manner the validity of the order appointing K. Kandarian as guardian, or to

suspend proceedings under it. Such appeal was taken too late.

We concur: SHURTLEFF, J.; LENNON, J.; SLOANE, J.; WASTE, J.; WILBUR, J.; RICHARDS, Judge pro tem.

187 Cal. 489

CRAIG v. WHITE. (S. F. 9332.)

(Supreme Court of California. Dec. 7, 1921.)

1. Navigable waters ⚡37(4)—**Patent to lands bordering on lake conveys title to actual shore.**

Government patents to uplands bordering on a lake convey title to the actual margin of the lake, though the surveyed meandered line does not coincide therewith, in view of Civ. Code, § 830, so that a state patent, purporting to convey shore lands between the meandered line and the margin of the lake under the Act March 24, 1893 (St. 1893, p. 341), gave no title where there had been no recession or drainage of the water of the lake.

2. Judgment ⚡704—**Judgment quieting title against both vendor and purchaser admissible to support purchaser's action against vendor for payments.**

In action by a purchaser to recover the payments for land, after rescission of his contract, a judgment, rendered against both vendor and purchaser, quieting the title of third parties to substantially all of the lands covered by the contract, is admissible.

3. Vendor and purchaser ⚡143—**Entering into contract after examination of title does not waive right to deed conveying title.**

Approval of the title by the purchaser before entering into an executory contract for purchase does not, in the absence of an express agreement or of facts constituting an estoppel, waive purchaser's right to a deed carrying the title, on the final execution of the contract.

4. Vendor and purchaser ⚡143—**Acceptance of deed after approval of title prevents rescission.**

Ordinarily the payment of the purchase price and acceptance of a deed to land after approval of title by the purchaser precludes the purchaser from rescinding and recovering the purchase money upon the failure of his title.

5. Vendor and purchaser ⚡130(1)—**Breach of implied agreement to convey merchantable title warrants rescission.**

In an executory contract for the sale of land there is an implied agreement to convey a merchantable title, and failure to do so on demand and tender of final payment is a breach of the contract which justifies rescission and recovery of the money paid by the purchaser.

6. Escrows ⚡8(1)—**Escrow agreement held not to show executed transaction.**

An escrow agreement whereby a deed of bargain and sale was delivered to a bank to be

delivered to the grantee upon the completion of the stated payments therefor, and to be forfeited for failure to make such payments within 30 days after they became due, does not, on its face, constitute as executed a conveyance which would merge the implied agreement of the contract to convey a good title into the covenants of the deed.

7. Escrows ⚡8(1)—Delivery in escrow does not make transaction executed.

The placing in escrow of a deed to the property conveyed by an executory contract for sale does not make the deed an executed instrument.

8. Vendor and purchaser ⚡143—Acceptance of imperfect title might estop purchaser.

An examination and acceptance of an imperfect title before entering upon a contract to purchase might operate as an estoppel against rescission by the purchaser either by express agreement or under circumstances giving substantial advantage to the purchaser or operating to the detriment of the vendor.

9. Vendor and purchaser ⚡114—Waiver implies knowledge of right.

A waiver of the purchaser's right to rescind implies a knowledge, actual or constructive, on his part of the existence of the right and an intention to relinquish it.

10. Vendor and purchaser ⚡119, 144(2)—Purchaser not guilty of laches before time of conveyance; vendor may cure title any time before performance.

A purchaser is not guilty of laches in failing to give notice of rescission to the vendor in ample time to make title good before time for final payment and delivery of the deed, since vendor had until that time to make his title good.

In Bank.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Joseph Craig against Richard White. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel M. Shortridge, of San Francisco, for appellant.

A. E. Shaw and A. E. Cooley, both of San Francisco, for respondent.

SLOANE, J. The plaintiff in this action brought suit to recover the sum of \$20,797.17, paid to defendant as part of the purchase price of real estate under a contract which was rescinded by plaintiff, the purchaser, because of failure of title in the defendant, the vendor. Judgment was for plaintiff, and defendant appeals.

The finding of the trial court that the defendant had no title to the land at any time and failed to convey title upon demand and tender of full performance of the contract by plaintiff is amply supported by the evidence. The original contract of purchase and sale called for a conveyance of all of

the defendant's "holdings on the shore of Clear Lake in Lake county, Calif., being about 350 acres and embracing about 13 miles of lake shore land."

The evidence disclosed that the lands referred to consisted of a strip of water front along the borders of the lake lying between the meander line as established by the United States survey and the actual water line of the lake. According to the calls of the United States field notes, it is shown that this meander line does not conform to the actual water line of the lake, but that the meander line is a sufficient distance from the actual border of the lake to inclose between such line and the water line of the lake the quantity of land called for by the contract between plaintiff and defendant.

Defendant's claim of title was evidenced by patents from the state of California purporting to convey by courses and distances the land between the meander line and the lake "under an act of the Legislature of the state of California, entitled 'An act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes and unsegregated swamp and overflowed lands, and validating sales and surveys heretofore made,'" approved March 24, 1893 (St. 1893, p. 341).

[1] These conveyances were made on the theory that the meander line as marked by the United States survey constituted the actual boundary between the uplands belonging to the government and the state lands included within the borders of the lake. Prior to the issuance of state patents to the defendant, United States patents had been duly issued to settlers on the government uplands bordering on this part of the lake, which patents, under the established rule governing such transfers, conveyed title to the patentees to the actual margin of the lake. Civ. Code, § 830; *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

[2] It also was shown in evidence that there had been no recession or drainage of the waters of the lake, and that there had been therefore no additional land uncovered below the original water line to which defendant's state patents could attach. The title, therefore, to all the land covered by the contract between plaintiff and defendant was vested in other parties under the United States patents. There was, moreover, introduced in evidence the judgment roll in an action by a grantee under the government patents, in which action both the plaintiff and defendant here were made defendants, wherein a judgment had been given and had become final, quieting title in the claimants under the government title, and wherein it was found "that said defendants Richard White

and Joseph Craig have not, nor has either of them any estate, right, title or interest whatever in or to any of said lands or premises," referring to lands described in the complaint. This description covered all lands bordering on the lake included within 11 of the 13 miles of lake front in controversy here. We think this judgment roll was properly admitted in evidence.

Neither of the parties to this action were ever in possession of the land contracted for. There was, if not a complete failure of consideration for the money paid to defendant under this contract, such an approximation to a complete failure as to justify a rescission by plaintiff and the recovery of the money paid, unless defendant was justified to raise the question of failure of title by waiver or laches.

The instrument setting out the terms of the contract for the sale of this land, dated July 16, 1906, and signed by the defendant, acknowledged the receipt of \$100 from the plaintiff, on account of purchase price of the land, and provided that—

"Said Craig is to have until and including the 2d day of August, 1906, to examine title to property, and shall have to that date to pay an additional sum of \$1,500.00, and to have a deed placed in escrow to be delivered to him, his heirs or assigns, upon condition that he or they shall pay to me or my heirs or assigns the additional sum of \$14,400," payable in designated annual installments.

It was also specified that—

"Should the title of said undersigned prove unsatisfactory to said Craig," he, the said Craig, "may on or before August 2, 1906, have return of said \$100, and cancel this contract."

On the date specified, August 2, 1906, plaintiff, by his attorney, notified defendant that he was ready and willing to make the \$1,500 payment, accepted the terms of the contract, and demanded that the deed to the premises be executed and placed in escrow as therein provided. The deed was prepared, signed, and acknowledged by defendant, and, after its inspection by plaintiff, placed in escrow with a trust company under an escrow agreement which set out the terms and conditions for the deferred payments, and directed the delivery of deed to plaintiff when the payments were completed. The deferred payments were thereafter met substantially as required by the contract, or as extended by agreement. It is questioned by appellant that some of the extensions were authorized, but the payments were accepted without protest, and no default on the part of plaintiff can be predicated upon such delays as occurred. Prior to the falling due of the last installment, defendant's claim of title was called in question by the suit of the holder of title under the government patents. Plaintiff thereafter and within the period allowed by his contract tendered payment of the bal-

ance due upon condition that the defendant convey to him a good title to the land in question. This was not done, and this suit was brought for the recovery of the purchase money already paid.

[3] The main contention of appellant, and the real point at issue on this appeal, is as to whether or not the election of plaintiff to affirm the contract and consummate the deal, after the period of 17 days given him to examine title and exercise his option to purchase, constituted such an acceptance of whatever title defendant might have, irrespective of its validity, as to estop him from pleading a failure of consideration. Time was given under this agreement of the vendor to sell for the examination of title as a condition precedent, not to the acceptance of a conveyance, but as preliminary to entering upon the contract of purchase. The approval of the title under such a provision should not, in the absence of express agreement, or of facts constituting an estoppel, operate as a waiver of the right to a deed carrying the title, on the final execution of the contract.

[4] It may be conceded that ordinarily the payment of the purchase price and acceptance of a deed to land, after approval of title by the purchaser, thus effecting an executed contract, precludes him from rescinding or recovering the purchase money upon failure of his title. *Bryan v. Swain*, 56 Cal. 616; *Frederick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 209.

[5] On the other hand, it is the general rule in case of an executory contract that there is an implied agreement on the part of the vendor to convey a merchantable title, and failure to do so on demand and upon tender of final payment is a breach of the contract which justifies rescission and recovery of the money paid by the purchaser. *Backman v. Park*, 157 Cal. 607, 103 Pac. 686, 137 Am. St. Rep. 153; *Crim v. Umlsen*, 155 Cal. 697, 103 Pac. 178, 132 Am. St. Rep. 127; *Sanders v. Lansing*, 70 Cal. 429, 11 Pac. 702; *Winkler v. Jerrue*, 20 Cal. App. 559, 129 Pac. 804; *Flinn v. Barber*, 64 Ala. 193; *Eggers v. Busch*, 154 Ill. 604, 39 N. E. 619.

This distinction between the rights of the purchaser under executed and executory contracts is plainly stated in *Bryan v. Swain*, supra. In that case plaintiff entered into an agreement with defendants by the terms of which he agreed to sell defendants certain parcels of land. The deed was to be a good and sufficient one to convey the title free from all incumbrances and was to be executed and delivered when full payment of the purchase money was made. A grant, bargain, and sale deed was executed and delivered by plaintiff to defendants, and a note and mortgage was taken for the unpaid purchase price. This completed the transaction as an executed contract. Title to one of the tracts

covered by the contract and deed had never vested in the grantor. This was pleaded as a defense to an action to recover on the mortgage. Chief Justice Morrison, writing the opinion for this court, says:

"There can be no doubt that the plaintiff was obliged, under the agreement, to execute a good and sufficient deed, conveying the title; and if this case depended upon such agreement, the matter pleaded would be a good defense to the action. But the finding of the court is that the deed was taken and accepted in execution of the contract. * * * The rights of the defendants, therefore, depend upon the deed, and not upon the agreement, the latter being merged in and extinguished by the former."

It was further held in the case cited that, the deed having been accepted in execution of the agreement, the defendants must look to its covenants for a defense to the action.

But there, as here, the deed was one of grant, bargain, and sale, and the only covenant was the implied covenant that the grantor had not previously conveyed the premises, and that they were free from all incumbrances made or suffered by him (Civ. Code, sec. 1113), and, there as here, there was no breach of such implied covenant to which the purchaser could resort for relief.

Appellant, in the case before us, demands the application here of this rule of an executed contract, on the theory that the placing in escrow of a deed to the premises was a complete execution of the contract on the part of the vendor; that there was no further act for him to perform, and that the only condition to the delivery of the deed was the payment of the balance of the purchase price, and that the acceptance of the contract and execution of the escrow after the stipulated time for examining title was a waiver of all objection to the title.

Was the escrow deposit of this deed, for delivery upon payment of the balance of the purchase price, an execution of the contract to convey? In the first place, there was no mutual contract between the parties prior to the escrow. All that the agreement executed in the first instance by the defendant amounted to was an option giving the plaintiff the privilege to purchase on specified terms at the end of a specified period, if he was satisfied, from an examination of the title, to proceed with the deal. His refusal for any reason to proceed further could only have subjected him at most to the loss of the \$100 initial payment. It was only when, after he expressed himself as satisfied, paid the \$1,500 installment of the purchase price, and the deed and escrow agreement were executed by defendant and ratified by the plaintiff, that a mutual contract of purchase and sale was perfected. Then it was that the original option and offer of defendant became a contract of purchase and sale, and the nature and terms of such contract are evidenced

by the escrow agreement signed by defendant and accepted over the signature of plaintiff. The deed was an ordinary grant, bargain, and sale deed, without express covenants.

[6] The escrow paper was as follows:

"California Safe Deposit & Trust Company, San Francisco, Cal.—Gentlemen: There is herewith delivered to you a deed of conveyance dated August 2, 1906, from the undersigned Richard White, as grantor, to Joseph Craig, as grantee, embracing Lake Shore lands in Lake county, California, which deed is placed in escrow with you and is to be held by you and delivered to said grantee, his heirs or assigns, upon the condition that he shall pay, and when he or they shall have paid to you for account of the undersigned, or his heirs or assigns, the sum of fourteen thousand and four hundred dollars (\$14,400.00) in United States gold coin, at the time and in the manner following, to wit: Sixteen hundred dollars (\$1,600.00) on or before the second day of August, 1907, and a like sum on or before the second day of August of each year thereafter until the said sum of fourteen thousand and four hundred dollars (\$14,400.00) is paid. Together with interest upon all of the said deferred payments at the rate of three per cent. (3%) per annum from August 2, 1906, until paid, interest payable annually at the same time as the payments of the principal installments as above.

"The whole unpaid balance may be paid at any time and if the same shall be paid within three years after the 2d day of August, 1906, all interest which shall have been actually paid shall in that event be credited upon the principal, and considered as having been paid on that account and not as interest.

"If the said grantee, his heirs or assigns, shall fail to make payment of any of such installments at or before maturity, or within thirty days thereafter, he or they shall forfeit all right to have a delivery of the said deed, and shall forfeit all right to the moneys which may have been paid, and the said deed shall be redelivered to the undersigned, his heirs or assigns, free from all claims or rights of the said grantee, his heirs or assigns.

"Witness my hand at San Francisco, California, this 3d day of August, A. D. 1906.

"Richard White.

"I accept the terms of the within conditions.

"J. Craig."

This transaction does not on its face constitute an executed conveyance such as to merge the implied agreement of the contract to convey a good title into the covenants of the deed, as indicated in *Bryan v. Swain*, supra.

[7] The placing of the deed in escrow did not make it an executed instrument. There had been no delivery to the purchaser, no transfer of title. Civ. Code, § 1057; 3 Washburn on Real Property, 536; *Whitney v. Sherman*, 178 Cal. 435, 173 Pac. 931. It is said by this court (*Fitch v. Bunch*, 30 Cal. 212) that "an escrow differs from a deed in one particular only, and that is the delivery,"

but the lack of delivery is a very essential omission to the consummation of a conveyance. It will not be questioned that the failure of a grantor's title pending the delivery of an escrow deed would support a rescission by the vendor, unless the deed itself and not the title was the subject of the agreement between the parties. The same result follows when such title has failed prior to the escrow; because the agreement, express or implied, is that the escrow deed will convey title under the same conditions. In this case the implied agreement for title remained executory. The contract to convey a good title was independent of the escrow itself. That was but one of the steps toward the consummation of the contract, the final one on the part of the vendor, it is true, but not such as to satisfy the contract until its delivery.

We have been referred to no authority which holds that mere opportunity to investigate title before entering into a contract of purchase, and the implied approval of the title offered by subsequently entering into the contract constitutes a waiver of the obligation of the vendor to furnish title on tender of the final payment. The fact of inspection and approval by the plaintiff here of the deed offered for escrow has no significance, because the deed itself was regular on its face and purported to convey the title to the land contracted for.

[8] An examination and acceptance of an imperfect title precedent to entering upon a contract to purchase, by express agreement or under circumstances giving substantial advantage to the purchaser, or operating to the detriment of the vendor, might operate as an estoppel. But even an express agreement to buy and pay for land to which it was known the vendor had no title whatever would be void for want of consideration. Here there is no claim of an express waiver, and there are no circumstances to sustain an equitable estoppel of the purchaser. It is entirely clear that both parties contracted on the belief that the defendant had and could convey title to the land. The plaintiff, although it does not so appear of record, presumably made some search or inquiry. The record title appeared to be in defendant. The plaintiff, by entering upon the contract to purchase, impliedly, at least, expressed himself as satisfied that the title was good. We are of the opinion that this did not preclude him from rescinding while the contract was still executory, and not merged in an executed and delivered deed of conveyance, when he discovered that the defendant had no title whatever and could not make such conveyance.

[9] As is said in Ruling Case Law (27 R. C. L., p. 908):

"To constitute a waiver within the definitions given, it is essential that there be an existing

right, benefit or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them."

And again:

"In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."

It can hardly be seriously contended in this case that the defendant was impressed by anything the plaintiff said or did, with a belief that the latter intended to accept an entirely inoperative deed in satisfaction of his contract.

[10] There was no laches in failing to give notice of rescission before the time had arrived for final payment and delivery of the deed, because the defendant had until such time to make his title good, and it could not appear until the judgment was given in the attack upon defendant's title that he would be unable to do so. The vendor is not in default in such contract if he is able to furnish title when the conveyance is due. *Backman v. Park*, supra; *Hanson v. Fox*, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. And it was not incumbent on plaintiff to tender his final payment so as to enable him to make demand for a conveyance of title before the final payment was due.

Appellant places strong reliance upon the decision in the case of *Sage L. & I. Co. v. McCowen*, 30 Cal. App. 126, 157 Pac. 244, in support of his contention that there was a waiver of objections to invalidity of title. In that decision of the Court of Appeal of the Third District, in an opinion by Mr. Justice Burnett, it was held that, upon the examination of title by vendee under an executory contract to purchase, failure to point out defects constituted a waiver. We think, as pointed out by the District Court of Appeal, there is a material distinction between that case and this. In the case cited the purchasers did point out the defect in the title they were contracting for, and expressly agreed in writing to accept it on specified conditions.

In the first place, the purchasers were furnished an abstract and given 30 days thereafter to make an examination, and report defects, the vendor agreeing to clear such defects within a reasonable time. Title to part of the land was approved and accepted and

deeds of conveyance made and delivered. As to part of the land, certain defects were pointed out, and ostensibly cured in a suit to quiet title brought by the vendor. The only remaining objection was that one defaulting defendant served by publication was entitled under the law to appear within one year and contest the proceedings. A deed to this property was placed in escrow under the express agreement of the purchaser that if the defaulting defendant did not appear within the year the deed would be accepted. No such appearance was made, but the purchaser discovered other defects in the title; but, under the state of facts indicated, it was held that grounds of objection other than that specified in the agreement were waived. This is not contrary to the doctrine we have set out in this opinion. In this case we hold there was no express waiver, and no facts to support an equitable estoppel to plead a failure of title.

The judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SHURTLEFF, J.; WASTE, J.

187 Cal. 431

HYGIENIC HEALTH FOOD CO. v. GRANT.*

(S. F. 10054.)

(Supreme Court of California. Nov. 28, 1921.
Rehearing Denied Dec. 27, 1921.)

1. Corporations ⇨308(10)—Evidence in suit to recover amount paid manager for services held to sustain finding that majority of directors voted to increase his salary.

In an action by a corporation against defendant, to recover an amount paid defendant for his services as manager, which resulted from an increase in his salary for one year, evidence held to sustain a finding that the minutes of the meeting at which the increase in salary was voted by the directors, and which showed that the majority of the directors did not vote for such increase, had been amended at the next meeting by striking the statement that one of the directors did not vote.

2. Evidence ⇨389—Minutes may be contradicted by other evidence.

A statement in the minutes of the meeting of the directors of corporation may be contradicted by other evidence.

3. Corporations ⇨289 — Cannot recover increase of salary paid on plea that it was voted by de facto director.

Where an increase of salary voted the manager of a corporation, who was also a director and stockholder, had been paid to the manager for services rendered by him, the corporation cannot recover the amount of the increase on the plea that one of the directors,

whose vote was necessary to make a majority for the increase, was only a de facto director.

4. Corporations ⇨308(10)—Evidence held to sustain finding of corporation extending term of increased salary of manager.

Where it appears that directors of a corporation voted to increase the salary of the manager for a period of six months, evidence of a vote by the directors more than three months after expiration of that six months' period ratifying all payments to the manager at the increased rate, and continuing the same salary for the remainder of the year, sustains the finding of the court, in a suit to recover the increase paid him, that he did not receive any money during the year to the use of the corporation by reason of such increased salary.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Hygienic Health Food Company against J. E. Grant. Judgment for defendant, and plaintiff appeals. Affirmed.

Welles Whitmore, of Oakland, and Cyril C. Lotz, of Berkeley, for appellant.

Greene & Sinclair, of Berkeley, for respondent.

SHAW, C. J. The District Court of Appeal in the above-entitled action rendered an opinion of which the following is a portion:

"This is an appeal by the plaintiff from a judgment against it in an action to recover from the defendant, who was formerly its general manager and member of its board of directors, the sum of \$300 claimed to have been illegally paid by the plaintiff company to the defendant as salary. The defendant had acted as such general manager for some time prior to February 1, 1918, and during that time, according to the testimony, had received a salary of \$125 a month. From that time on, for a period of one year, the defendant was paid \$150 a month. The increase of \$25 a month for one year—\$300—is the subject of this action.

"Payment of \$150 a month to the defendant as salary, for a period of six months, was purported to be authorized by a resolution of the board of directors of the plaintiff company on February 19, 1918.

"The appellant argues two questions: (1) That this resolution providing for payment of \$150 a month was invalid because not carried by the requisite number of votes of directors. (2) That, if said resolution was valid, nevertheless, after the expiration of the period of six months covered by said resolution, the defendant was not entitled to \$150 a month for his services while he continued in the employment.

[1] "The action was for money had and received by the defendant for the use of the plaintiff, and the trial court found that the defendant was not indebted to the plaintiff, impliedly finding that the resolution was properly passed and that the salary of defendant was

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Motion to vacate judgment denied, 204 Pac. —.

thereby fixed at \$150 a month for six months. This view of the evidence finds some support in the record. It appears that there were five directors of the company. Two of these, admittedly, voted for this resolution. The defendant was present at the meeting, but was disqualified, by reason of his interest in the subject-matter, to vote upon this resolution. The other directors were Cyril C. Lotz, who was secretary of the company, and Mr. Lewars, the president of the company, who was chairman of the meeting of the board. It is admitted that Mr. Lotz did not vote for the resolution. The dispute arises over the vote of Mr. Lewars. The original minutes of the meeting of February 19, 1918, where this question of increase of salary first came up for discussion, were written up by the secretary, and were offered in evidence. They recite that the motion was duly made and seconded, and that 'the motion thereupon was passed, the chair and the secretary not voting.'

"When these minutes were read at the following meeting of the board of directors, held on May 14, 1918, Director Lawson, who had made the original motion, raised a question about the correctness of the minutes. He testified that when the minutes were read, and he discovered that they were so written up as to convey the idea that Mr. Lewars had not voted on the resolution, he objected that they did not recite the fact, and asked that the erroneous portion be stricken out, and it was so agreed. Mr. Rogers, another director, also testified that at the meeting of May 14, 1918, Director Lawson objected to the statement in the minutes of the previous meeting that 'the chair' had not voted, and such words were accordingly stricken out. It is true the minutes of May 14, 1918, do not recite this objection of Mr. Lawson that the minutes did not state the fact with reference to the vote of Mr. Lewars, but they do show an amendment which eliminates the recital that 'the chair' did not vote, and to that extent corroborate the testimony of the two witnesses just referred to. The portion of said minutes bearing upon this matter is as follows: "Thereupon the secretary read the minutes of the meeting of the board of directors held on the 19th day of February, 1918, the said meeting being the last one at which the board had convened; Director Lawson stated in reference to the clause "the chair and secretary not voting" in line 28 on page 140 hereof, that the secretary of a board of directors was not necessarily a director and that he thought they should be amended to state, "Director Cyril C. Lotz not voting." They were thereupon approved as so amended."

"There is also testimony to the effect that the amendment was actually made on the face of the minutes by drawing a line through the entire clause 'the chair and secretary not voting,' and by writing in between the lines the words 'Director Cyril C. Lotz not voting.'

"A witness for the defendant testified that she had made about 12 copies of the minutes of this meeting, and that the words 'the chair and the secretary not voting' appeared upon the original copy as stricken out by having a line drawn through them; that she had seen these minutes up to within a month of the trial, when she was denied access to them. The testimony of Director Lawson is that it was agreed at the

meeting where said minutes were read that these words would be stricken out, and he thinks they were stricken out in his presence. The secretary, Mr. Lotz, upon producing the minutes in court, was asked about the line drawn through these words. There had evidently been an unsuccessful attempt made to erase this line. He explained it by saying that there had been some talk of amending the minutes to show that the chair did vote, and during such discussion the line was probably drawn through the words, but the amendment was not made, and the line was afterwards erased. This testimony, together with the testimony of Mr. Lewars, merely raised a conflict in the evidence upon this point, and, assuredly, there is sufficient testimony in the record to indicate that the minutes were amended to conform to what was then conceded by all the directors, including Mr. Lewars and Mr. Lotz, to be the fact, i. e., that all directors, except the secretary and the defendant, actually voted for the resolution.

[2] "It is true, as contended by appellant, that a statement in the minutes may be contradicted by other evidence, and that the testimony of Mr. Lewars that he did not vote is competent to contradict a statement to the contrary in the minutes. However, the record presents more than a mere statement in the minutes contradicted by the testimony of Mr. Lewars. It presents evidence that at the following meeting the question of whether or not Mr. Lewars actually voted for the resolution was under discussion. Two witnesses testified that at that time Mr. Lawson challenged the correctness of the statement in the minutes of the previous meeting that 'the chair' had not voted for the resolution; that his contention at this time was conceded to be correct, and the minutes were corrected to conform to this acknowledgment of the facts. As so amended, the minutes were then accepted and approved. All directors were present at that meeting, including the two who now contradict by their testimony the recital of the minutes so amended. The conflict is not, therefore, between a recital in the minutes and the testimony of Messrs. Lewars and Lotz, but a conflict between the testimony of these gentlemen at the trial and their admissions and acknowledgments regarding the facts made at an earlier time by the amendment and approval of the minutes. The trial court resolved this conflict in favor of the defendant, and with such determination we may not interfere.

[3] "At the trial an attempt was made by the plaintiff to show that one of the men who was acting as director, and who voted for the resolution, did not actually hold stock in the company in his own name, and therefore was not qualified as a director. The court excluded such evidence upon the ground that it was immaterial. If he was not a director de jure, he was a director de facto, and that is sufficient to bind the plaintiff under the facts shown here. Appellant contends that the doctrine of de facto directors applies only between the corporation and innocent third persons, and those who have no means of ascertaining the fact. The case of *Rozecrans Gold Mining Co. v. Morey*, 111 Cal. 114, 43 Pac. 585, cited by appellant, does not support this contention. The facts of that case make it entirely inapplicable

here. It is there said that the rule of law for the protection of third parties as to acts of de facto officers may well be doubted when applied between the corporation and its own illegally elected officers.

"In the present case, the question is not between the corporation and an illegally elected officer, as it was in the case of Rozecrans Gold Mining Co. v. Morey, supra. This is a case where a corporation has received the benefit of defendant's services under a resolution to compensate him therefor at the rate of \$150 a month. The testimony is abundant that the defendant earned all of his salary, if not more. He supervised the mixing of the company's products, and managed all its business, devoting all his time to this work. Having received the benefit of the defendant's services, we think the corporation is estopped to assert now that one of the directors who voted for the resolution providing for payment of defendant's salary was not qualified to act as a director. If it could question this increase in salary upon this ground, it could, upon the same logic, accept the services of all its employees, if they happened to own stock in the corporation, and then refuse to pay any of them because the resolutions authorizing payment were voted upon by a director not actually holding stock in his own name. The plainest principles of estoppel apply equally to both situations. We think the ruling of the trial court excluding this evidence was proper."

The foregoing part of the opinion is approved.

[4] The appellant also contends that the judgment is excessive because of the fact that the resolution above referred to was limited in its operation to a period of six months, and that thereafter there was no authority for the payment to the defendant of a salary, or, at all events, of anything in excess of \$125 a month, which was the salary fixed by the by-laws of the corporation. The record, however, shows that on November 12, 1918—more than three months after the expiration of the first six months' period succeeding the passage of the resolution raising the salary to \$150 a month—the board of directors unanimously passed a resolution declaring that all payments of \$150 a month to Grant for his services as general manager made since February 1, 1918, were fully authorized and that the same salary be continued the remainder of the year. This was full authority for the finding of the court that the defendant had not received any money for the use of the plaintiff on account of the payment to him of the additional \$25 per month for the last six months for the year ending February 1, 1919.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

187 Cal. 443

PLATNER v. VINCENT. (Sac. 2999.)

(Supreme Court of California. Dec. 2, 1921.)

1. Appeal and error ⇨1078(3)—Point raised by demurrer, but not mentioned in brief, regarded as abandoned.

A point raised by demurrer, but not mentioned in the brief on appeal, will be regarded as abandoned.

2. Husband and wife ⇨213—Wife executing deed with deceased husband as joint and several obligors may be sued alone.

A wife, who with her husband executed a deed as joint and several obligors, was severally liable, and could be sued alone after the husband's death for breach of covenants.

3. Courts ⇨7—Action for breach of warranty of title need not be brought in state where land situated.

An action for damages for breach of warranty of title in a deed need not be brought in the state in which the land is situated.

4. Covenants ⇨22—Covenant for quiet enjoyment of land assumed to run with land, in absence of statutes or judicial decisions to contrary.

In absence of a stipulation, the *lex situs* not *lex loci contractus* determines whether an express covenant for quiet enjoyment runs with the land, but in absence of statutes or decisions in the *situs* it must be assumed that the covenant runs with the land.

5. Evidence ⇨80(1)—Presumption is that covenant for quiet enjoyment of property in another state runs with land as in California.

In an action for breach of a covenant for quiet enjoyment of land situated in another state, the presumption, where no statute of such state is pleaded or called to the court's attention, is that the law of that state is similar to that of California (Civ. Code, § 1464), under which such a covenant runs with the land.

6. Courts ⇨7—Claim for breach of covenant for quiet enjoyment enforceable where grantor found, though covenant runs with land.

While a covenant for quiet enjoyment runs with the land, it is interrupted by and ceases on a breach thereof, and, where such breach occurs while the original grantee still holds the interest originally conveyed to him, the claim becomes a chose in action, transitory and enforceable in any jurisdiction in which grantor may be found.

7. Courts ⇨7—Only original grantee of land in foreign state may recover for breach of covenant for quiet enjoyment, irrespective of whether it runs with land.

The original grantee under a deed executed in California, conveying land situated in Washington, may recover for breaches of covenants of title and quiet enjoyment, irrespective of whether such covenants run with the land, though the laws of Washington (Rem. Code 1915, § 8748) declare such covenants to be express and hence substantially part of the deed,

but an assignee or grantee of such original grantee, in the absence of a contract that such covenant should inure to his benefit, cannot recover for a breach occurring while he holds the title, unless the covenant runs with the land, there being no privity of contract, but only of estate, between him and the original grantor.

8. Covenants ⚡22—Covenants in deed of land situated in another state construed according to laws of that state.

Since the effect and construction of the deed must be determined by the laws of the state in which the lands it conveys are located, irrespective of where it was executed or grantors reside, covenants in a deed of real property situated in the state of Washington, reciting that grantor "has granted, bargained, sold and conveyed," etc., must be construed, and their scope measured by the law of Washington (Rem. Code 1915, § 8748), requiring that the words "bargain, sell and convey" be adjudged an express covenant that grantor was seized of an indefeasible estate in fee simple, free from incumbrances, and for quiet enjoyment, unless limited by express words in the deed, and providing that grantee and his assigns may recover for breaches as if such covenants were expressly inserted, thus reading into and making them part of the deed.

9. Covenants ⚡114(1)—Allegations held to sufficiently allege eviction, though not by actual dispossession.

Allegations that plaintiff grantee had not been permitted to peaceably occupy or enjoy the premises, nor receive the rents, but that named parties had lawful right to certain parts of the premises from which they had lawfully ousted plaintiff, sufficiently alleged eviction by assertion of paramount title constituting a breach of covenant, since eviction need not be by actual dispossession.

10. Covenants ⚡97—Failure to obtain possession by reason of superior title in third person is breach of covenant for quiet enjoyment.

Grantee's failure to obtain possession by reason of a superior title in a third person is a breach of covenant for quiet enjoyment.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Charles F. Platner against Lillian Vincent. From a judgment of dismissal, plaintiff appeals. Reversed and remanded, with instructions.

H. D. Jerrett and James T. Matlock, both of Red Bluff, for appellant.

L. W. Hughes, of Corning, for respondent.

SHURTLEFF, J. The amended complaint in this action contains two counts. The first alleges that on June 5, 1916, plaintiff was the owner, entitled to and in possession of a designated lodging house in San Francisco, under and by virtue of a certain lease, and

on the same day was also the owner of, entitled to and in possession of the furniture therein; that on said day one C. H. Vincent and the defendant Lillian Vincent made their bargain and sale deed, which is set forth in *hæc verba*, conveying certain real property situate in the state of Washington to plaintiff, the operative words of which deed are, "has granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey," etc. It appears from this deed, it not being otherwise alleged, that the Vincents were residents of the county of Tehama, and that the deed was acknowledged by them in the county of Alameda, this state. It is further alleged that the consideration for the deed and the delivery thereof was said lease, and furniture of the value of \$2,500, which lease and furniture were then and there (on June 5, 1916) delivered to said C. H. Vincent and the defendant Lillian Vincent; that said deed was recorded; that C. H. Vincent is dead, and that the defendant Lillian Vincent is the only grantor named in said deed now living; that plaintiff, on or about the 20th day of May, 1917, discovered for the first time that the title so conveyed to him was defective, and did, upon or about said last-mentioned date, notify the defendant that said title was defective, and then and there and at divers times thereafter until on or about the 24th day of February, 1918, made demand on defendant "for a settlement."

It is also alleged: That section 8748, Remington's Code, 1915, Laws of the state of Washington, provides as follows: That every grant, bargain, and sale deed for the conveyance of land in the state of Washington containing in substance and form the words "bargain, sell, and convey * * * shall convey to the grantee, his heirs or other legal representatives, an estate of inheritance in fee simple, and shall be adjudged an express covenant to the grantee, his heirs or other legal representatives," that the "grantor was seized of an indefeasible estate in fee simple, free from incumbrance, done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed." That by the words "grant, bargain, sell and convey," as contained in said deed, the Vincents covenanted to the plaintiff, his heirs and legal representatives, that they (Vincents) were seized of an indefeasible estate in fee simple, free from incumbrance, done or suffered from the grantor, except the rents and services that may be reserved. "That at the time of the execution and delivery of the said deed, the said C. H. Vincent and Lillian Vincent, the defendant herein, were not, nor were they

or either of them, the true, lawful, or rightful owners or owner, nor were they or either of them lawfully seized in their own right of a good and indefeasible estate of inheritance in fee simple, nor had they or either of them good right, full power, or lawful authority to grant, bargain, sell, or convey the same in the manner and form as in said deed pretended and adopted, or in any manner."

The second count is similar to the first, with the exception that it omits the allegations which are in effect but a construction of the statute just quoted, and the negative allegations that the Vincents were not the owners, nor lawfully seized in fee simple, nor had the right to convey, in the manner and form adopted in said deed, the property in it described, and in addition, alleges:

"That by the words 'grant, bargain, sell and convey,' as contained in said deed, the grantor [defendant] covenanted to the grantee, his heirs and legal representatives, to wit, for quiet enjoyment against the grantor [defendant], her heirs and assigns, unless limited by express words (and there were none) contained in said deed; that the plaintiff has not been permitted at any time to peaceably occupy or enjoy said premises under the said deed, or indenture, mentioned and hereby (thereby) intended to be conveyed; nor has he been permitted to have or receive the rents, issues, and profits thereof, but, on the contrary, on the 5th day of June, 1916, one Estelle E. Cooke, at the time of making said deed, or indenture, had, and ever since has continued to have, lawful right to the premises [lot 8] as described in said deed, * * * and J. R. Haight and Floy Haight, his wife, had and ever since they continued to have, lawful right to the premises [lot 1] as described in said deed," and they and each of them "oust[ed] plaintiff therefrom, and still lawfully hold him out of the same."

Then follow an allegation of damages, and a prayer for judgment in the amount claimed. To this amended complaint the defendant demurred upon the following grounds, namely: That the court had no jurisdiction of the subject of the action, nor of the subject of the first or second alleged cause of action, because each of them related to "the question of the title and possession" of real property situate in the state of Washington, "and that the judgment prayed for * * * requires a determination of such question"; that the complaint as a whole, and each count thereof, fails to state a cause of action; that there is a defect of parties defendant in the omission to join the heirs of C. H. Vincent, deceased; that the first count is ambiguous and for the same reasons uncertain and unintelligible, in that "no facts are alleged therein showing that the defendant was not the owner and seized of a fee-simple title, and had a good right, full power, and lawful authority to bargain, sell and convey the lands therein described"; that the second cause of action is ambiguous and also for

the same reasons uncertain and unintelligible, in that "it does not appear by what right, or claim of right, or in what manner Estelle E. Cooke or J. R. Haight and Floy Haight ousted plaintiff from the premises therein described, or interfered with plaintiff's quiet enjoyment of same."

The demurrer was sustained without leave to amend, whereupon a judgment of dismissal was entered, and it is from this judgment that plaintiff prosecutes this appeal.

[1, 2] Respondent in her brief does not mention the point of defect of parties raised by the demurrer, hence it will be regarded as abandoned, but we find no merit in it, for it appears from the amended complaint that the defendant and her husband executed the deed in question as joint and several obligors, from which it follows that defendant was severally liable and could be sued alone. *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968.

[3] The action sounds in damages, and if for any reason it becomes essential to investigate the title of the land described in the deed, such investigation is an incident to the main inquiry or complaint, which is not one to try title in the sense that requires the suit to be brought in a court of competent jurisdiction of the state in which the land is situate. As declared by the Supreme Court of Illinois (*Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555), and with which we agree:

"Where the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate. * * * The court, having the parties in interest all before it, may proceed, although the land to which the controversy relates may lie without the jurisdiction of the court."

Respondent does not seriously contest the soundness of the last-stated propositions so far as they are applicable to the first cause of action pleaded in the amended complaint, because it is grounded upon an alleged breach of a contract of seisin, which is admittedly a personal covenant and does not run with the land, and may be enforced wherever the covenantor may be found, but claims they do not apply to the second cause of action, which charges a breach of a covenant for quiet enjoyment, which covenant respondent affirms runs with the land, and for that reason an action for its breach can alone be brought in the proper court of the state wherein the land to which it relates is situate.

[4-7] In the absence from the deed of a stipulation providing therefor, the question whether an express covenant for quiet enjoyment runs with the land must, in our opinion, be determined by the *lex situs* rather than the *lex loci contractus*; to hold otherwise would not only give rise to possible irreconcilable confusion touching such a covenant in the state in which the land affected

thereby is situate, but might be tantamount to reading into the statutes, of such state a conflicting law of a sister state, which cannot be done. If, however, there are no statutes or judicial decisions in the state wherein the land is located, determining the question, and none have been called to our attention in the instant case (unless the statute just quoted accomplishes that result, which we do not decide, but, if it does, it would merely confirm what follows), it must be assumed that in the state of Washington a covenant for quiet enjoyment runs with the land, for in the absence of a statute or agreement between the parties negating such transmission, such covenants "run with land in all jurisdictions." 11 Cyc. p. 1088. Moreover, no statute of Washington upon the subject having been pleaded or called to our attention, the presumption is that the law of that state upon the subject is similar to our own, namely, that such a covenant runs with the land. Civ. Code, § 1464. But while it is true that the covenant for quiet enjoyment runs with the land, it is interrupted by and ceases upon a breach thereof (11 Cyc. p. 1088; 15 C. J. 1248); and where, as here, the breach occurs while the original grantee still holds the interest originally conveyed to him by the grantor, the claim, assuming that it arises from the fact that the broken covenant runs with the land, becomes a chose in action and transitory and enforceable in any jurisdiction in which the grantor may be found (*Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782), from which it follows that in this instance the superior court of the county of Tehama also had jurisdiction of the cause of action pleaded in the second count of the amended complaint. But we think such jurisdiction must be sustained for another and stronger reason. While it is true that each of plaintiff's two alleged causes of action respectively spring from a breach of a covenant, which the laws of Washington declare to be express, and hence, for all purposes, substantially part of the deed delivered to him by the Vincents, it is likewise true that the enforcement of neither of them is dependent upon the question as to whether it runs with land. In our opinion the cause of action of the original grantee, and such is the plaintiff, is upon the deed—the contract—and if plaintiff establishes the allegations of his complaint, he should recover, irrespective of whether the covenants involved run with the land. As to the grantee, each covenant is one of agreement, and not of some law declaring that it runs with the land. It is fallacious to contend that an express covenant for quiet enjoyment, such as the one involved here is declared to be by the laws of Washington, could not be enforced by the grantee of the deed unless under the laws of the state wherein enforcement is sought it runs with

the land. Quite a different rule would prevail where an assignee or grantee of the original grantee seeks recovery for an alleged breach occurring while he held the title. In such a case there would be no privity of contract between the original grantor and the assignee, and hence the latter's right to enforce the covenant would rest upon privity of estate, and, in the absence of a contract providing that the covenant should inure to his benefit, his right for relief for its breach would be dependent upon the covenant running with the land. The early case of *Lienow v. Ellis*, 6 Mass. 331, upholds these views. It was an action by the assignee of the grantee upon a covenant, broken by the grantor, that the land conveyed by the deed was free of incumbrances. Chief Justice Parsons, speaking for the court, said:

"When the action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory, and may be sued as a transitory action, but when it is founded on privity of estate, the action is then local, and must be sued in the county where the land lies. In the case before us, if the plaintiff can maintain an action of covenant upon the covenant on which he declares, he must maintain it as assignee of Bartlet, by virtue of his conveyance of the land: and his privity is a privity of estate, and not of contract."

[8] Having determined, therefore, that the defendant's objection to the jurisdiction cannot be sustained, we pass to the discussion of her contention that neither count of the amended complaint states a cause of action. All agree that the solution of this question depends upon the nature and extent of the covenants, if any, arising from the presence in the deed executed by the Vincents of the words "granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey," which involves the further inquiry whether the laws of California, where the deed was executed and the grantors resided, or the laws of Washington, where the land is situate, govern and are controlling in solving the problem. A determination in favor of the state of location of the land practically disposes of the proposition, because it then becomes a question of interpretation and application of the law of Washington, which fortunately, is free from difficulty. We are satisfied that upon the weight of authority, as well as upon reason, the effect and construction to be given a deed must be determined by the laws of the state in which the lands it conveys are located, irrespective of where it may have been executed, or the grantors reside.

In *McGoon v. Scales*, 9 Wall. (76 U. S.) 23, 27 (19 L. Ed. 545) it is said:

"It is a principle too firmly established to admit of dispute at this day, that to the law

of the state in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

And this is true, wherever they may be made.

In *Thompson v. Kyle*, 39 Fla. 582, 23 South. 12, 63 Am. St. Rep. 193, the court uses the following language:

"It is * * * almost universally held that so far as real estate or immovable property is concerned, we must look to the laws of the state where it is situated for the rules which govern its descent, alienation and transfer, and for the construction, validity and effect of conveyances thereof."

In *Dalton v. Taliaferro*, 101 Ill. App. 592, 596, it is said:

"We are of opinion that the meaning and validity of the words of grant, and of the words supposed to create covenants running with the land, must stand or fall together, and therefore must be governed by the same law. If a deed of land in Illinois be executed in Maine or Germany it would be unreasonable to say that while its sufficiency to transfer title must depend alone upon the laws of Illinois, yet we must resort to the laws of Maine or Germany to ascertain the existence and construction of covenants which are inseparable from the land, are annexed to the estate granted, can pass only with the grant of the land, and depend for their validity upon privity of estate between covenantor and covenantee. We therefore conclude that in a deed of conveyance of real estate, covenants running with the land are to be controlled and construed solely by the law of the state where the land is situated."

It is our opinion that the covenants upon which the amended complaint is predicated must be construed and their scope ascertained from, and measured by, the law of Washington, which, so far as applicable, is, to repeat, as follows: That the words "bargain, sell and convey" shall be adjudged an express covenant "to the grantee, his heirs or other legal representatives," that he the grantor, "was seized of an indefeasible estate in fee simple, free from incumbrances, done or suffered from the grantor * * * as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and the grantee * * * and assigns may, in any action, recover for breaches, as if such covenants were expressly inserted." It will be noted that the statute in plain terms declares that the covenants in and by it provided shall be express as distinguished from implied, which, in substance, reads them into the deed and makes them part thereof as completely and effectively as they would be were they in terms written therein, from which it follows that the respondent, by the execution of the deed set out in the amended complaint, expressly stipulated that she was seized of

the property in it described, in fee simple, free from incumbrances, and for the quiet enjoyment thereof by the appellant.

[9] Respondent further contends that the second count of the amended complaint, charging a breach of the covenant for quiet enjoyment, not only fails to state a cause of action, but is uncertain and ambiguous and is a statement of conclusions of law. Its material parts have already been stated, but we will repeat them:

"That the plaintiff has not been permitted at any time to peaceably occupy or enjoy said premises under the said deed, or indenture, * * * nor * * * permitted to have or receive the rents, issues, and profits thereof, but, on the contrary, * * * one Estelle E. Cooke, at the time of making said deed, or indenture, had, and ever since has continued to have, lawful right to the premises [lot 8] as described in said deed, or indenture, * * * and J. R. Haight and Floy Haight, his wife, had and ever since they continued to have, lawful right to the premises as described in said deed, or indenture [lot 1], * * * and said Estelle E. Cooke and said J. R. Haight and Floy Haight and each of them ousted the plaintiff therefrom, and still lawfully hold him out of the same."

We think this alleges such an eviction as will, if proven, constitute a breach of the covenant. It is well settled that eviction need not be by actual dispossession. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456. In this case the court said:

"The true rule deducible from the recent cases is that the covenant [for quiet enjoyment] is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title. * * * It is enough that the true owner asserts his title and demands the possession. If it is his right to have possession, it certainly is the duty of the covenantee to surrender it to him. The covenant is for quiet possession, and against a rightful eviction. * * * Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee."

Mr. Justice Shaw, now Chief Justice, speaking for the court, reaffirms this principle in *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449, in these words:

"There is no breach of the covenant for quiet and peaceable possession of land until there has been an eviction by the true owner, or an assertion by him of his paramount right in such a manner that the holder through the covenantor is compelled to yield possession or buy the outstanding superior title"—citing cases.

[10] If the assertion of the paramount title is such that the grantee cannot avoid yielding to it, or by reason of such assertion is unable to secure possession, there is an eviction as complete as would attend removal from the land by force. Failure to obtain possession by reason of a superior title in a

third person is, according to the weight of authority, a breach within the meaning of the covenant. 11 Cyc. 1120; Playter v. Cunningham, 21 Cal. 229.

From what precedes, it follows that the court erred in sustaining the demurrer, and that the judgment must be and it is reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer and to grant the defendant a reasonable time within which to answer the amended complaint.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; WILBUR, J.; WASTE, J.; RICHARDS, Justice pro tem.

187 Cal. 490

Ex parte LIGGETT. (Cr. 2418.)

(Supreme Court of California. Nov. 28, 1921.)

1. Drunkards ⇨2(1)—Hearing for commitment held outside of courtroom.

Under Pol. Code, § 2185c, prescribing the proceedings for the commitment of inebriates and authorizing the judge to fix the time and place for the hearing, which is similar to the provision of section 2168, relating to insanity proceedings, the court has the discretion to designate as a place for hearing a place other than the regular place for holding court as designated by law or by an order made and published as required by Code Civ. Proc. § 142.

2. Drunkards ⇨2(1)—Authority to hold hearing outside of courtroom is valid.

The provision authorizing the court to fix the place of a hearing and examination of a person for commitment as an inebriate at some place other than the regular courtroom is valid, since it is frequently for the best interests of the patient himself as well as of his attendants and witnesses that it be held at the place of his detention.

3. Jury ⇨19(1)—Not entitled to jury trial on hearing for commitment of drunkard.

Pol. Code, § 2174, giving the right to a jury trial in proceedings for examination and commitment as an insane person, does not apply to provisions under Pol. Code, § 2185c, authorizing a hearing for commitment of a person as an inebriate or narcotic addict.

4. Jury ⇨19(1)—Right not guaranteed in proceedings for commitment as drunkard.

The provision of Const. art. 1, § 7, that the right of trial by jury shall be secured to all and remain inviolate refers to the common-law right of trial by jury in ordinary civil and criminal cases, and does not give a right to a jury trial at a hearing and examination for commitment of a person as an inebriate or narcotic addict.

5. Drunkards ⇨2(1)—Affidavit held sufficient to give jurisdiction over hearing for commitment.

An affidavit that a man had been addicted to the excessive use of intoxicating liquors for more than five years last past and had been continuously intoxicated for the last six months shows that he is subject to dipsomania or inebriety, and is sufficient to give the court jurisdiction to proceed with a hearing for his commitment under Pol. Code, § 2185c.

In Bank.

Application for writ of habeas corpus by William M. Liggett, prayed to be directed to the Superintendent of Agnew State Hospital, to secure the release of petitioner from detention therein. Writ denied.

E. G. Ryker, of Oakland, for petitioner.

SHAW, C. J. The petitioner asks for a writ of habeas corpus to discharge him from detention in the Agnew State Hospital at Agnew, Cal., in pursuance of a commitment under section 2185c of the Political Code. He claims that his commitment is unlawful, and that the proceedings are void for the reasons about to be mentioned.

The above-named section authorizes the superior court to commit a person to said hospital for care and treatment upon finding that such person "is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety."

The first objection of the petitioner to the validity of the proceedings is that the hearing, which was before the superior court of Alameda county, was held in a place in Oakland known as the "Emergency Hospital," and that there is no legal authority for holding a session of the superior court in any place other than the place designated by law or by an order of the superior court made and published as provided in section 142 of the Code of Civil Procedure, and that no order designating such other place or publication thereof was made in the present case prior to the hearing.

[1] The objection is answered by the fact that section 2185c provides that, when such accused person is brought before the superior court and the judge has informed him of his rights to make a defense to the charge, "the judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses." The same provision is made by section 2168 of the Political Code with regard to the hearing of a proceeding to commit a person to a hospital for the insane. The two must be presumed to have the same meaning.

[2] We think this provision authorized the superior court to designate any place other

than that fixed in pursuance of section 142 aforesaid, in its discretion. It has been customary for the courts to hold such hearings at places other than the courthouse for many years. In the nature of things it must often be more convenient and sometimes absolutely necessary to do so. Persons to be examined for insanity are sometimes physically unable to be taken to the courthouse without endangering their life or health. It is evident that this provision of the statute was inserted to give the court discretion to direct a hearing to be made so as to give a reasonable opportunity to the person to be examined and to the persons initiating the examination to produce and examine witnesses. It is often necessary to have the patient to some extent under restraint, so that he cannot attack or injure persons present. It would be much more convenient in such cases to have the examination conducted in the place where he is so restrained, or in some other place where similar facilities for restraint are ready for use. Frequently, also, the witnesses for the prosecution of the case are persons who are also confined in such hospital or in attendance there, and the order fixing such place for the hearing would be more convenient for every one else and fully as convenient for the patient to be examined. We think the law is valid, and that the court properly followed it in the present case.

[3] Within five days after the examination and commitment the petitioner demanded a trial by a jury, claiming the right to such trial under the provisions of section 2174 of the Political Code. This was denied, and the examination and commitment were made by the court without any submission of the matter to a jury. This does not invalidate the order of commitment. Section 2174 applies only to proceedings to adjudge a person insane for commitment as an insane person. The authority for committing one to an asylum for care and treatment who has lost the power of self-control because of his addiction to narcotics or stimulants or is subject to dipsomania or inebriety is found in section 2185c aforesaid. That section does not authorize or require the submission of the matter to a jury.

[4] We do not think that the constitutional provision that the right of trial by jury shall be secured to all and remain inviolate (section 1, art. 1) applies to the present proceeding. The right of trial by jury there referred to is the common-law right of trial by jury in ordinary civil and criminal cases.

[5] The petitioner claims that the affidavit was insufficient to give the court jurisdiction to proceed because it does not state the facts necessary to bring the case within the provisions of the aforesaid section. In this behalf he refers to the case of Henley v. Superior Court, 162 Cal. 240, 121 Pac. 921. That case holds that an affidavit which mere-

ly states that the person named "is so far addicted to the intemperate use of stimulants as to have lost the power of self-control," and states no other facts tending to show the truth of such allegation, is insufficient to give the court jurisdiction to proceed. That was a proceeding in prohibition, and the writ was issued in accordance with this conclusion. In the present case the affidavit not only contains the allegation above quoted, but proceeds to allege that Liggett has been addicted to the excessive use of intoxicating liquors for more than five years last past and has been continuously intoxicated for six months preceding the making of the affidavit. Whether the additional facts tend to show the truth of the first allegation or not, it cannot be denied that they do show that the patient to be examined is "subject to dipsomania or inebriety," and this is sufficient to bring him within the purview of the statute and give the court jurisdiction to proceed.

We think the record sufficiently shows, so far as a proceeding in habeas corpus is concerned, that a copy of the order fixing the time and place of hearing was actually served upon the petitioner, and that he was present at such hearing. We find no sufficient reason for any further consideration of the case.

The petition for a writ of habeas corpus is denied.

We concur: SHURTLEFF, J.; WILBUR, J.; SLOANE, J.; RICHARDS, Justice pro tem.; WASTE, J.; LENNON, J.

187 Cal. 437

Ex parte CULVER. (Cr. 2362.)

(Supreme Court of California. Dec. 1, 1921.)

1. Habeas corpus ⇨96—Sufficiency of complaint before justice of the peace can be determined.

In habeas corpus proceedings the court can determine whether or not a complaint in a criminal proceeding in the justice's court states facts sufficient to constitute a public offense.

2. Habeas corpus ⇨96—Complaint before justice of the peace liberally construed.

In determining in habeas corpus proceedings the sufficiency of the complaint before a justice of the peace to charge a criminal offense, the greatest liberality of construction must be indulged and if the complaint states facts which constitute a crime, it is not invalid because other irrelevant facts are stated, or because the law violated by the alleged acts is inaccurately described.

3. Criminal law ⇨252(3), 304(9)—Court takes judicial notice of statutes, and they need not be alleged in complaint.

A court takes judicial notice of the statutes of a state, so that it is unnecessary that

their titles or terms be set forth in a complaint before a justice of the peace charging a misdemeanor.

4. Criminal law ⚡252(3)—Stating wrong statute does not invalidate complaint.

If the facts stated in a complaint before a justice of the peace constitute a crime under a particular law, an allegation that they violate another and different law may be disregarded as immaterial.

5. Health ⚡24—Board can quarantine contacts with, and carriers of, contagious diseases.

Under Pol. Code, §§ 2979, 2979a, and the Public Health Act, the state board of health can order the quarantine of persons who have come in contact with cases and carriers of contagious diseases.

6. Health ⚡40—Removing quarantine placard is misdemeanor.

Under Public Health Act, §§ 13, 21, as amended by St. of 1911, pp. 565, 568, the removal of a quarantine placard affixed to a place of residence under the orders of the state board of health is a misdemeanor, so that a complaint, charging such removal states an offense, though it alleged the act to be a violation of a rule of the state board of health, which is a misdemeanor under Pen. Code, § 377a, regardless of whether it stated a violation of the latter act.

7. Health ⚡37—Person may be quarantined by confinement in place of residence.

The accepted method of quarantining a person under Public Health Act, § 13, as amended by St. 1911, pp. 565, 568, is by confining him to the house in which he is living, so that the quarantine of the person and of his residence are not distinguished in the statute, and the removal of a quarantine placard from such residence by a person other than the one quarantined is a misdemeanor.

8. Health ⚡40—Allegation quarantined person resided at place shows she was an occupant.

An allegation in a complaint, charging the unlawful removal of a quarantine placard, that the defendant's niece, who was the person quarantined, resided at the place mentioned, may, under the liberal rules of construction applied to complaints before a justice of the peace in habeas corpus proceedings, be interpreted as meaning that the niece was an occupant of the place.

In Bank.

Application by Laura Culver for writ of habeas corpus, prayed to be directed to the Sheriff of Alameda County to secure the release of the petitioner from custody after conviction of violating regulations of the public health authorities. Petitioner remanded to custody.

See, also, 195 Pac. 1055.

Chas. C. Boynton, of San Francisco, for petitioner.

Ezra W. Decoto, Dist. Atty., of Oakland, and Frances Wilson Kidd, Deputy Dist. Atty., of Berkeley, for respondent.

LENNON, J. In the justice's court of the city of Berkeley, county of Alameda, petitioner, Laura Culver, was convicted on a complaint purporting to charge her with the commission of a misdemeanor. She was fined, with the alternative of imprisonment, and, accordingly, upon refusing to pay the fine, was taken into custody and imprisoned by the sheriff of Alameda county. Petitioner subsequently applied to this court for a writ of habeas corpus, and was released on bail pending a determination of this proceeding.

In his return to the writ the sheriff of Alameda county, the respondent herein, raised several objections to a consideration by this court of the merits of petitioner's application for the writ. However, inasmuch as respondent apparently abandoned reliance upon these preliminary objections at the oral argument and counsel for petitioner and respondent addressed their discussion solely to the merits of the case both at the oral argument and in the briefs filed subsequent to the oral argument, any opposition to a hearing on the merits must be held to have been withdrawn. The first point before this court is therefore the contention that the imprisonment of petitioner is unlawful for the reason that the complaint does not charge the commission of any act constituting a criminal offense.

The complaint herein alleges that: The state board of health issued an order directing the quarantine of petitioner's niece, who was a minor child residing at petitioner's home in Berkeley, for the reason that said child had come in contact with cases and carriers of diphtheria. Upon receiving this order of the state board, a police officer of the city of Berkeley affixed a placard on petitioner's premises reading:

"Diphtheria Contact

"These premises are declared to be in a state of quarantine. All persons are forbidden to leave or enter these premises or to remove any article therefrom without the permission of the Health Officer. Persons removing this notice will be prosecuted."

Petitioner removed the placard from the premises in the presence of the police officer. Such conduct, the complaint charges, constituted a misdemeanor under section 377a of the Penal Code, which provides:

"Every person who after notice shall violate, or who, upon the demand of any public health officer, shall refuse or neglect to conform to any rule, order or regulation prescribed by the state board of health respecting the quarantine, or disinfection of persons, animals, things or places, shall be guilty of a misdemeanor."

[1] It is true, as petitioner contends, that it is a settled rule in habeas corpus proceedings that a court may determine whether or not a complaint in a justice's court in a

criminal proceeding states facts sufficient to constitute a public offense. Ex parte Kearny, 55 Cal. 212; Ex parte Greenall, 153 Cal. 767, 770, 96 Pac. 804; Matter of Ah Sing, 156 Cal. 349, 104 Pac. 448.

[2] However, the rule is also well established that in determining the sufficiency of such a complaint the greatest liberality of construction must be indulged; if the complaint states facts which constitute a crime, it will not be held insufficient because other facts are stated which are irrelevant or immaterial, or because the law violated by the alleged acts is inaccurately described therein. Ex parte Williams, 121 Cal. 330, 53 Pac. 706.

[3, 4] A court takes judicial notice of the statutes of the state and it is unnecessary that their titles or terms be set forth in the complaint. If the facts stated constitute a crime under a particular law, an allegation in a complaint that the acts in question are a violation of another and different law may be disregarded as immaterial, for it does not alter the nature of the acts charged nor prevent them from constituting a crime. Consequently, it is not essential that the acts alleged to have been committed by petitioner shall have been violative of a "rule, order or regulation prescribed by the state board of health," so as to amount to a misdemeanor under section 377a of the Penal Code. If the tearing down of the placard under the circumstances alleged in the complaint constituted a misdemeanor under any statute of the state, the complaint must be held to charge the commission of a public offense.

[5] There can be no doubt but that, by virtue of the broad power conferred by sections 2979 and 2979a of the Political Code and by the "Public Health Act," the state board of health has power to order the quarantine of persons who have come in contact with cases and carriers of contagious diseases "whenever in the judgment of the said board such action shall be deemed necessary to protect and preserve the public health."

[6] Section 13 of the so-called "Public Health Act" (Stats. 1907, p. 893; amended, Stats. 1911, pp. 565, 568), provides certain rules governing cases of quarantine. Rule 1 provides, among other things, that, with respect to quarantine, the local health authorities must follow all general and special rules, regulations, and orders of the state board of health. Rule 3 reads as follows:

"When any building, house, structure, or part thereof, or tent or other place, is quarantined because of a contagious, infectious or communicable disease, said local health boards or chief executive health officer shall cause to be firmly fastened, in the most conspicuous place upon such house, building, tent or other place, a placard or flag, upon which is printed the name of the disease, in plain and legible letters of at least two and one-half inches in length. This placard or flag must not be removed by any person except the health officer

or his deputy and in no case until the premises have been thoroughly disinfected."

Section 21 of the said act provides that—

"Any person violating any of the provisions of this act * * * shall be guilty of a misdemeanor. * * *"

In the instant case, upon receiving an order from the state board of health directing that petitioner's niece be quarantined, the local authorities affixed to the place of residence of petitioner's niece a placard conforming to the provisions of rule 3, above quoted. If the quarantining of these premises was a proper act in pursuance of the order received from the state board of health, then petitioner's act in tearing down the placard was punishable as a misdemeanor under the "Public Health Act."

[7] In this connection petitioner points out the distinction between the quarantining of a place and quarantining a person. There may be cases in which buildings are quarantined, as distinguished from persons. For instance, where smallpox patients have been removed from a building to a pesthouse the building itself should be quarantined until disinfected, but this does not alter the fact that the ordinary method of quarantining persons is by confining them to their residences and by giving notice to the people outside and inside that there is to be no going out and coming in. It is perfectly apparent from a consideration of the quarantine rules incorporated in the "Public Health Act," section 13 (Stats. 1911, pp. 565, 568), that this statute recognizes that the method of quarantining a person is to quarantine the place in which he lives. Otherwise the quarantine is spoken of as an arrest of the person. Thus, rule 1, requiring quarantine in case of certain contagious diseases and a report thereof to be sent to the secretary of the state board of health, mentions only "cases" of quarantine. Rule 2, likewise, provides that—

Diseases "shall be isolated whenever in the opinion of the state board of health, its secretary, or the local board of health or health officer, isolation is necessary to protect the public health."

In other words, both sections provide for the isolation of the disease, without distinguishing between the quarantining of place or person. Rule 4 provides for the disinfection of certain parts of the house when persons have been quarantined therein. Rule 8 provides:

"Every person subject to quarantine, residing, or being, in a quarantined building, house, structure or tent, shall not go beyond the lot upon which such building, house, structure or tent is situated. * * *"

In fact, all the rules, from 1 to 8, inclusive, clearly disclose that the accepted method of

quarantining a person is by confining him to the house in which he is living.

[8] Section 2979 of the Political Code provides that the state board may establish and maintain places of quarantine or isolation, but how can it be seriously contended that a mere order directing that a person be quarantined is intended to mean that that person shall be arrested and placed in such an isolation hospital, rather than be quarantined by being confined to his residence? Of course, taking possession of the person in the exercise of the powers of the state over health matters would be a method of quarantine, but obviously that cannot be said to be the only method of quarantining a person when the statute clearly indicates that when a place is quarantined the people therein are confined thereto and cannot leave. For instance, in the case at bar, if the state board of health had ordered the quarantining of the place of residence of the petitioner, it would thereby have subjected the proceedings to the very absurdity which petitioner contends for, namely, that the place was quarantined and the person was not. The word "quarantine" in defined in 32 Cyc. 1286, as follows:

"Quarantine as a verb" means "to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community."

Now, the order of the state board of health was to quarantine the person of the petitioner's niece. This meant that she must be confined to a given place and kept out of the community. This was obviously accomplished by putting the appropriate notice upon the house which she occupied as required by statute. The allegation that the niece "resided" at the place mentioned may, under the liberal rules of construction above referred to, be interpreted in connection with the whole complaint as meaning that she was an "occupant" thereof.

It follows that the placard quarantining the premises was affixed in pursuance of the order of the state board of health, and that petitioner's act in tearing it down was a misdemeanor under the Public Health Act.

In view of the fact that the act was a violation of section 13 of the Public Health Act, it is unnecessary to pass upon the question raised by petitioner concerning the constitutionality of section 377a of the Penal Code.

The writ is discharged, and petitioner remanded.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.

187 Cal. 469

**FEDERAL MUTUAL LIABILITY INS. CO.
v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9919.)**

(Supreme Court of California. Dec. 5, 1921.)

1. Master and servant — 405(5)—Minor compensation claimant shown to be member of deceased employee's family.

In a proceeding for compensation under the Workmen's Compensation, Insurance, and Safety Act for the death of an employee, evidence held to show that claimant, the child of an undivorced woman living with deceased as his wife, was a member of deceased's family in good faith and wholly supported by him, so as to justify an award.

2. Master and servant — 388—Child's right to compensation for death not dependent on legal liability for support.

Notwithstanding Civ. Code, §§ 205, 206, making a father legally liable for the support of a minor child, a child who received her support wholly from another man, with whom her undivorced mother was living, and was a member of his family in good faith at his death in his employment, is within Workmen's Compensation Act, § 14; the benefit of the act not depending on legal liability for support.

Shaw, C. J., dissenting.

In Bank.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding by Bertha Fern Gnash for compensation under the Workmen's Compensation Act for the death of one William G. Thompson, opposed by W. C. Crowell, employer, and the Federal Mutual Liability Insurance Company, insurer. An order awarding compensation was made by the Industrial Accident Commission, and the insurer brings certiorari. Award affirmed.

Cooley, Crowley & Lachmund, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LAWLOR, J. This is a proceeding in certiorari upon a petition by the Federal Mutual Liability Insurance Company to review the action of the Industrial Accident Commission in granting an award to one Bertha Fern Gnash as compensation for the death of one William G. Thompson.

Cassander K. Gnash and George Gnash, parents of Bertha Fern Gnash, the claimant, were married in Kansas in 1896 and later moved to California. The record shows that Gnash was a poor provider and that the members of his family were compelled to support themselves to a large extent. He was in the habit of going away and leaving them for weeks at a time, and finally left them permanently. After that Mrs. Gnash supported herself by various kinds

of work until October, 1917, when she went to Yermo to do housework and cooking for the deceased, William G. Thompson, on his ranch. She took Bertha Gnash, then six years old, with her. Later the three moved to a mine near Baxter, and at about that time, according to the testimony, the relationship between Thompson and Mrs. Gnash changed. He stopped giving her wages and began paying the expenses of herself and Bertha. Mrs. Gnash continued to do the housework and cooking. In May, 1918, Mrs. Gnash, with Thompson's co-operation, started proceedings to secure a divorce from Thompson, which suit was never determined. From that time Thompson and Mrs. Gnash lived together openly as husband and wife. Mrs. Gnash used the name "Mrs. Thompson," and Bertha was called "Bertha Thompson." Thompson supported them entirely, giving the money to Mrs. Gnash, who bought what she wanted for Bertha. In February, 1920, they were living in Redlands, and Thompson was working for one W. C. Crowell as a carpenter. On February 19, 1920, he fell off a scaffold, sustaining injuries from which he died. Mrs. Gnash petitioned for compensation under the Workmen's Compensation, Insurance, and Safety Act (Acts 1917, p. 831). It was stipulated that the injuries which caused Thompson's death arose out of and in the course of his employment; that his average earnings were \$4.50 per day; that he was working six days per week; that any benefits to be awarded should be computed upon that basis; and that W. C. Crowell, the employer, was insured against risks under the Compensation Act by the petitioner, Federal Mutual Liability Insurance Company.

Upon the hearing Mrs. Gnash testified she was Thompson's wife and that Gnash was dead. She gave the date of her marriage to Thompson as November 28, 1917, and described a judge who, she said, performed the ceremony. After the hearing she confessed to the referee that her relationship with Thompson was meretricious. The referee, in an affidavit signed by himself, forwarded the information to the Industrial Accident Commission, and Mrs. Gnash abandoned all claim against petitioner on her own behalf. Bertha Gnash was awarded compensation in the sum of \$4,889.98; the Commission finding that she was "a member of his [Thompson's] family in good faith and wholly supported by him." A rehearing was had upon application of the petitioner. At the rehearing Mrs. Gnash testified that she had not been married to Thompson, and described the relationship as she had confessed it to the referee to have been. The Industrial Accident Commission affirmed its former finding that Bertha Gnash was a member of decedent's family and entitled to compensation. The award was affirmed, except that it was reduced to \$4,001.40, the correct sum when

computed at the stipulated rate of \$4.50 per day. Petitioner thereupon brought this proceeding.

[1] 1. In support of the contention that the award should be annulled, petitioner advances two arguments. The first of these is that—

"Mrs. Gnash was an employee of Thompson in domestic service, and therefore neither she nor Bertha Fern Gnash was a member of his 'family or household,' within the meaning of the Compensation Act. * * * Mrs. Gnash went to work as a cook, and that fact being established, and no criminal or unlawful act being proved, it is presumed that this relationship of employer and employee continued between Thompson and Mrs. Gnash until his death."

It is insisted that the record refutes any claim that the relation of employer and employee was terminated; that Mrs. Gnash testified she went to the mine to work for Thompson as a cook; that Mrs. Gnash's married daughter, Mrs. Grace Hart, testified that Mrs. Gnash did Thompson's work for him and in return received her own support and that of Bertha Gnash; that the change in method of payment, or the fact of cohabitation between Thompson and Mrs. Gnash, did not alter the relation of employer and employee. Respondents assert that—

"The facts of the case, however, show that there came a time in the relationship between the employee [Thompson] and Mrs. Gnash when she ceased to be his employee and he ceased to be her employer, and when they began to cohabit. When the period of cohabitation began, wages ceased, and the employee commenced to support Mrs. Gnash and her child as members of his household and on a distinctly different relationship from that which existed at the time that Mrs. Gnash first went to the employee. * * * After they reached the mine, a different relationship commenced. There they began to cohabit, and the employee paid the expenses for the woman and the child, apparently without regard to the amount thereof. * * * In spite of the contentions of petitioner, the record distinctly shows beyond all doubt that Thompson and Mrs. Gnash lived together as man and wife, and that he supported Mrs. Gnash and her child as he would his own wife and daughter."

In our opinion the evidence sustains respondent's contention and the implied findings of the Industrial Accident Commission that at the time of decedent's death his relations with Mrs. Gnash were not those of an employer. It is true that Mrs. Gnash testified she went to the mine as a cook, and that her daughter testified Mrs. Gnash received her support from Thompson in return for her services. However, we think the evidence shows there was more of a change in their relationship than might be implied from the fact that Thompson stopped paying Mrs. Gnash wages, or, indeed, from the fact of

the meretricious relationship. Mrs. Gnash testified:

"No, he never paid me wages after I went to the mining camp.

"Q. Out on the desert? A. Yes.

"Q. Did he pay the expenses? A. He paid the expenses.

"Q. To whom? A. To myself and my little girl. * * *

"Q. When did you first become known and call yourself Thompson? A. After we visited the lawyer's office to file the divorce suit. * * *

"Q. You never were married to Mr. Thompson? A. No.

"Q. Was he agreeable to having you use his name, Thompson? A. He asked me to on account of gossiping tongues.

"Q. What did Bertha call him; how did she address him?" And, addressing the child, she asked: "A. Daddy, didn't you?" Bertha Fern Gnash nods head affirmatively. * * *

"Q. Where was Guy Gnash living during 1919 and the first part of 1920? A. With Mr. Thompson and I.

"Q. Wherever you were? A. We were in Elsinore.

"Q. In Elsinore and Redlands? A. Yes.

"Q. He was living with you as one of the family? A. Yes. * * * No; it was after he was married; he and his wife lived here with us, on 115 Church, for a little while. * * *

"Q. Was he living at home? A. Yes.

"Q. With you? A. Yes.

"Q. Did you charge him board and lodging? A. Yes, surely; he paid his way."

Mrs. Gnash stated that her son did not contribute to her support or Bertha Gnash's "after Mr. Thompson started keeping us, supporting us, because it was not necessary." She further testified:

"Q. Did you and Mr. Thompson have any plans, any expectations of getting married? A. We surely did.

"Q. Had you discussed that with him? A. Yes.

"Q. And what did you intend to do? A. We intended to get married as soon as Mr. Maloney, after the suit was filed, but we just neglected sending in the rest of the money; in fact we bought some property which tied us up."

Guy Gnash, Mrs. Gnash's adult son, testified he met Thompson in 1917 on a train.

"Q. Was your mother then living with him? A. No, sir.

"Q. Was she working for him? A. Yes; I believe she was working for him. Yes; she was working for him. * * *

"Q. Was that the time [when they were at Afton] when your mother began living with Mr. Thompson? A. No. I don't think so.

"Q. When did she begin living with him? A. I think that's when they went to Elsinore.

"Q. She was working for him in Afton? A. She was working for him in Afton."

It thus appears that in the latter part of their association Thompson paid the expenses and supported Mrs. Gnash and Bertha

Gnash; that it was at his request they assumed his name; that he was assisting Mrs. Gnash to secure a divorce; that he intended to marry her when the divorce was obtained; that they bought property together; that Mrs. Gnash's son lived "at home" with them as "one of the family"; and that the difference in the relationship between them while Mrs. Gnash was "working for" Thompson and while she was "living with him" was clearly recognized by Mrs. Gnash's son. It is idle to assume that when he spoke of his mother as "living with" Thompson he meant anything else than what the words import. In our opinion these facts shows that at the time of Thompson's death Mrs. Gnash was a member of his household and supported as such, and that the money Thompson gave her was not paid as wages but was given for herself and Bertha Gnash, as if spent by the head of a family for those in the household.

Moore Shipbuilding Corporation v. Industrial Accident Commission, 196 Pac. 257, 13 A. L. R. 676, was a case in which the facts were similar to those in the case at bar. There a woman was living with an employee who was killed, and with them lived the claimant, the woman's young daughter. In that case the court said:

"Again, the word 'household' is variously used to designate people, generally, who live together in the same house, including the family servants, and boarders; or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the 'family' to include only those of the household who are thus intimately associated, the 'household' to exclude those of the family not living in the home. There can be no doubt that Bauer, Mrs. Miller, and the little girl constituted a family or household. They were living together in all the interdependency * * * of man and wife and their legitimate offspring. The only thing to exclude Mrs. Miller from the benefit of this relation was lack of good faith."

We think the facts of the case at bar, as already brought out, show that the three people were living together as a family and were members of one household; since it is held in Moore Shipbuilding Corporation v. Industrial Accident Commission, supra, that people living together in such a relationship may constitute a household.

[2] 2. Petitioner's next contention is that Bertha Fern Gnash, being a legal dependent of her father, George Gnash, could not legally be a total dependent of the deceased, Will Thompson. This claim is based upon the fact that sections 205 and 206 of the Civil Code make a father legally liable for the support of a minor child, and that section 14, subdivision a, of the Compensation Act, raises a conclusive presumption that a child under the age of 18 is wholly dependent "up-

on the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death."

Even if George Gnash is legally liable for the support of Bertha Gnash, we are not prepared to hold that this precludes her from becoming wholly a dependent on Thompson within the meaning of the Compensation Act. Section 14 of that act provides that—

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death. (2) A child or children under the age of eighteen years or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death, there being no surviving dependent parent.

"(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee.

"(c) No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee. * * *

It will be noted that subdivision (a) does not provide generally, as contended by petitioner, that a child is conclusively presumed to be dependent on the parent who is legally liable for his support. That subdivision provides that when a child's parent is killed, and no dependent parent survives, the child is presumed to have been dependent on the deceased parent. Such a situation is not presented here, for, even if it had been Bertha Gnash's father who was killed still she had a dependent parent surviving—Mrs. Gnash (Civ. Code, §§ 155, 174, 175)—who admittedly has no claim under the Compensation Act because of Thompson's death. The case, therefore, falls within subdivision (b), which provides that in all other cases dependency shall be determined in accordance with the fact as it may exist at the time of the injury.

In *Moore Shipbuilding Corporation v. Industrial Accident Commission*, supra, there was a finding that Mrs. Miller's husband, the claimant's father, was dead. An examination of the record shows that this finding was made in the first hearing of the cause, in spite of the testimony of Mrs. Miller to the effect that at the time she was living with Bauer she knew she was then the wife of another man. Upon the rehearing, however, which was a hearing de novo, there was no such finding. In that case the effect of Miller's legal liability for the claimant's support was not discussed. However, the fact that Bauer was not legally liable for

her support was considered, and the court said:

"The need of relief from the deprivation caused by the death of the employee and the questions of public policy involved rest upon the fact that the employee has in good faith taken into his home and assumed the support of one without other means of subsistence. The hardship to the individual dependent, and the incidental burden to the insurer or to society from the death of a breadwinner are no different whether the maintenance of the dependent has been voluntarily and gratuitously assumed, or legally imposed.

"As has been pointed out, the benefits of this law are not provided as an indemnity for negligent acts committed or as compensation for legal damages sustained, but is an economic insurance measure to prevent a sudden break in the contribution of the worker to society by his accidental death in the course of his employment. From this economic standpoint it makes no difference whether the workman's earnings are being distributed to those whose support he has voluntarily assumed, or to those who are legally entitled to such support. In either case they are the reliance of dependent members of society. The only difficulty is that where there is no legal dependent it is harder to determine that the contribution of support has been made so as to constitute the recipient a dependent in good faith. * * *

"There are three vital conditions required to establish dependency in this case under the Compensation Act: First, was Ida Miller actually dependent upon the decedent for her support; second, was she a member of his family or household; third, was the relation or connection sustained in good faith?"

It is clear both from the wording of the act and from that case that the benefit of the statute does not depend upon legal liability for support. As pointed out, there is no presumption that because Gnash was legally liable for Bertha Gnash's support she was wholly dependent upon him, within the meaning of the Compensation Act, and if she were in fact a dependent of Thompson, the effect of his death upon her is the same whether she had a father who was legally liable for her support or not. If she was in fact a dependent of Thompson, and was in good faith a member of his household, she is entitled to compensation, whether or not her father was living.

It was found by the Industrial Accident Commission that—

"Applicant Bertha Fern Gnash was at the time of the death of the employee in good faith a member of his household, and was totally dependent upon him for support at said time, within the terms of the Workmen's Compensation, Insurance, and Safety Act of 1917."

As we have shown, Mrs. Gnash was not an employee of Thompson at the time of his death, and the money paid for Bertha Gnash's support was not paid to Mrs. Gnash as wages. Concerning Bertha's position in Thompson's household, Mrs. Gnash testified:

"Have they [Mrs. Hart and her husband] made any gifts of money, clothes, or anything else to Bertha? A. Some clothes for Bertha since Mr. Thompson was killed.

"Q. Before Mr. Thompson was killed? A. No; not before; Mr. Thompson supported her. * * *

"Q. Did Mr. Thompson display any special affection for Bertha? A. Well, no; nothing more than a father, of course; he showed her more fatherly love than her own did, a whole lot, or ever did, as far as supporting her. * * *

"Q. Where did you get the money and the funds that you used to buy the clothing for Bertha and yourself since you were living with Mr. Thompson? A. From Mr. Thompson.

"Q. Did he understand that his money was being used to support Bertha that way? A. Yes.

"Q. To buy her clothing? A. Most assuredly.

"Q. Did he ever buy any school books? A. No, because books were furnished; he did not have to buy school books."

Bertha Gnash testified:

"Q. Do you know where you got your dresses and clothes that you wore; where did they come from? A. My father, Mr. Thompson.

"Q. What did you call Mr. Thompson? A. Father.

"Q. What is your name? A. Bertha Fern Thompson.

"Q. Was Mr. Thompson good to you? A. Yes."

Mrs. Grace Hart testified:

"Q. Do you know whether or not she [Bertha Gnash] has recognized Mr. Thompson, the deceased, as her father? A. Yes.

"Q. Did she look upon him as her father? A. She did.

"Q. Do you know whether she ever knew the difference? A. She never. * * *

"Q. Do you happen to know whether Mr. Gnash contributed anything to your mother for her support or for the support of Bertha since he has been away? A. No.

"Q. He has not? A. He has not."

Guy Gnash testified further:

"Q. Did you have occasion to observe how Mr. Thompson provided for your mother? A. He provided well for her.

"Q. Who else lived with them? A. Bertha Fern.

"Q. Did he provide for her? A. He did.

"Q. Did she consider him her father; did she treat him as though she thought he was her father? A. Yes; she did

"Q. What did she call him; what was her term? A. Sometimes she called him 'Dad.' * * *

"Q. You knew that your sister Bertha was called Bertha Fern Thompson? A. Yes."

This evidence shows clearly that Thompson treated Bertha as if she were his own child and that he provided for her as a father might. It is ample to support the finding of the Industrial Accident Commission that Bertha Fern Gnash was wholly dependent on Thompson and was a member of his household. There can be no question but that she regarded him as a father and that she was in good faith a member of his household.

Petitioner has cited *Farrington v. Lachman and Jacobi*, 1 I. A. C. (Part I) 116, a case wherein a father, whose children were being cared for by another, was killed, and the children were allowed compensation. It appears the mother of the children had died before the father. There being no surviving dependent parent, the case fell squarely within subdivision (a) of section 14 of the Compensation Act, and the children were to be conclusively presumed wholly dependent upon the father. *Wilcut v. Cudahy Packing Company*, 4 I. A. C. 308, a case of a deserted wife, also came within subdivision (a) of section 14, and in *Aldinger v. Ransome Concrete Co.*, 1 I. A. C. (Part I) 151, the Commission found the applicant's mother to have been, as a fact, an employee of the deceased, with whom she was living, and that the mother and not the deceased supported the child. In the case at bar the claimant's mother was not an employee of the decedent, but, as we have pointed out, was a member of his household.

The award is affirmed.

We concur: SLOANE, J.; SHURTLEFF, J.; WILBUR, J.; LENNON, J.; WASTE, J.

SHAW, C. J. I dissent. I do not believe that persons living together in the relation shown in this case can justly or properly be considered as constituting a lawful family or household, within the meaning of the Workmen's Compensation, Insurance, and Safety Act. This court has heretofore decided that such persons may be a lawful household, but I did not concur therein. On such a question of ordinary morality I cannot defer to or follow that decision.

187 Cal. 500

OBERKOTTER v. WOOLMAN. (L. A. 6787.)

(Supreme Court of California. Dec. 9, 1921.)

1. Appeal and error ⇨422—Appeal not dismissed as one from order sustaining demurrer and not from judgment rendered.

An appeal will not be dismissed as one taken from an order sustaining demurrer, instead of from the judgment, though notice of appeal states that appeal was from judgment rendered on specified date, which was date on which demurrer was sustained, and though judgment of dismissal was not made until subsequent date, where there was but one judgment entered in the case, especially where notice correctly gave book, page, and date of the entry of the judgment.

2. Libel and slander ⇨80—Complaint held to state a cause of action for slander.

Complaint alleging that plaintiff was a skilled teacher, that defendant publicly announced that "we are going to drop" enumerated persons, including plaintiff, from the staff of school-teachers, and that "these changes have been recommended to the school board by" a named principal, "for the reason that he considers these positions, as they exist, weak spots in the public school system of instruction," that such statements were false, malicious, and unprivileged, so far as the plaintiff was concerned, and that the defendant thereby publicly accused the plaintiff of being unfit and incompetent to be employed in his profession, *held* to state a cause of action for slander, under Civ. Code, § 46, subds. 3, 5.

3. Libel and slander ⇨88—Complaint held to allege general and special damages.

In action for slander, allegation that the false, malicious, and unprivileged publication by defendant exposed plaintiff to hatred, contempt, ridicule, and obloquy, and were made by the defendant to so expose him, and that by reason thereof plaintiff has suffered great mental anguish, and has been greatly injured and prejudiced in his reputation as a school-teacher, and has lost and will continue to lose great gains and profits which would otherwise have accrued to him, in the sum of \$55,000, *held* a sufficient allegation of general and special damages.

4. Limitation of actions ⇨127(7)—Amended complaint pleading slander, held not to change cause of action.

Where original complaint, filed within period of limitations under Code Civ. Proc. § 340, alleged that defendant communicated false and malicious words to a reporter of a certain newspaper, knowing and intending that they would be published therein, and that they were so published, amended complaint, alleging that defendant made false and unprivileged communication to such reporter, knowing and intending that it would be given further circulation through the public press, *held* not barred by limitations, though filed more than one year after alleged utterance, since the amended complaint did not change the cause of action; both complaints pleading a cause of action for slander, under Civ. Code, § 46.

In Bank.

Appeal from Superior Court, San Diego County; T. L. Lewis, El. A. Luce, and C. N. Andrews, Judges.

Action by Lewis M. Oberkotter against Claude Woolman. Judgment of dismissal, and plaintiff appeals. Reversed and remanded, with directions.

Wynne S. Staley and Marcus W. Robbins, both of San Diego, for appellant.

Stephen Connell and Richard M. Kew, both of San Diego, for respondent.

WASTE, J. The plaintiff brought this action to recover damages from the defendant for alleged slander. The demurrer to the second amended complaint was sustained, without leave to amend. Judgment dismissing the action followed, from which judgment this appeal was taken.

[1] The respondent makes a preliminary objection, and seeks a dismissal of the appeal upon the ground that it was taken from the order sustaining the demurrer, which is not appealable. The notice of appeal states that the plaintiff appeals from the judgment rendered on the 27th day of September, 1920. While the court sustained the demurrer on that date, the judgment of dismissal was not made until September 29th. It is this discrepancy upon which the respondent relies. Since it clearly appears that but one judgment was entered in the case, the defect is one which would not invalidate the appeal, were there no further reference to the judgment (Wilson v. Union Iron Works Dry Dock Co., 167 Cal. 539-541, 140 Pac. 250); but the notice of appeal gives the correct book, page, and date of entry in the judgment records of the court. There is no merit in the objection.

[2] The demurrer, which interposed the general ground of want of sufficient facts and the bar of the statute of limitations, should have been overruled. It is alleged in the complaint that the plaintiff was, and is, a teacher in colleges, academies, and graded schools, having the requisite skill and qualifications proper and necessary for the practice of his profession. He had always conducted himself with diligence, industry, and propriety, and had acquired and was acquiring gain and profits from the pursuit of his calling. At the time of the alleged slander he was the principal of one of the public schools of the city of San Diego. The defendant, who is alleged to have great influence by reason of his wealth, standing, and an official position, the exact nature of which is not clearly stated, intending to bring the plaintiff into public contempt, infamy, and disgrace among his neighbors and citizens generally, particularly all persons interested in the cause of public education in San Diego and other portions of the United States, and

to cause it to be believed that the plaintiff was a person of bad character, and unfit and unqualified to be employed in his calling, business, and profession, and to cause the plaintiff to be deposed, and lose his employment, and to be deprived of his livelihood, and to prevent plaintiff from being employed as teacher, said and uttered to a reporter of a newspaper published in San Diego certain slanderous, unprivileged and uncalled-for statements, knowing and intending that the same would be given further circulation, through the public press of San Diego and elsewhere. The statement was as follows:

"We are going to drop at least three principals and one department head of the high school from the staff of city school-teachers at the close of the current school year. These are William D. Edwards, principal of the Brooklyn, Archibald M. Fosdick, principal of the Florence, and Lewis M. Oberkotter, principal of the Grant, and W. S. Staley, in charge of the commercial department of the high school. These changes have been recommended to the school board by Principal Guy V. Whaley, for the reason that he considers these positions, as they exist, weak spots in the public school system of instruction."

It is further alleged in the complaint that the charges and words uttered by the defendant were false, malicious, and unprivileged, so far as this plaintiff is concerned, and that the defendant thereby publicly accused the plaintiff of being unfit and incompetent to be employed in his profession as teacher, and intended to and did assert that he was not a fit and proper person to teach in the public schools of San Diego or elsewhere. Thus construed, the complaint states a cause of action. *Ingraham v. Lyon*, 105 Cal. 254-257, 38 Pac. 892; *Schomberg v. Walker*, 132 Cal. 224-227, 64 Pac. 290; *Frolich v. McKiernan*, 84 Cal. 177, 180, 24 Pac. 114. Slander, under our law, as applied to the facts of this case, is a false and unprivileged publication, other than libel, which tends to directly injure one in respect to his office, profession, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit, or which by natural consequence causes actual damage. Civ. Code, § 46, subs. 3 and 5. Tested by this provision of the law, we think the accusation of the defendant that the plaintiff was about to be dropped from the staff of city school-teachers of the city of San Diego, for the reason that the city superintendent considered him a "weak spot in the public school system of instruction," tended naturally, necessarily and proximately to produce one, at least, of the results mentioned in section 46 of the Code, in that it imputed to plaintiff "a general disqualification" in those respects which the profession of teaching pe-

culiarly requires. *Swan v. Thompson*, 124 Cal. 193, 199, 56 Pac. 878; *Tonini v. Cevalco*, 114 Cal. 266, 273, 46 Pac. 103; *Bettner v. Hold*, 70 Cal. 270, 275, 11 Pac. 713.

[3] The plaintiff also alleges that he has suffered actual damages. He avers that the false, malicious, and unprivileged publication by the defendant exposed him to hatred, contempt, ridicule, and obloquy, and were made by the defendant to so expose him, and that by reason of the slander he, the plaintiff, has suffered great mental anguish, and has been, and is, and from henceforth will be, greatly injured and prejudiced in his reputation as a school-teacher, and has lost, and will continue to lose and be deprived of, great gains and profits which would otherwise have accrued to him in his calling, occupation, and profession, to his damage in the sum of \$55,000. The prayer of the complaint is for actual damages in that amount and for punitive recovery as well. Here was a sufficient allegation of general and special damages, which, if proved, would entitle the plaintiff to recover. *Turner v. Hearst*, 115 Cal. 394, 399, 47 Pac. 129. It requires no argument to show that the complaint, read as a whole, constitutes a cause of action. *Waite v. San Fernando Pub. Co.*, 178 Cal. 303, 306, 173 Pac. 591.

[4] The respondent contends that the plaintiff's original complaint is one for libel; that the second amended complaint, filed more than one year after the making of the statement by the defendant, sets up a new cause of action, to wit, slander, which is barred by section 340 of the Code of Civil Procedure, which provides that an action for slander must be commenced within one year after the alleged utterance. There is nothing in the contention. The only difference in the two statements of the cause of action lies in the fact that in the original complaint it is asserted that the defendant, knowing and intending that the false and malicious words would be published in a certain newspaper, communicated them to a reporter of that paper, and they were so published, the article quoting the words of the defendant being given in full, while in the second amended complaint it is alleged that the false and unprivileged communication was made to the same party, the defendant knowing and intending that it would be given further circulation through the public press, the exact words of the defendant being set out. As finally amended the complaint did not materially, or at all, change the cause of action. *Frost v. Witter*, 132 Cal. 421, 425, 64 Pac. 705, 84 Am. St. Rep. 53. It has at all times been one based on slander. Civ. Code, § 46. For the foregoing reasons the demurrer to the second amended complaint should have been overruled.

The judgment is reversed, and the cause is remanded to the lower court, with instruc-

tions to overrule the demurrer to the second amended complaint, with a reasonable time accorded to the defendant within which to answer.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; WILBUR, J.; SHURTLEFF, J.; RICHARDS, Judge pro tem.

187 Cal. 505

TORR v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 8936.)

(Supreme Court of California. Dec. 9, 1921.
Rehearing Denied Jan. 5, 1922.)

1. Damages ☞38—Injured person may recover for decreased earning capacity.

Injured person was entitled to recover for decreased earning capacity due to injuries.

2. Damages ☞186 — Finding that school-teacher did not lose any amount which she would have otherwise earned by reason of injuries held not supported by evidence.

In action for injuries to school-teacher, finding that she did not lose any amount by reason of injuries which she would have earned at her profession if injuries had not been sustained held not supported by evidence.

3. Damages ☞132(15) — \$550 verdict for school-teacher who sustained permanent injuries, making her unable to teach for months at a time, held inadequate.

Where school-teacher, with earning capacity of \$120 per month, sustained permanent injuries to spine and innominate, rendering her unable to teach school for long periods of time during the five years between the accident and the time of the trial, and where by reason thereof she was unable to work as a school-teacher during the year immediately before the trial, and was unable to do much of anything, verdict of \$550 for damages for other than medical services and surgical appliances held inadequate.

4. Appeal and error ☞1013 — Judgment reversed for inadequacy of verdict, where actual loss of earning capacity exceeds total award for all causes.

The trial court has almost unlimited discretion in fixing and determining the damages for pain and suffering and permanent injury, but where the actual loss of earning capacity exceeds the total award for all causes, the appellate court must conclude that the court acted upon an erroneous view of the laws as to measure of damages, and will reverse the judgment.

5. Appeal and error ☞1172(5) — Appellate court cannot reverse judgment as to portion fixing amount, and affirm portion fixing liability.

Where verdict for personal injuries is grossly inadequate, the appellate court cannot merely reverse that portion of the judgment fixing the amount and affirm that portion fixing the liability of the defendant, but must reverse the judgment that the case may be retried.

In Bank.

Appeal from Superior Court, City and County of San Francisco; D. C. Deasy, Judge.

Action by Eva Torr against the United Railroads of San Francisco, a corporation. From judgment for plaintiff giving her insufficient relief, and from an order denying motion for new trial, she appeals. Reversed.

J. J. Dunne, of San Francisco, for appellant.

Wm. M. Cannon, Wm. M. Abbott, and Kingsley Cannon, all of San Francisco, for respondent.

WILBUR, J. The plaintiff having been injured September 23, 1910, by the negligence of the defendant in starting its street car while she was alighting therefrom, brought this action May 24, 1911, to recover \$21,214 for the injuries alleged to have been received by her. The case was tried by the court without a jury on July 2, 1915. Findings of fact were made on December 24, 1915, and judgment was rendered December 27, 1915, in plaintiff's favor for \$1,100, \$550 of which was for medical services and surgical appliances and \$550 for other damages. Plaintiff, being dissatisfied with the amount of the judgment, moved for a new trial, and, upon her motion being denied, March 30, 1916, appealed to this court from the judgment and order denying the new trial. The court found her injuries to be as follows:

"Her right arm was sprained, her left innominate was displaced; her spine was injured, and she sustained a severe nervous shock. Said injuries rendered plaintiff sick, and caused her to suffer pain and mental suffering. The court finds that said injuries to said innominate and said spine are permanent in their nature.

"(3) That by reason of said injuries plaintiff was obliged to and did employ the services of physicians and surgeons to treat her, thereby incurring an indebtedness and expense in the sum of \$325, and expended \$106.50, making a total of \$431.50, which sum was and is the reasonable value of the services so rendered by said physicians and surgeons in the treatment of said injuries; and was obliged to and did expend the sum of \$35 for medicines and liniments, which sum was and is the reasonable value thereof; and was obliged to and did expend the sum of \$6 for arch braces for her feet, the further sum of \$6.75 for special shoes, and the further sum of \$18 for corsets, garters, and straps, which sums were and are the reasonable value of said articles; and was obliged to and did expend the sum of at least \$52.75 for massage treatments in treating said injuries, which sum was and is the reasonable value of the services rendered in giving such massage treatments.

"(4) That at and prior to the date of said injuries, plaintiff was a school-teacher by profession, and then was, and prior thereto had been, earning as said school-teacher, a salary in the sum of \$120 a month; *that plaintiff did*

not lose any amount whatever, by reason of said injuries, which she would have earned at her said profession if said injuries had not been sustained.

"(5) That by reason of said injuries, and the pain and suffering endured by plaintiff therefrom, in addition to said sum hereinabove set forth, plaintiff has sustained damages in the sum of \$550." (Italics ours.)

The direct and cross-examination of the witnesses who testified with reference to plaintiff's injuries cover over 250 pages of the transcript, and it would therefore be impossible to discuss the evidence in detail within the reasonable limits of an opinion. All of these witnesses, with the exception of one physician, Dr. B. F. McElroy, called by the defendant as an expert, testified on behalf of the plaintiff. Dr. B. F. McElroy was one of the physicians and surgeons of the defendant company. He had made no examination of the plaintiff, and did not testify with reference to her condition. His testimony was directed to the proposition that the injuries complained of by the plaintiff might not be the result of the accident, but might result from flat feet caused by her occupation or from other causes. The court, however, found that the injuries to plaintiff's spine and hip were caused by the accident, and by the finding that all the expenses for medical attendance incurred by her were the result of the accident, evidently disregarded the testimony advanced by this physician to the effect that her difficulties might have been due to other causes.

There is no conflict in the testimony of the plaintiff's witnesses as to the nature and character of the injuries received by her, or as to her condition before and after the injury. All agree that before the accident plaintiff was a high-school teacher in normal health and in full physical and mental vigor, with good endurance; that at all times after the accident her face showed signs of suffering; she looked ill; her demeanor changed; and she was often moved to tears over trivial matters, and complained constantly of suffering great pain. Her walk and carriage were affected; she dragged one foot slightly; she carried her head twisted to one side; and the degree of motion of the spine was considerably limited.

[1, 2] The plaintiff was entitled to recover for her decreased earning capacity due to her injuries. *Storrs v. L. A. Traction Co.*, 134 Cal. 91, 66 Pac. 72; *Kline v. Santa Barbara, etc., Ry. Co.*, 150 Cal. 741, 90 Pac. 125; *Campbell v. Bradbury*, 179 Cal. 364, 176 Pac. 685. The trial court found that the earning capacity of the plaintiff was \$120 a month, but also found:

"That plaintiff did not lose any amount whatever, by reason of said injuries, which she would have earned at her said profession if said injuries had not been sustained." (Italics ours.)

This finding is not supported by the evidence. The plaintiff testified that she was unable to teach school for long periods of time, and that she did not teach school because she was unable to do so. Plaintiff contends that her earning capacity was reduced from \$1,200 per annum to \$200 per annum, and that during the five years preceding the trial she had actually suffered a loss of \$5,000 because of her inability to work. For one year immediately before the trial she did not work as a school-teacher and was unable to do much of anything. She practically earned nothing. It is evident that the plaintiff lost from this source alone much more than was allowed her for all her injuries. The court seems to have been of the opinion that her failure to secure employment was not due to her injuries. While as we have said, this finding is not sustained by the evidence, if we assume that the fact is as found by the court that she did not lose any employment in her profession as a teacher because of her injuries, it was still the duty of the defendant to compensate her for her loss of time and decreased earning capacity. The court found that she was sick as a result of the accident. Plaintiff testified that she was ill for months. At one time she was ill for four months and unable to teach. If this is true she should have been allowed \$480 for this loss. She testified that at another time she was in bed for several weeks; that she spent Thanksgiving and Christmas vacation in bed; that from the spring of 1913 to the time of the trial, almost two years, she was unable to teach school; and that she had earned almost nothing during that period.

[3] In the face of this testimony the allowance by the court for all her injuries was barely sufficient to pay her for the time lost in going to and from her physician's office, and not enough in all to compensate her for the time lost while she was sick in bed. It is clear that the compensation awarded the plaintiff was wholly inadequate.

[4, 5] We purposely refrain from expressing a conclusion as to the amount due plaintiff because of her decreased earning power, and for her loss of time and employment and her two permanent injuries and the attendant pain and mental anxiety; that is a matter to be determined on a new trial.

It is enough for us to say that the judgment is wholly inadequate to compensate plaintiff for the injuries found by the court to have been suffered by her and established by uncontradicted and overwhelming proof. We have not overlooked the fact that the trial court has almost unlimited discretion in fixing and determining the damages for pain and suffering and permanent injury, but where the actual loss of earning capacity exceeds the total award for all causes, we must conclude that the court acted upon an erroneous view of the law as to the measure

of damages. It is not contended that the judge was actuated by passion or prejudice, but we are not limited to a consideration of results arising from such causes. Where it is manifest that under the express findings of the court, and the creditable and uncontradicted evidence in explanation thereof, that the allowance of damages is grossly inadequate to compensate for the injury due to decreased earning capacity, we will reverse the judgment, just as we would if the trial judge had rendered a judgment for \$900 on a promissory note of \$1,000. The court having determined the legal responsibility of the defendant, and having found the nature and extent of the injuries, and the effect of such injuries being disclosed by the uncontradicted evidence upon which the finding is based, we have the simple case of a legal obligation of the defendant established in an amount in excess of that allowed by the trial court to compensate for the loss. The plaintiff asks to have us reverse only that portion of the judgment fixing the amount, and affirm that portion fixing the liability of the defendant. This may not be done. The judgment is an entirety, and the case should be retried.

Judgment reversed.

We concur: SHAW, C. J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.; LENNON, J.

187 Cal. 481

MINIFIE et al. v. ROWLEY et al.
(S. F. 9318.)

(Supreme Court of California. Dec. 6, 1921.
Rehearing Denied Jan. 5, 1922.)

1. Partnership ⚡258(6)—**Action on note to partnership maintainable by executors of partner last dying without joining executors of other decedent.**

An action to recover money due a firm being one which, under Code Civ. Proc. § 1585, the surviving partner could maintain without joining the executors of the deceased partner, it could, under section 1582, after death of both partners, be so maintained by the executors of the partner last dying.

2. Limitation of actions ⚡163(4)—**Bar removed by payment of interest constituting acknowledgment, evidenced by writing.**

Code Civ. Proc. § 360, requiring acknowledgment or promise to be "contained in some writing signed by the party to be charged," to take the case out of the bar of the statute, does not require the new or continuing contract to consist of a written acknowledgment or promise, but acknowledgment may still be by act, as payment of interest; such acknowledgment, however, must be evidenced by writing, and is so evidenced where the payment is accompanied by letter of the debtor, stating inclosed check of a certain amount is in payment of in-

terest due creditor for a certain period on a loan of a certain amount.

3. Limitation of actions ⚡102(2)—**Statute does not run against debt of executor to testator.**

The appointment of a debtor of testator as his executor, whereupon Code Civ. Proc. § 1447, provides that the executor shall be liable for the debt as for so much money in his hands, when the debt becomes due, makes him, by reason of his fiduciary relation, continue liable for the money, irrespective of the running of the statute against the debt itself.

4. Corporations ⚡174—**Conditions for holding corporation's obligations those of a particular person stated.**

Before obligations of a corporation can be legally recognized as those of a particular individual, it must not only be influenced and governed by him, but there must be such a unity of interest and ownership that the individuality or separateness of him and it has ceased; and the facts must be such that an adherence to the fiction of the separate existence of the corporation would, under the circumstances, sanction a fraud or promote injustice.

5. Corporations ⚡174—**Unity of interest and ownership such as to warrant holding corporation's obligations those of an individual.**

That an individual has always been the owner and holder of all of its stock, excepting enough shares to qualify others to act as directors, not exceeding one to each, has always controlled the board and always been the representative of and the only person interested in the corporation, is enough to constitute the virtual identity of him and it, essential to hold its obligations his.

6. Corporations ⚡174—**Debt in form that of corporations but in reality that of individual owning corporation treated as his to prevent inequitable result.**

The fraud, to prevent which obligations of a corporation will be held those of an individual virtually identical with it because of unity of interest and ownership, need not be actual fraud, but it is enough that the dealings were in form with the corporation but in reality with the individual and that refusal to recognize this fact will bring about inequitable results; and so enough that the individual being indebted to testator gave a renewal note in the name of the corporation, and afterwards became executor of testator, so that treating the debt as his he, under Code Civ. Proc. § 1447, would not be relieved of liability by the subsequent running of the statute, whereas treating it as the debt of the corporation it would have become barred by limitations.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Charles G. Minifie and another, executors of Samuel Jones, deceased, against Forrest S. Rowley and another. Judgment for defendants on the sustaining of demur-

ners to the complaint, and plaintiffs appeal. Reversed, with directions.

Percy E. Towne, Metson, Drew & Mackenzie and Heller, Powers & Ehrman, all of San Francisco, for appellants.

Mastick & Partridge and H. F. Chadbourne, all of San Francisco, for respondents.

LENNON, J. Demurrers to the complaint in the present action were sustained without leave to amend and a judgment was rendered in favor of defendants, from which plaintiffs appeal.

In the complaint, which is under attack, it is alleged that on July 8, 1907, defendant Forrest S. Rowley was indebted to the partnership of Jones & Givens in the sum of \$10,000, the indebtedness being evidenced by two promissory notes of said defendant for the sum of \$5,000 each, dated July 8, 1907. On January 3, 1910, Forrest S. Rowley, "for the purpose of renewing said notes of July 8, 1907, and for the purpose of continuing in existence the evidence of said indebtedness," delivered to said Jones & Givens a certain promissory note, executed by the Rowley Investment Company, for \$10,000, due one day after date and bearing interest at the rate of 4 per cent. per annum from date until paid. For several years the Rowley Investment Company paid the interest on the note, making its last payment on January 6, 1914, by a check accompanied by a letter reading:

"San Francisco, Cal., January 6, 1914.

"Jones & Givens, 8th Floor Crocker Bldg., San Francisco, Calif.—Gentlemen: Herewith check 8889—Amount 100.00 in payment 3 months interest due you on \$10,000 loan. That is to say interest from October 3, 1913, to January 3, 1914.

"Very truly yours,

"[Signed]

"The Rowley Investment Co. (Inc.)"

In 1913, Charles S. Givens, one of the members of the partnership which he'd the \$10,000 note, died, and Samuel Jones, as surviving partner of the said firm of Jones & Givens, continued in possession of the partnership funds, securities, and assets, and engaged in the liquidation of the affairs of said copartnership. Prior to the completion of the liquidation, and also prior to the conclusion of the administration of the estate of Charles S. Givens, deceased, the surviving partner, Samuel Jones, died, on May 1, 1915. Subsequently plaintiffs, Charles G. Minifie and Ralph T. Jones, and defendant Forrest S. Rowley were appointed and qualified as executors of the will of Samuel Jones. The \$10,000 note and the interest thereon falling due after January 3, 1914, remained unpaid. The present action for the amount of said note, and interest, was commenced January 20, 1919, by Charles G. Minifie and Ralph T. Jones, as executors of the will of Samuel

Jones, deceased, against the Rowley Investment Company and Forrest S. Rowley, who refused to join as plaintiff.

[1] Both defendants demurred to the complaint upon the same grounds, eight in number. The first ground relied upon was that of misjoinder of parties in this respect: That the executors of the will of Samuel Jones, the last surviving partner, brought the action without joining, either as plaintiffs or defendants, the executors of the will of Charles S. Givens, the other deceased partner. The first question to be considered is, therefore, whether the executors of the will of the deceased partner, Charles S. Givens, were necessary parties to the action.

As against a surviving partner, the administrator or executor of a deceased partner has, under the provisions of our Code of Civil Procedure, no power to handle the property or settle the affairs of the partnership, for the right to the possession, control, and disposition of the partnership property vests in the surviving partner, who has full authority to consummate all acts necessary to liquidate the affairs of the partnership. Code Civ. Proc. § 1585; *Berson v. Ewing*, 84 Cal. 89, 23 Pac. 1112; *Cooley v. Miller & Lux*, 168 Cal. 120, 142 Pac. 83; *Raisch v. Warren*, 18 Cal. App. 655, 665, 124 Pac. 95. While the Code thus specifically provides for the control of the partnership property as long as some member of the firm survives, there is no law expressly applying in the event that all of the partners die before the liquidation of the partnership affairs has been completed, which is the situation here presented. It is, however, unnecessary in this case to determine what the rights of the representatives of the estates of the respective partners may be in such a situation in regard to the management and disposition of the partnership property. Without deciding that question, it is clear that under the general law the executors of the will of the last surviving partner are entitled to bring the present action for the recovery of partnership property without joining the executors of the will of the deceased partner, Charles S. Givens. In actions upon claims for or against the partnership, the surviving partner may sue or be sued alone and in such actions by or against the surviving partner the executors or administrators of a deceased partner are not necessary parties. *Corson v. Berson*, 86 Cal. 433, 25 Pac. 7. Section 1582 of the Code of Civil Procedure provides:

"Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

There is no law expressly or impliedly altering the operation of section 1582, Code of Civil Procedure, in cases where the decedent is a surviving partner. Therefore, since the present action for the recovery of the money alleged to be due the partnership was one which might have been maintained by the surviving partner, Samuel Jones, during his lifetime without joining the executors or administrators of his deceased partner, the right and duty of instituting this action passed to and devolved upon the executors of the will of said Samuel Jones.

[2] Although the note sued upon matured January 4, 1910, and the present action was brought January 20, 1919, the demurrers cannot be sustained upon the grounds that the action is barred by the provisions of either section 337 or section 343 of the Code of Civil Procedure. Under section 337 of the Code of Civil Procedure the note would have been barred on January 4, 1914, four years from the date of maturity; but subsequent to that date, on January 6, 1914, the Rowley Investment Company made a payment of interest on the note, accompanied by a letter evidencing the said payment, which is quoted above. It is doubtful whether the letter in question contained a distinct, unqualified, unconditional recognition of the obligation as due at the date of the writing so as to amount, in and of itself, to an acknowledgment or promise sufficient to take the case out of the operation of the statute of limitations under the provisions of section 360, Code of Civil Procedure, as that section has been interpreted by this court. *Biddel v. Brizzolara*, 56 Cal. 382; *Pierce v. Merrill*, 128 Cal. 476, 61 Pac. 67, 79 Am. St. Rep. 63; *Powell v. Petch*, 166 Cal. 329, 136 Pac. 55. However, it is unnecessary for the letter itself to amount to a written promise or acknowledgment of the debt as due, for it accompanied a payment of interest.

Section 360 of the Code of Civil Procedure is as follows:

"No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

The effect of this provision is not to require that the new or continuing contract must consist of a written acknowledgment or promise. There may be an acknowledgment by conduct, as well as by words. In the case of a part payment, for instance, of either principal or interest the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal acknowledgment of a subsisting contract or liability from which a new contract to pay the debt must be inferred. *Barron v. Kennedy*, 17 Cal. 574, 577. Section 360 of the Code of Civil Procedure makes no attempt

to regulate the character of the acknowledgment itself; its sole purpose is to alter the form of the evidence by preventing parol proof of the acknowledgment or promise whether the latter be in the form of words or acts. *Pena v. Vance*, 21 Cal. 142; *Concannon v. Smith*, 134 Cal. 14, 20, 66 Pac. 40. Therefore, where an act of payment after the statutory period is evidenced by a clear and unqualified written memorandum, the acknowledgment is "contained in some writing" within the meaning of the Code section even though the writing itself does not contain a distinct recognition of a subsisting liability. The acknowledgment consists of the act of payment, from which a new contract is inferred. The new contract arose, therefore, on January 6, 1914, and that fact removed the case from the operation of the statute of limitations in so far as the bar attaching on January 4, 1914, is concerned. Notwithstanding this circumstance, however, the action was not brought within time unless there are other facts which prevented the bar of the statute of limitations from attaching, or removed the bar if any did attach, between January 6, 1914, the date of the making of the new promise, and January 20, 1919, the date on which the present complaint was filed.

[3] On June 3, 1915, defendant Forrest S. Rowley was appointed an executor of the will of Samuel Jones, the last surviving partner of the firm to which the debt herein sued upon is alleged to have been due. "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due." Code Civ. Proc., § 1447. As a necessary consequence, if defendant Forrest S. Rowley owed the \$10,000 here in controversy on June 3, 1915, when he became executor, he became chargeable with that sum as for so much money in his hands and continued liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity. *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20. It is apparent from what has previously been said that this \$10,000 debt was not barred on June 3, 1915; the sole question is, therefore, whether the defendant Forrest S. Rowley was individually liable upon that debt. While the \$10,000 note was signed, and interest paid, according to the complaint, not by defendant Forrest S. Rowley, but by the Rowley Investment Company, nevertheless plaintiffs claim that the facts alleged in the complaint are sufficient to justify a disregard of the corporate entity of the Rowley Investment Com-

pany and compel a recognition of the liability of Forrest S. Rowley on the note.

[4] Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. *Erkenbrecher v. Grant*, 200 Pac. 641; *Llewellyn Iron Works v. Abbott-Kinney Co.*, 172 Cal. 210, 155 Pac. 986. The complaint in the present action must comply with these tests if it is to be upheld upon the theory of the identity of the Rowley Investment Company with the defendant Forrest S. Rowley.

[5] The allegations of the complaint are, in part, to the effect that defendant Rowley is and at all times since September, 1908, has been the owner and holder of all the subscribed, issued, and outstanding capital stock of the said corporation, excepting only a sufficient number of shares necessary to qualify other persons to act as directors, not exceeding one share to each of such persons; that he at all times mentioned controlled the board of directors thereof; that at all times mentioned he was the representative of and only person interested in the said corporation. There is, therefore, an adequate observance of the first requirement above set forth, for plaintiffs do not merely aver that the Rowley Investment Company was an instrumentality which was used for the individual benefit of the defendant Rowley, but, in substance and effect, allege that the corporation was but the double, or "alter ego" of the defendant Rowley. That is to say, they allege facts showing the virtual identity of the two defendants.

[6] With regard to the second requisite, it must be conceded that the allegations of the complaint are not as definite as might be desired and the interests of clarity would doubtless be subserved by an amendment in this respect. Nevertheless, the complaint is not fatally defective, the allegations being sufficient to reveal a situation justifying a disregard of the corporate entity. It is not necessary, as defendants contend, that the complaint allege actual fraud; it is suffi-

cient if the facts set forth disclose that the dealings were in form with a corporation but in reality with an individual and that a refusal to recognize this fact will bring about inequitable results. *Erkenbrecher v. Grant*, supra; *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 97 C. C. A. 144; Civ. Code, § 3528. Upon this phase of the case it is alleged in the complaint that the defendant Rowley was indebted to the partnership in the sum of \$10,000, evidenced by his individual promissory notes. For the purpose of renewing these notes he made and delivered to the creditor a new note, signed by the Rowley Investment Company, a corporation, which was at that time and continued to be but the "alter ego" of the said defendant Rowley, there being no dealings between the partnership and the corporation as distinct from the individual Rowley. Having subsequently become an executor of the will of one of the partners, defendant Rowley now seeks to avoid the incidents of his fiduciary relationship solely by reliance upon the fiction of the independent existence of an organization which was in effect nothing more than a form assumed by him in his business dealings. The case is, therefore, distinguishable from the case of *Erkenbrecher v. Grant*, supra, recently decided by this court, for in that case, as stated in the opinion, the dealings in the corporate form were wholly devoid of inequitable results, whereas in the instant case the assumption of that form will result in the avoidance of a legal obligation, unless equity intervenes to prevent this injustice. This equity does by penetrating the fiction of the independent existence of the corporation.

The discussion and disposition of this last point disposes of the remaining grounds of the demurrer. If the identity of Forrest Rowley and the Rowley Investment Company is recognized, then there is no uncertainty, or unintelligibility, or ambiguity in the allegation to the effect that the note executed by the corporation was made, executed, and delivered by defendant Rowley, and there is no misjoinder of parties defendant. Likewise, in view of what has been said, we see no merit in the general demurrer.

The judgment is reversed, with directions to the court below to enter an order overruling the demurrers.

We concur: SHAW, C. J.; SLOANE, J.; WILBUR, J.; WASTE, J.; RICHARDS, Justice pro tem.

54 Cal. App. 636

MCGILLIVRAY CONST. CO. v. HOSKINS.
(Civ. 2299.)

(District Court of Appeal, Third District, California. Oct. 24, 1921. Hearing Denied by Supreme Court Dec. 22, 1921.)

1. Appeal and error $\Leftrightarrow$ 931(9)—On appeal on judgment roll presumed that findings were waived.

Where appeal is taken on the judgment roll alone, it must be presumed, in support of the judgment, that findings of fact and conclusions of law were waived.

2. Mandamus $\Leftrightarrow$ 154(7)—Allegation of demand not necessary where demand would have been futile.

Where complaint in mandamus alleges that defendant refused to include in estimate of excavations work upon which the action was based, and answer denies that plaintiff was entitled to have such work so included, a demand would have been futile, and the complaint objected to on appeal will not be held insufficient, in that it did not allege that demand was made upon defendant to make the required estimate.

3. Highways $\Leftrightarrow$ 113(4)—Contract held to contemplate compensation for excavation below subgrading.

A contract for construction of a concrete highway for a county providing for certain compensation per cubic yard for all grading *held* to contemplate compensation for necessary excavation below the subgrade where oil was encountered, though the specifications provided specially for payment for excavating ditches.

4. Highways $\Leftrightarrow$ 113(4)—Decision of engineer held not to bar recovery for excavation below subgrade.

Under a contract for construction of concrete road for a county, providing that the opinion of the county engineer should be final and binding on any questions arising as to the meaning or intent of the contract, a decision of the engineer that certain work should be done without compensation, as being incidental to other work, will not prevent recovery therefor, the reason for such provision in the contract being only to require the contractor to perform the work in accordance with the engineer's decision in order to avoid delay.

5. Mandamus $\Leftrightarrow$ 93—Proper to compel county engineer to include in estimate work done by contractor.

Mandamus is a proper remedy to compel the county surveyor to include proper work in estimate to be submitted to board of supervisors concerning work done by contractor at unit price in constructing roads under Pol. Code § 2643, subd. 11.

Appeal from Superior Court, Stanislaus County; G. W. Nicol, Judge.

Action by the McGillivray Construction Company against J. H. Hoskins. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Brown and Hawkins & Hawkins, all of Modesto, for appellant.

Stanley Moore, of San Francisco, for respondent.

FINCH, P. J. This appeal is from a judgment directing the issuance of a writ of mandate requiring the defendant to make a true and correct final estimate of excavations made by the plaintiff under a contract for the construction of a concrete highway for Stanislaus county.

[1] Appellant assigns as error that the court failed to file findings of fact and conclusions of law. The appeal is taken upon the judgment roll alone, and therefore, in support of the judgment, it is presumed that findings were waived. *Mulcahy v. Glazier*, 51 Cal. 627; *Baker v. Baker*, 139 Cal. 626, 73 Pac. 469; *Ladd v. Myers*, 4 Cal. App. 352, 87 Pac. 1110; *Hutton v. Newhouse*, 41 Cal. App. 689, 183 Pac. 276.

[2] It is contended that the complaint is insufficient, in that it does not allege that prior to the commencement of the action a demand was made upon the defendant to make the required estimate. The complaint alleges that the defendant refused to include in his estimate the work upon which the action is based. The answer denies that the plaintiff was entitled to have such work so included, and this appeal is founded on the same contention. Under such circumstances a demand would have been futile, and this court would not be justified in holding that there has been a miscarriage of justice because of failure to make a futile demand. *Moreing v. Shields*, 28 Cal. App. 513, 152 Pac. 964; *Moore v. Superior Court*, 20 Cal. App. 299, 128 Pac. 946; *Chicago, K. & W. R. Co. v. Chase County Com'rs.*, 49 Kan. 399, 30 Pac. 456; *Gamble v. First Judicial Dist. Ct.*, 27 Nev. 233, 74 Pac. 530; *State ex rel. Weinberg v. P. B. & M. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *State v. Baushausen*, 49 Neb. 558, 68 N. W. 950; *City of Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552.

[3] The contract provides, in so far as pertinent to the issues tried, that plaintiff shall be paid for the work as follows:

"Proposition B. Approximately 7.483 miles of Portland cement concrete road not including the grading for a lump sum of \$66,935.

"Proposition C. All excavation of every description without classification including all incidental work for the unit price of 60 c. per cubic yard."

Among the specifications, under the head "Grading," are the following:

"(a) Grading shall include the removing of all material, filling, refilling, trimming and shaping, or such other work as may be necessary to bring the surface of the roadway to conform with the adopted subgrade and cross-section.

"(b) All brush, roots, trees or vegetation lying between the gutters must be grubbed out and removed as directed by the county engineer."

"(d) All soft and unsuitable material shall be removed and the space refilled with suitable material."

"(e) Ditches shall be excavated by the contractor in such places and of such dimensions as the engineer may direct, and he shall be paid for such work at the contract price for excavation."

"(f) The entire roadway shall be ploughed or broken up as directed by the engineer to secure a bond between new and old material."

"(i) Computation of quantities shall be made by the method of average end areas and all measurements of work to be paid for shall be made in excavation."

"(j) The contract price per cubic yard of excavation shall include the excavation, loading, transportation, and deposit of material in accordance with these specifications, and also all grubbing and clearing, ditching and all other work incidental to the grading."

"(o) Whenever oil is encountered during the grading, all lumps must be neatly piled by the side of the right of way and must not be placed in the grade."

The complaint alleges that—

"Oil was encountered and excavated below the finished subgrade in a considerable portion of the roadway for said highway, and the excavating done by applicant in the removal of said oil, and necessary in order to remove the same, amounted to 28,204.6 cubic yards, * * * that all of the work under said contract was completed by the applicant on March 20, 1918, and said work was done to the satisfaction of said Hoskins."

The judgment recites that under and by the terms of the contract "petitioner was required to excavate and remove oil cake encountered below the subgrade" to the amount of 10,319 cubic yards and "was entitled to be paid therefor at the rate of 60 cents per cubic yard."

Appellant contends that "the removal of the oil cakes was work incidental to the grading," and that therefore the plaintiff is entitled to no compensation for the excavation necessary to its removal. It is not claimed that such work was unnecessary in the preparation of a proper subgrade on which to lay the concrete. Proposition B provides for the payment of a lump sum for the construction of the "concrete road not including the grading." The implication necessarily follows that compensation is to be received for the grading. Proposition C provides the measure of such compensation, 60 cents per cubic yard for "all excavation of every description without classification including all incidental work." No language could be clearer. It does not appear why excavations below the subgrade are any more incidental to the grading than those above.

It is next argued that since the specifica-

tions provide specially for payment to the contractor at the agreed price per yard for excavating ditches "the idea that payment was to be made for any of the other incidentals mentioned under the heading of 'grading'" is thereby excluded under "the rule *expressio unius est exclusio alterius*." The specifications, however, do not purport to fix the compensation to be received and the reference therein to payment for excavating ditches cannot reasonably be held to limit the express provision of the contract that payment shall be made for "all excavation of every description." It is more probable that the provision was inserted in the specifications to guard against any controversy as to whether the term "excavation" included the construction of ditches.

Article 9 of the contract provides:

"Should it appear that the work hereby intended to be done, or any of the matters relative thereto, are not sufficiently detailed or explained in the said plans, drawings, profiles, cross-sections and specifications when taken together, the contractor shall apply to the engineer for such further explanation as may be necessary, and shall conform to the same as part of this contract, so far as may be consistent with the original specifications; and in the event of any doubt or question arising respecting the true meaning of the said plans, drawings, profiles, cross-sections and specifications, and each and every difference respecting the same shall be finally determined by the said engineer, and it is understood that no advantage will be taken by either party hereto of any discrepancy that may be found in any plan or specification."

In the specifications it is provided:

"Bidders are cautioned to examine carefully the plans and specifications and form of proposal. If in doubt as to their meaning, the bidder should apply to the county engineer for explanation. If any questions arise as to the meaning or intent thereof after the bids are opened, the opinion of the county engineer shall be final and binding. Forms of proposal will be furnished by the county engineer or the county clerk."

[4] Appellant urges that, under the foregoing provisions of the contract, the decision of the engineer that the contract does not provide for payment on account of excavations below the subgrade is conclusive. The contract, however, does not evince any intention to make the engineer an arbitrator as to the amount due thereunder or as to whether payment shall be made for any item of work done. His decision is made final on questions arising during the progress of the work as to what is required by the contract and in what manner it is to be done. This is necessarily so, because it would not be practicable to cease operations and resort to a lawsuit every time a difference of opinion might arise. But when the contractor has

followed the decision of the engineer and performed the contract in accordance with that decision, then it becomes a question of law whether the former is entitled to compensation for any particular item of work done.

"Where the architect or engineer, acting under an erroneous construction of the contract, without authority to construe that instrument, excludes work which should have been included in his estimate, or includes work which should have been excluded, the error will be corrected. * * * So also the estimates or the classifications are not binding where the contract fixes certain classifications of work, and the architect or engineer ignores such provisions in the contract." 9 C. J. 827; Lewis v. Chicago, S. F. & C. Ry. Co. (C. C.) 49 Fed. 708; Williams v. Chicago, etc., Ry. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403.

"The jurisdiction of the engineer relates to disputes arising in the performance of the work which might prevent the work from progressing unless determined on the spot. * * * The clause cannot be interpreted so as to deprive the parties of their rights to a judicial construction of the contract, so far as such construction involves matters of law relating to the present right of the plaintiff to maintain suit, and relating to the question whether the plaintiff has received such compensation as he was legally entitled to under the provisions of the contract." Gammino v. Inhabitants of Town of Dedham, 164 Fed. 593, 90 C. C. A. 465.

See, also, *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572; *Wren v. City of Indianapolis*, 96 Ind. 206; *Aetna Indemnity Co. v. Waters*, 110 Md. 673, 73 Atl. 712; *Derby Desk Co. v. Conners*, 204 Mass. 461, 90 N. E. 543.

[5] Section 2643 of the Political Code, subdivision 11, relative to work of the character here involved, provides:

"* * * Upon the completion of the work, the county surveyor must examine the same, and if completed in accordance with the specifications thereof, he must submit to the board of supervisors a certificate over his signature and official seal to the effect that such work by the contractor therefor has been completed in accordance with the specifications therefor, and recommending its acceptance. The board shall thereupon audit the same and direct its payment out of the proper fund or funds."

On the engineer's failure to include in his estimate work for which the contractor is entitled to compensation, mandamus is the proper remedy. *Conn v. Board of Commissioners*, 151 Ind. 517, 51 N. E. 1062; *Wren v. City of Indianapolis*, 96 Ind. 206.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

54 Cal. App. 643

BATES et al. v. HOSKINS. (Civ. 2300.)

(District Court of Appeal, Third District, California. Oct. 24, 1921. Hearing Denied by Supreme Court. Dec. 22, 1921.)

1. Highways §113(4)—Road contractor held entitled to compensation for certain excavation.

Under a contract for the construction of concrete roads for a county, providing compensation of a certain amount per cubic yard for excavation, held that contractor was entitled to compensation for excavation, ordered by the engineer as necessary, made in filled sections between header boards placed along the side to hold the concrete in place as it was poured.

2. Appeal and error §907(2)—Presumed that evidence supports judgment.

In the absence of evidence and findings, it must be presumed on appeal that the evidence supports the judgment.

Appeal from Superior Court, Stanislaus County; G. W. Nicol, Judge.

Action by Charles D. Bates, A. Borland, and R. B. Ayer, copartners doing business under the firm name and style of Bates, Borland & Ayer, against J. H. Hoskins. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. J. Brown and Hawkins & Hawkins, all of Modesto, for appellant.

Stanley Moore, of San Francisco, for respondents.

FINCH, P. J. The defendant appeals from a judgment directing the issuance of a writ of mandate requiring him to make a true and correct final estimate of excavations made by the plaintiffs under a contract for the construction of a concrete highway in Stanislaus county.

The contract in question and the issues involved are the same as those discussed in the case of *McGillivray Construction Co. v. Hoskins*, 202 Pac. 677, this day decided by this court, with the additional question whether the plaintiff is entitled to compensation for excavations made, in filled sections, between the header boards placed along the sides to hold the concrete in place as it was poured.

[1, 2] The complaint alleges that—

"In order to make dikes, remove the same, and bring the grade to a perfect subgrade, as was ordered by said J. H. Hoskins, and as provided in the specifications covering said contract, there was necessarily excavated by the applicants 20,203.05 cubic yards of material."

In the judgment it is recited that—

"In order to bring the grade of said highway to be constructed under said contract to a perfect subgrade, the petitioners excavated

and removed between header boards in filled sections of said highway 8,585.73 cubic yards; and that said 8,585.73 cubic yards was excavated and removed by petitioners under and by virtue of the terms of said contract, and petitioners are entitled to be paid for the removal thereof at the rate of 60 cents per cubic yard."

It thus appears that the court did not allow anything for the yardage included in the building of dikes or the removal thereof, but only for excavations between the header boards. In his oral argument counsel for respondent states that—

In the filled sections "the engineer compelled the contractor to first level up the width of the roadway from crown to crown; that is, from the height of the shoulder on either side the contractor was supposed to first make the entire space between the two shoulders level, then he was supposed to build a system of cross-dikes, so that the level surface would be divided into checks, and then the contractor was required to fill those checks with water and to soak the water down, with the purpose of having the moisture from the top meet the moisture which was below. Thereafter he was to remove those dikes, and thereafter still he was to excavate the space in that level from crown to crown, or outer shoulder to outer shoulder. He was supposed to excavate out of that space that was between header boards," the excavation to be made after the fill had been "rolled in a firm hard condition."

While the record does not show the facts thus stated, in the absence of the evidence and findings, it must be presumed that the evidence supports the judgment. Under such circumstances, the decision of the engineer as to what work was necessary under the contract as the work progressed being conclusive, the contractors were entitled to compensation for the excavation in question.

Since all other matters involved in this appeal are considered in the opinion filed in *McGillivray Construction Co. v. Hoskins*, supra, it is unnecessary to discuss them here.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

55 Cal. App. 1

SCHILLING v. HAYES et al. (Civ. 3734.)

(District Court of Appeal, Second District, Division 1, California. Nov. 1, 1921.)

1. Municipal corporations $\S$ 706(5)—Evidence held to show injuries caused by concurrent negligence of drivers of two automobiles.

In an action for injuries from an automobile, in front of which plaintiff stepped to avoid another car, evidence held to show that both automobiles were operated at excessive speed, and that plaintiff occupied a position of safety but for the negligent act of the driver of the car, which forced him to move.

2. Trial $\S$ 395(2)—Finding as to concurrent negligence of drivers of two automobiles held not erroneous.

In an action for injuries to a pedestrian struck by an automobile in front of which he stepped to avoid another car, where the court found that both drivers so negligently and carelessly managed, operated, and controlled their respective automobiles as aforesaid, and at such a high and negligent rate of speed" that a collision between them was imminent, and that plaintiff, to avoid being run into by them, prudently jumped from the place in which he was standing, but was knocked down by one of them by reason of their drivers' negligence, individually and concurrently, held not erroneous, though there was no preceding finding as to defendants' negligence, to which the words "as aforesaid" could refer, the finding being full and complete in showing the concurrent negligent acts of defendants, which were the proximate cause of the injury.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Alva Schilling against V. M. Hayes, another, and Harry J. Bristol. Judgment for plaintiff, and defendant Bristol appeals. Affirmed.

H. C. Millsap and N. J. Kendall, both of Los Angeles, for appellant.

Erwin P. Werner, Werner & Brown, and Isaac Pacht, all of Los Angeles, for respondents.

SHAW, J. Action to recover damages alleged to have been sustained as the result of defendants' concurrent negligence in the operation of their automobiles. The case was tried without a jury by the court, which gave judgment for plaintiff, from which defendant Bristol appeals.

Appellant attacks the findings upon the ground of insufficiency of the evidence. The evidence clearly tends to show the following facts: The accident occurred at a point in Lake Shore avenue, extending north and south, near its intersection with Santa Ynez street, which extends east and west. A street car was operated on Lake Shore avenue, and at the time in question plaintiff, at the usual stopping place of the cars, was standing near the west track to board an approaching south-bound car on the west track, which at the time was distant about 150 feet. At the same time an automobile, at a speed of some 30 miles per hour, was operated by defendant Bristol in an easterly direction on Santa Ynez street, having a grade at that point of 6 or 7 per cent., and, reaching the intersecting street, it turned sharply to the right in a southerly direction into Lake Shore avenue, the left front wheel of the automobile crossing the westerly rail of the street railway track near where plaintiff was standing. In order to escape collision therewith, he stepped 2 or 3 feet to the east, at

which time he was instantly struck by the car of defendant Hayes, which, operated southerly on Lake Shore avenue at a speed of some 40 miles per hour, darted around the street car and collided with plaintiff. There is testimony to the effect that a collision between the two automobiles, as well as between the street car and the Bristol automobile, appeared to be inevitable.

[1] That both automobiles were, under the circumstances, being operated at a high and excessive rate of speed, admits of little question. That plaintiff occupied a position of safety but for the negligent act of the driver of the Bristol car would seem likewise clear. By such negligence he was forced to change his position to a point where, by reason of the negligence of the driver of the Hayes car, it collided with him, causing the injuries complained of. The testimony of C. C. Moore, who appears to have been a wholly disinterested witness and who happened to be in the vicinity, discloses that he saw the Bristol car coming down the hill at an excessive speed, and saw he could not beat the street car to the intersection of Lake Shore and Santa Ynez if the street car did not slow up. He came so near to plaintiff that he was compelled to jump in order to keep from getting hit by the automobile, and about that time the Hayes machine shot past the street car and struck Schilling. And, further, that the Bristol automobile was traveling at least 30 miles an hour. Plaintiff's testimony is to the effect that if he had not moved, the Bristol automobile would have struck him, and that immediately upon stepping aside he was struck by the Hayes car and rendered unconscious. And Mrs. Lottie Hayes, an occupant of the Hayes car, testified that—

"As we approached the intersection of Santa Ynez and Lake Shore Boulevard, a collision with the Bristol taxicab appeared to me to be inevitable."

[2] The court, after a finding to the effect that Bristol was operating his automobile easterly along Santa Ynez street and into Lake Shore avenue, and defendant Hayes was operating her automobile southerly along Lake Shore avenue at and across its intersection with Santa Ynez street, at which time plaintiff was a pedestrian at said intersection of said streets made a finding as follows:

"That said defendants Harry J. Bristol and V. M. Hayes then and there so negligently and carelessly managed, operated, and controlled their respective automobiles as aforesaid, and at such a high and negligent rate of speed, that by reason of said negligence and carelessness on the part of said defendants Harry J. Bristol and V. M. Hayes, and each of them, a collision between them then and there became and was imminent; that by reason of the aforesaid

negligence and carelessness of the defendants * * * and each of them the plaintiff was about to be run into by the said automobiles of the defendants; * * * that to avoid being run into by the said automobiles the plaintiff prudently jumped from the place in which he was standing; * * * that by reason of the said negligence of the defendants, * * * and each of them, individually and concurrently, and by reason of said collision of said automobile of the defendant V. M. Hayes with the plaintiff so negligently occasioned as aforesaid, the plaintiff was knocked down and suffered injuries."

Conceding, as claimed by appellant, that there is no preceding finding as to negligence on the part of defendants to which the words "as aforesaid," appearing in the first part of the finding quoted, can have reference, nevertheless the finding is in itself full and complete in showing the concurrent acts of defendants constituting the negligence and which was the proximate cause of the injury, namely, the high rate of speed at which, under the circumstances, both defendants were operating their cars at a crossing, and where electric cars were accustomed to stop for the purpose of taking on and letting off passengers. There is no merit in appellant's contention.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 683

ALLRED v. SHEEHAN. (Civ. 3906.)

(District Court of Appeal, First District, Division 2, California. Oct. 28, 1921. Rehearing Denied Nov. 25, 1921. Hearing Denied by Supreme Court Dec. 27, 1921.)

1. Pleading $\S$ 350(3)—On defendant's motion for judgment on pleadings, allegations of complaint deemed true.

On defendant's motion for judgment on the pleadings, all the material allegations of plaintiff's complaint must be deemed true.

2. Vendor and purchaser $\S$ 328—Complaint held to state cause of action for damages for breach of contract.

Allegations that plaintiff sold a lot, with improvements being constructed, to defendant, that a written memorandum of sale, fully set out in the complaint, was duly made, executed, and delivered, that the parties agreed on the terms of sale of a house plaintiff was constructing on the premises, and defendant paid a deposit thereon, which was to be returned if all work and material were not satisfactory to defendant on completion, that certain work was to be done in the house to meet defendant's demands as specified in the contract, and the house painted, and fixtures, wall paper, hard wood floors, etc., installed to suit defendant, that all such conditions were duly

performed, and the work completed as called for by the contract, but that defendant repudiated it, stating he did not like the way the house was completed, stated a cause of action for damages for breach of contract.

3. Pleading ⚡350(3)—On motion for judgment on pleadings, court cannot pass on allegations of answer.

On consideration of defendant's motion for judgment on the pleadings, in an action for breach of contract, the court cannot pass on denials contained in the answer as to the execution of the contract or any other material matter alleged therein.

4. Contracts ⚡282—Dissatisfaction must be reasonable.

An agreement to complete a building according to specifications is to be construed as one to furnish such a thing as ought reasonably to satisfy the buyer, and not as one permitting him to express dissatisfaction merely for the purpose of repudiating his contract.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by C. S. Allred against Howard J. Sheehan. Judgment for defendant, and plaintiff appeals. Reversed.

I. M. Peckham, of San Francisco, for appellant.

J. J. Lermen, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued in damages for breach of contract in the sum of \$950. Defendant answered, setting up a counterclaim for \$250. The complaint alleged that on October 8, 1919, plaintiff sold to defendant a certain lot of real estate, with improvements which were then being constructed thereon and that a written memorandum of sale was thereupon duly made, executed, and delivered by both parties. This memorandum was set out in full in the complaint. It appears therefrom that the parties agreed upon the terms of sale of a six-room house which plaintiff was constructing upon the premises; that defendant paid plaintiff \$250 deposit thereon; that this deposit was to be returned to defendant if all work and material were not satisfactory to him on completion; that certain work was to be done in the house to meet the demands of the defendant as specified in the contract; and that the house was to be painted on both the outside and the inside in colors to suit defendant; fixtures and wall-paper were to be selected by defendant and installed to suit defendant; hard wood floors, tiling, and a shower bath to suit defendant were to be installed. The complaint alleged that all these conditions were duly performed, and

that the work was completed as called for by the contract, but that the defendant, on the 2d day of December, 1919, repudiated the contract and wrote the plaintiff a letter stating that he did not like the way the house was completed.

Defendant answered putting in issue some of the allegations of the complaint, particularly the execution of the contract and the completion of the work called for by the contract. A separate defense was set out in the answer alleging that defendant paid plaintiff \$250 on the 8th day of October, 1919, with the understanding and agreement that the whole would be returned to defendant on demand unless the work and material in the improvements to the house were satisfactory to defendant on completion. It was then alleged "that all of said work and material was not satisfactory." The answer closed with a prayer that plaintiff take nothing, but that defendant have judgment on his counterclaim for the sum of \$250.

Thereafter defendant moved for judgment on the pleadings upon the ground that, under the admissions and allegations of plaintiff in the pleadings on file, defendant was entitled to judgment in the sum of \$250. This motion was granted, and from the judgment following plaintiff appeals.

[1-4] On defendant's motion for judgment upon the pleadings all the material allegations of plaintiff's complaint must be deemed true. That the complaint stated a cause of action cannot be denied. The pleading of the written contract for the sale of the property, the due performance by plaintiff of all conditions on his part to be performed thereunder, the repudiation thereof by defendant, and the damages caused thereby to plaintiff, was in sufficient form. On consideration of the motion for judgment on the pleadings the court could not pass upon the denials contained in the answer as to the execution of the contract, or any other material matter alleged therein. The contract called for the completion of the building in accordance with specifications in the contract. Such an agreement is to be construed as one to furnish such a thing as ought reasonably to satisfy the buyer, and not as one permitting him to express dissatisfaction merely for the purpose of repudiating his contract. *Tiffany v. Pac. Sewer Pipe Co.*, 180 Cal. 700, 702, 182 Pac. 428, 6 A. L. R. 1493; *Bryan Elevator Co. v. Law*, 31 Cal. App. 204, 215, 160 Pac. 170.

The trial court treated the counterclaim of defendant as a cross-complaint, and gave judgment for the defendant thereon. This having been set up as a separate answer and defense to plaintiff's complaint, all the allegations contained therein must have been deemed denied. There is nothing in plaintiff's complaint which can be construed as

an admission of the essential allegations of this counterclaim.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 510

GLOBE INDEMNITY CO. v. HENDERSON.
(Civ. 3967.)

(District Court of Appeal, First District, Division 2, California. Oct. 10, 1921. Hearing Denied by Supreme Court Dec. 8, 1921.)

1. Master and servant 405(6)—Evidence held not to support findings for compensation insurer against wrongdoer.

In an action by a general contractor's insurer against an independent contractor, whose negligence was alleged to have caused injuries to general contractor's employee, evidence that the employee had received compensation in specified amount from the insurer, and that named physician was treating employee upon the request of the insurer, held insufficient to sustain findings that after the accident the insurer furnished employee with hospital and medical expenses, and had been, previous to, and was at time of trial, paying him workmen's compensation.

2. Appeal and error 1011(1)—Findings on conflicting testimony conclusive.

The appellate court is bound by the trial court's findings of fact on conflicting testimony.

3. Evidence 18—Court will take judicial notice that trusses, being hoisted into place by gin pole 37½ feet long, were very heavy load.

Where trusses being hoisted into place with gin pole 37½ feet high, supported by four guy lines, when constructed, were 60 feet from tip to tip, 12 feet high, and where the dimensions of the cross sections, when planks have been nailed together, were 8 by 10 inches, the court, in action involving question as to whether contractor exercised due care in securing gin pole, will take judicial notice that each one of the trusses was a very heavy load.

4. Negligence 20—Gin pole for lifting heavy weights dangerous instrumentality.

A contractor, lifting heavy trusses into place with a gin pole 37½ feet high, is required to exercise great care to secure the pole, though Civ. Code, § 1714, makes every one liable for want of ordinary care, since to stand a pole of great weight, 37½ feet long, perpendicularly, is to maintain a very dangerous instrumentality, and great care being required when the danger is great.

5. Negligence 134(4)—Evidence held to show negligence in maintaining gin pole.

In an action against an independent contractor, lifting trusses into place with gin pole 37½ feet high, for injuries sustained

when the supporting guy line tore loose and the pole toppled over, evidence held to sustain finding that the pole was negligently secured.

On Rehearing before the Supreme Court.

6. Master and servant 389—Measure of compensation insurer's recovery against wrongdoer stated.

In an action by an employee and a compensation insurance carrier against a third party, whose negligence caused injuries, in which the appellate court affirmed judgment for the employee, but reversed judgment for insurance carrier and directed a retrial as to certain issues, the amount awarded insurance carrier on retrial should not exceed the amount awarded employee nor the amount insurer has paid or has become obligated to pay for the benefit of the employee as insurance carrier, and the judgment for insurance carrier should provide that any payment made by third party to either employee or insurance carrier should be credited on both judgments.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by the Globe Indemnity Company and George L. Masow against H. B. Henderson. Judgment for plaintiffs, and defendant appeals. Judgment for last-named plaintiff affirmed, and judgment for first-named plaintiff reversed, with directions.

L. Gonsalves, of Oakland, for appellant.

Earle Warren, of Oakland, and Hadsell, Sweet & Ingalls, of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs recovered a judgment against the defendant in the sum of \$2,500 for damages, and the defendant has appealed, bringing up the judgment roll and a bill of exceptions.

Morris & Muller, as general contractors, were engaged in erecting a brick garage on the southeast corner of Broadway and Twenty-Fourth streets in Oakland. George L. Masow, one of the plaintiffs, was working for the contractors as a carpenter, and at the time of the accident hereinafter mentioned was standing on some planking which rested on the rafters. The defendant, H. B. Henderson, as an independent contractor, was engaged in hoisting the rafters into place. The rafters, more properly called trusses, were made of wood, and after each one had been constructed it was about 60 feet long from tip to tip, about 12 feet high, and, when the planks had been nailed together, the dimensions of a cross section were 8x10 inches. The weight of one of these trusses was such that the defendant was using a gin pole 37 feet 6 inches high, supported by four guy lines. While one of the trusses was being raised into place one of the guy lines tore loose, the gin pole top-

pled over, and the plaintiff Masow was injured, and for the injuries so received he brought this suit to recover damages.

[1] In their complaint the plaintiffs aver that the Globe Indemnity Company is a New York corporation doing business in California, and as such was the insurance carrier of Morris & Muller; that after the accident the Globe Indemnity Company furnished Masow with hospital and medical expenses, and has been and now is paying him workmen's compensation. The court found all of said allegations to be true. The appellant in his brief attacks each of those findings as not being supported by the evidence. In reply to appellant's contention the respondent states that the evidence shows that since the accident the plaintiff has received compensation from the Globe Indemnity Company amounting to about \$1,100, exclusive of his doctor and hospital expenses, and that Dr. Shade treated Masow, acting upon the request of the Globe Indemnity Company. Such testimony, standing alone, is not sufficient to support the allegations regarding the Globe Indemnity Company, and the judgment in favor of that company is not supported by the evidence.

[2] The appellant claims that the plaintiff Masow was guilty of contributory negligence. This claim rests upon the assertion that a short time before the accident Masow saw the gin pole swerving, and, from that fact, he should have assumed that the pole was not properly anchored. In another place in the testimony Masow testified:

"I did not observe anything in connection with the erection of the boom until it came across the trusses. Up to that time I did not know that anything was wrong with the manner in which the boom was erected, or the manner in which the boom was being held."

In view of this testimony it is patent that the most that can be said is that the evidence on the subject of contributory negligence was conflicting. However, this court is bound by the finding of the trial court in the face of conflicting testimony.

It is further claimed by the appellant that it was not shown by the plaintiffs that the injury to Masow was the result of the falling of the gin pole. In this behalf the defendant asserts that when the gin pole fell it did not strike the plank on which the plaintiff Masow was standing. There is some evidence supporting that reasoning. Be that as it may, another witness testified:

"I believe plaintiff Masow was standing on the second purline; * * * after Mr. Masow had fallen the gin pole was resting on the second purline."

The situation, therefore, is another instance of conflicting testimony, and the conflict was for the trial court, and not for this court

[3-5] The defendant makes the further claim that under the facts pleaded and proved he was not negligent. In this behalf he takes the position that it was his duty to exercise ordinary care (Civ. Code, § 1714), and that he did so. The record does not show the weight of the gin pole, neither does it show the weight of the trusses which it was engaged to lift up into place, but we have set forth above the dimensions of the trusses, and we may add that the same were constructed out of pine timber, and this court will take judicial notice that each one of the trusses was a very heavy load. To raise such a weight required a very strong gin pole, and therefore a gin pole of great weight. To stand a pole of great weight, 37 feet 6 inches long, perpendicularly is to maintain a very dangerous instrumentality. When the danger is great the care should be great. *Foley v. Northern California Power Co.*, 14 Cal. App. 401, 407, 112 Pac. 467; *Spear v. United Railroads*, 16 Cal. App. 637, 663, 117 Pac. 956. Now, the evidence shows that the defendant had anchored his gin pole by four guy lines. That one end of each guy line was fastened to the top of the pole, and that the other end of line 3 and the other end of line 4 were fastened to pegs driven into the foundation soil. Exhibit A is a diagram. The diagram shows that the guy lines were not fastened at right angles such as north, south, east, and west, but that lines 1 and 2 were fastened on Webster street, line 4 was fastened on the opposite side of the building lot, and line 3 was fastened in Twenty-Fourth street, but in such a location that the straining strength was practically the same as though it were on the same side of the building as line 4. It is clear that with lines so fastened the tendency of the pole to lean toward Twenty-Fourth street, or from Twenty-Fourth street, was not sufficiently guarded against. Again it does not require the ability of an engineer to note that if the top of the gin pole were allowed to swerve in any direction the result would be that there would be a strain on the opposite guy line approximately equal to the weight of the truss. If one anchorage was not entirely sufficient the same guy line should have been anchored two or three times, and if such fastening was not sufficient, additional guy lines should have been attached to guard completely against any leaning of the gin pole. The trial court made a finding that the gin pole was negligently and carelessly secured, and in view of the foregoing facts we are not at all inclined to question the soundness of that finding.

The judgment in favor of George L. Masow is affirmed, and the judgment in favor of the Globe Indemnity Company is reversed, with directions for the trial court to retry the issues contained in findings 1, 2, and 8, and

thereafter to render such judgment for or against the Globe Indemnity Company as may be supported by the law and facts.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying
Hearing

PER CURIAM. [6] The petition for a rehearing in this court is denied. We deem it proper to say, however, that upon the retrial, if judgment is given in favor of the plaintiff Globe Indemnity Company, it must not exceed the amount already adjudged to plaintiff Masow, with interest, less any payments made thereon in the meantime, nor be in excess of the amount said company has paid, or has become obliged to pay for the benefit of Masow, as insurance carrier for Morris & Muller, and the judgment should also provide that any payment made by defendant to either of the plaintiffs shall be credited on both judgments.

SHAW, C. J., and LENNON, WASTE, WILBUR, SLOANE, and SHURTLEFF, JJ., and RICHARDS, Judge pro tem., concur.

187 Cal. 543

REYNOLDS v. CHURCHILL CO.
(Sac. 3014.)(Supreme Court of California. Dec. 13, 1921.
Rehearing Denied Jan. 12, 1922.)

1. Judgment $\hookrightarrow$ 702, 713(2)—In mandamus proceedings against surveyor general, determination held conclusive on state and on petitioner as to latter's right to purchase land under certificate of purchase; binding as to matters that might have been presented.

In mandamus proceedings against the surveyor general of the state to compel the issuance of a patent to lands owned by the state under Pol. Code, §§ 3493m-3493t, the determination is conclusive on the state and on petitioner as to his right to purchase, not only as to his claims set forth therein, but as to any other claims which might have been presented.

2. Judgment $\hookrightarrow$ 729—Recital in judgment in mandamus held not a withdrawal from the entire judgment of matters determined.

Where, during a contest between plaintiff and defendant for the right to purchase state lands, defendant corporation brought mandamus proceedings to compel issuance of a patent to it notwithstanding the pendency of the contest, a recital in the judgment in the mandamus proceedings "that the rights of the contestants are not foreclosed by our decision therein" held not to affect the whole judgment which determined contestants' rights to purchase the land, and the exclusion of the judgment and record when offered in the trial of the contest was erroneous.

3. Public lands $\hookrightarrow$ 61(2)—Swamp and overflowed land is subject to sale even if unsegregated.

Under Pol. Code, § 3493m, swamp and overflowed land is subject to sale even if unsegregated.

4. Navigable waters $\hookrightarrow$ 1(6)—Little Klamath Lake not shown to be navigable.

Little Klamath Lake not being one of the bodies of water declared navigable by Pol. Code, § 2349, held, that the District Court of Appeal erred in declaring it to be such, in a contest between claimants of the right to purchase part of its bed as swamp lands.

5. Public lands $\hookrightarrow$ 61(1)—Evidence held insufficient to show as a matter of law that land was not swamp and overflowed land.

Evidence held insufficient to show as a matter of law that land was not swamp and overflowed land.

6. Public lands $\hookrightarrow$ 61(6)—State is not a party to contest between parties as to right to purchase swamp or overflowed land from state.

Although under Pol. Code, § 3416, the surveyor general of the state must issue a patent to swamp or overflowed lands to the successful party in a contest concerning the right to purchase such lands from the state, the state is not a party to the contest, and is not estopped by judgment of the court to which the contest is referred in pursuance of section 3414.

7. Public lands $\hookrightarrow$ 61(6)—Character of lands held not in issue.

In a contest between parties as to the right to purchase swamp and overflowed land of the state, where both parties claimed that the land was swamp and overflowed land, that question is not an issue in the contest, and evidence bearing on it was ineffectual and immaterial.

8. Judgment $\hookrightarrow$ 702—State not bound by judgment in contest between claimants of swamp land.

In a contest between claimants of the right to purchase alleged swamp lands, the state, not being a party, is not bound by the judgment.

9. Judgment $\hookrightarrow$ 702—Decision as to character of land in action between contestants for right to purchase from the state cannot prejudice rights of the United States, not a party.

A decision as to the character of land, in a contest between two parties as to the right of purchasing the land from the state as swamp and overflowed land, is not binding on the rights of the United States derived in pursuance of St. 1905, p. 4, ceding certain sovereign lands to the United States, where the United States was not a party to the proceeding.

In Bank.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Proceeding by Robert B. Reynolds against the Churchill Company in the office of the surveyor general of the state, and by him referred to the superior court, in accordance with Pol. Code, §§ 3414, 3415. From a judgment holding valid a certificate of purchase under which defendant claims, and ordering that a patent issue to him upon payment of fees provided by law, plaintiff appeals. Reversed, with directions.

C. E. McLaughlin, of Sacramento, and Leon Samuels, of San Francisco, for appellant.

Tapscott & Tapscott, of Yreka, for respondent.

William V. Cowan and Johnson & Lennon, all of Sacramento, amici curiæ.

WILBUR, J. This is a contest instituted by the plaintiff in the office of the surveyor general of the state and by him referred by proper order to the superior court of the county of Siskiyou, as provided in sections 3414, 3415, Political Code. The plaintiff claims the right to purchase the land involved by reason of applications made in the office of the surveyor general in 1917 and contests the prior application and certificate of defendant's assignor. The defendant claims the right to purchase the land under and by virtue of an application filed in the office of the county surveyor of the county of Siskiyou in 1872 and certificate of purchase issued therefor October 4, 1874. The court

rendered judgment against the plaintiff, and held valid the certificate of purchase under which defendant claims, and ordered that a patent issue to the defendant upon payment of the fees provided by law. The plaintiff appeals.

During pendency of this contest the defendant petitioned this court for a writ of mandamus to compel the issuance of a patent to it, notwithstanding the pendency of this contest. *Churchill Co. v. Kingsbury*, 178 Cal. 554, 174 Pac. 329. In that original proceeding the facts were stipulated, as to the character of the land, and the petitioner's application and certificate therefor. The proceeding was dismissed.

Upon the trial of this contest the plaintiff offered in evidence the proceedings in the mandamus case, and defendant's objection thereto was sustained.

The appellant claims that the respondent is concluded by the judgment of dismissal in the mandamus case, and we will consider this point first.

The history of the respondent's claims is fully set forth in the opinion in *Churchill Co. v. Kingsbury*, supra. The proceeding was dismissed because the court concluded that under the stipulated facts the land in question was a part of the bed of Little Klamath Lake, which was stipulated to be a navigable body of water, and hence that the land was owned by the state in its sovereign and not in its proprietary capacity, and that the sale thereof was not authorized by the act of 1893, relied upon by the petitioner as validating its prior certificate of purchase (Stats. 1893, p. 341, subsequently codified [1907] as sections 3493m to 3493t). The petitioner in the mandamus case claimed that the land was sovereign land uncovered by recession, and that the statute of 1893 validated the certificate. The surveyor general, on the other hand, claimed that the lands were swamp and overflowed lands. The court determined the matter of fact in accordance with the petitioner's contention, but held that the statute of 1893 did not validate the petitioner's certificate of purchase, for the reason that the land in question was not uncovered by the recession of the lake within the meaning of the law of 1893 relied on by petitioner therein.

In this contest both parties alleged in their pleadings that the land was swamp and overflowed land, and so stipulated as well. The defendant also introduced evidence which it claims established the fact that the land was swamp and overflowed land, and the trial court found as a fact that the land was notoriously swamp and overflowed land. On appeal the District Court of Appeal, Third District, held that, notwithstanding the stipulation of the parties, it would take judicial notice of the fact that the land was sovereign land of the state, as shown by the government surveys of rec-

ord in the office of the United States surveyor general of this state, and the United States General Land Office. Both parties filed petitions for transfer to this court, and the attorney general also upon leave filed a similar petition, all contending that the land is swamp and overflowed land. The case has been briefed and argued in this court. The respondent and the Attorney General both claim that the mandamus proceeding is not res adjudicata in this proceeding and both seek to distinguish the facts in proof herein and as stipulated therein.

[1] We have reached the conclusion that the mandamus proceedings are conclusive of the rights of the respondent to purchase the land under its certificate of purchase. In the mandamus proceedings the surveyor general of the state of California represented the state, and the judgment in the case as to the validity of the defendant's certificate of purchase is binding upon the state of California and upon the petitioner in mandamus. It was so held in *Bernhard v. Wall*, 194 Pac. 1040. In that case an applicant for the purchase of public land had been successful in a mandamus proceeding. This court, in discussing the effect of the judgment in mandamus, said:

"That judgment was an adjudication that the Parkinson foreclosure was valid, and that the tax deed was invalid. It was conclusive, not only of the matters actually alleged in opposition to the writ, but also of any fact which might have been alleged and proven in that proceeding to show that Bernhard was not entitled to the relief given by the judgment (*Crew v. Pratt*, 119 Cal. 149, 51 Pac. 38). It follows, therefore, that if the tax deed on the Foster assessment would have been a defense to the mandamus proceeding, it would have been the surveyor general's duty to plead it therein, and, failing to do so, he would be forever estopped to claim that it was a defense. Unquestionably that judgment was a final adjudication of the right of Bernhard, binding on the surveyor general in his official capacity. He is the state official in charge of all matters pertaining to the disposal of the public lands of the state. He is ex officio register of the state land office (Pol. Code, § 497). His duties in relation to public lands are prescribed in sections 3395 to 3573, inclusive, of the Political Code. In any proceeding against him to compel him to perform an official duty in disposing of the public land, he represents the state, and the judgment rendered in such proceeding is in all respects binding and conclusive against the state to the same extent that it binds the officer in his official conduct with respect to the matter decided. Such a judgment bars the state from afterwards setting up to the contrary of what is there adjudicated. * * * It therefore follows that the right of Bernhard to have his application to purchase and his deposit of money accepted on the 11th day of May, 1903, was conclusively determined by that judgment, not only as against the surveyor general, but also as against the state. The state and all its officers were thereby estopped to deny such right, or to claim that

thereafter in disregard of that right, it had regularly or lawfully disposed of the land to other and subsequent applicants, or that it could so dispose of it, so long as Bernhard's right continued."

The same rule with reference to the effect of a judgment as against the state in mandamus would apply with equal force to the rights of the petitioner. The petitioner would be bound by the judgment not only as to its claims set forth therein, but any others which might have been presented. Let us now consider the issues therein presented and determined and the effect of the judgment. It was there stated:

"The petitioner relies upon the terms of the act of March 24, 1893, providing for the sale of lands uncovered by the recession or drainage of the waters of inland lakes and unsegregated swamp and overflowed lands. Stats. 1893, p. 341. * * * Since the act authorizes the sale both of sovereign lands and of unsegregated swamp and overflowed lands, it might not be necessary for the petitioner to maintain that the lands in question fall within one of these classes rather than the other. *It does, however, take the stand that the land is, in fact, sovereign land of the state, and in this, we think, it is clearly right.* * * * The agreed facts in this case show that the land in controversy is a part of the bed of Little Klamath Lake, a navigable body of water. * * * The lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water. * * *

"As we have seen, the lands in question are *not swamp and overflowed*, and the petitioner can, therefore, prevail only by bringing them within the first class described in section 3493m, viz., 'lands now uncovered or which may hereafter be uncovered by the recession or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty.' * * * The lands are still covered by the waters of the lake during the greater part of each year. * * *

"It follows that the petitioner has not established his right to any relief." (Italics ours.) Churchill Co. v. Kingsbury, supra.

[2] The question of the nature and character of these lands and the right of the petitioner under its application to purchase being directly involved in the proceeding, it is evident that the decision of this court that the lands were not swamp and overflowed lands is binding upon the petitioner as well as the state so far as the petitioner's right to purchase the land is concerned. The respondent and the attorney general, however, contend that this court expressly left the parties to this contest to have their rights determined in this proceeding. This contention is based upon the concluding sentences of the opinion in Churchill Co. v. Kingsbury, supra, which reads as follows:

"It appears from the answer that various contests between this petitioner and opposing applicants for purchase of portions of the lands are pending in the superior court, pursuant to

reference by the surveyor general. Pol. Code, § 3414. It should perhaps be said that the rights of the contestants are not foreclosed by our decision herein, which is, of course, based upon the facts as stipulated by the parties to this proceeding.

"The alternative writ is discharged, and the proceeding dismissed."

The respondent claims that in the proceedings then pending in the county of Siskiyou both parties were "contestants" and therefore the opinion must be construed as reserving the rights of both parties. It may be true as an abstract proposition that both parties herein are, in a sense, contestants in the trial of a contest of this character. Both are affirmatively seeking to have their right to purchase the land from the state established by the decree. But the question here is not the significance of the term "contestant" in the abstract, but is, what was intended by this court in the opinion in question when it used the term "contestants"? If the court had declined to consider petitioner's claim for the reason that a contest was then pending in which that claim would be presented and determined and had, for that reason, dismissed the proceedings with the statement that its judgment was without prejudice to the rights of the contestants in the then pending contest respondent's position would be correct beyond peradventure. No such condition, however, is presented by the record. The obvious and avowed purpose of the mandamus proceeding was to determine the validity of the petitioner's certificate of purchase, and that because expressly validated by the Legislature it was not open to contest.

The court considered the claims of the petitioner in that regard and passed upon them. The decision, therefore, is binding on the petitioner unless the statement of the court with reference to the effect of the decision upon the contest entirely changes the legal effect of the judgment. It is clear from the nature and the character of the decision, and well as the context that the term "contestant," as used in this opinion, was intended to refer to the rights of those who were contesting the claims of the petitioner, and that the court did not intend to change the usual effect of the whole opinion and judgment by this clause relating to contestants. This is indicated by the language used:

"It should *perhaps* be said that the rights of the contestants are not foreclosed by our decision herein, which is, *of course*, based upon the facts as stipulated by the *parties to this proceeding*." (Italics ours.)

The court is merely calling attention to the self-evident proposition that the other applicants for the land were not bound by the stipulation entered into between the surveyor general and the Churchill Company, "parties to the proceeding."

It follows from the foregoing that the trial

court was in error in excluding the judgment and record in the mandamus proceeding, which record was conclusive against the Churchill Company. The trial court should have rendered judgment declaring that the Churchill Company had no right of purchase.

[3] No question is raised as to the sufficiency of the plaintiff's application. The question as to whether the land in question is segregated is discussed at length by the parties, but is immaterial, so far at least as plaintiff's claims are concerned. If the land is swamp and overflowed land, it is subject to sale, even if unsegregated, under the provisions of section 3493m, Political Code (*McGill v. Cowan*, 179 Cal. 429, 177 Pac. 290), and the appellant is entitled to have his application therefor granted, upon the elimination of the respondent's prior claim.

[4] In view of the conclusion of the District Court of Appeal in this case that the land is not swamp and overflowed land, but is sovereign land, and hence not subject to sale (*Churchill Co. v. Kingsbury*, *supra*), it is proper to state our view on that subject, although the parties all contend that the land is swamp and overflowed land and not sovereign land. The District Court of Appeal was of the opinion that the government surveys of 1873, of which it took judicial notice, established the character of the land as sovereign land. So far as the record in this case is concerned, it is not shown that Little Klamath Lake is a navigable body of water. It is not one of the bodies of water so declared by statute (section 2349, Pol. Code), and whether actually navigable is not shown in the evidence, although the fact was stipulated in *Churchill Co. v. Kingsbury*, *supra*. The district court held that it appeared from the government maps above referred to that the meander line indicating the easterly shore of Little Klamath Lake was east of the land in question and that the land, therefore, was a part of the lake bed, and that this map established that the land in question was a part of the submerged land of a navigable lake and therefore belonged to the state by virtue of its sovereignty. On this basis it was held that the patent of the land issued by the Secretary of the Interior to the state of California for these lands as swamp and overflowed land was not binding upon the state of California, for the reason that the land had all along belonged to the state by virtue of its sovereignty, and that the action of the officer of the United States could not affect the title of the state.

[5] It is clear that the District Court of Appeal was in error in its conclusion. The meander line was evidently run for the purpose of establishing the boundaries of the upland or agricultural land and not for the purpose of delimiting the boundaries of the lake. It does not purport on the face of the map to be the easterly boundary of the lake. On the contrary, to the west of this meander

line is shown a large body of land indicated as tule or swamp and overflowed land; the acreage of each quarter section and subdivision is indicated on the map and preceded by the letter "S," which indicates swamp and overflowed land. In the margin of the map of township 48 north, range 3 east, M. D. M., is an estimate of the amount of swamp and overflowed lands appearing upon the township map of 3,798 acres, which corresponds with the quarter sections and subdivisions shown upon the map as swamp and overflowed land. The same is true as to the map of township 47, range 3 east, M. D. M., where the acreage of swamp and overflowed land is estimated on the map as 2,063 acres. On each map this acreage is indicated as swamp and overflowed land and is separated from the body of water designated as Little Klamath Lake by a heavy diagonal line, and the land in question lies between the meander line on the east and this diagonal line on the west. The field notes of the survey show that this diagonal line is the eastern boundary of the open water of the lake as distinguished from the land in question east thereof, which is covered with a dense growth of tules. We do not think that this court can declare as a matter of law, from facts of which it takes judicial notice, that the land is not swamp and overflowed land.

[6, 7] This contest is one over the relative rights of the parties to purchase swamp and overflowed lands. Their applications are only for land of that character. The surveyor general of the state was of the opinion that the land was swamp and overflowed land, and for the purpose of having the relative rights to purchase such land determined referred the contest to the superior court. The proceeding was not intended to determine the character of the land; the parties foreclosed inquiry on that subject by admitting the land to be swamp and overflowed land, as indeed they were bound to do, in order to secure the rights for which they were respectively contending. This was also the contention of the surveyor general, who stood ready to issue his certificate of purchase or patent as swamp and overflowed land as soon as the relative priority of the parties was determined, while it is made the duty of the surveyor general of the state to issue his patent or certificate to the successful party in the contest. Section 3416, Pol. Code; *Laugenour v. Shanklin*, 57 Cal. 71, 75, 76; *Lobree v. Mullan*, 70 Cal. 150, 11 Pac. 685; *People v. Morris*, 77 Cal. 204, 207, 19 Pac. 378; *McFaul v. Pfan Kuch*, 98 Cal. 400, 402, 403, 33 Pac. 397; *Youle v. Thomas*, 146 Cal. 537, 541, 80 Pac. 714. The state, however, is not a party to the contest, and is not represented therein (*Cunningham v. Crowley*, 51 Cal. 128, 132, 133; *Polk v. Sleeper*, 158 Cal. 632, 636, 637, 112 Pac. 179; *People v. California Fish Co.*, 166 Cal. 576, 611, 138 Pac. 79), and is no more estopped by a

judgment in such a contest than by the issuance of a patent by the surveyor general without a contest. As was stated in *People v. California Fish Co.*, supra, concerning a patent of sovereign lands issued after such a contest:

"Some of the patents in controversy in this series of cases were issued after and in pursuance of a land contest in the courts, under section 3414 of the Political Code, as to the right of opposing claimants to purchase the land under the law. Such a contest does not estop the state from claiming and showing that the land was reserved, or that it was and is dedicated to public use. The judgment in such a case merely determines which, if either, of the claimants is a qualified purchaser (not whether the law authorizes a sale of the particular land, but which had the better right) and that the one found to be qualified and having the prior claim is entitled to purchase. The state is not a party thereto and public rights are not adjudicated or concluded thereby (*Polk v. Sleeper*, 158 Cal. 637 [112 Pac. 179]). * * *

In the case of *Polk v. Sleeper*, supra, 158 Cal. page 637, 112 Pac. 182, a land contest brought under sections 3415 to 3417, Political Code, before the superior court, it was said:

"The only parties concerned in the action are the parties who properly become parties to the contest in the surveyor general's office and whose rights have been referred by that officer to the courts for adjudication, and prior to the amendment of section 3415 of the Political Code, in 1907, no other person could intervene in an action commenced under said reference. This was definitely settled in *Youle v. Thomas*, 146 Cal. 537 [80 Pac. 714], and reaffirmed in *Youle v. Thomas*, 150 Cal. 676 [91 Pac. 584]. The amendment of 1907 authorizes such an intervention only by one legally qualified to purchase from the state public lands of the same character, who after the order of reference, presents his own application to purchase the land or a portion thereof, to the surveyor general. The only questions involved in the action are those affecting the relative rights of the parties thereto. *The state is in no sense a party to the action.* * * *" (Italics ours.)

[8] In this case we have the peculiar situation that this court in *Churchill Co. v. Kingsbury*, supra, upon a stipulation entered into by the Attorney General representing the surveyor general, has declared the lands in question to be sovereign lands, notwithstanding the contention of the surveyor general to the contrary. The Attorney General, in his brief filed herein, states that that stipulation, which was based upon "a careful reading of all the published reports which counsel was able to find from Fremont's narrative, 1843, to the last report of the reclamation service," but that none of these reports revealed the facts now disclosed for the first time by the testimony of certain witnesses in this case, called by the Churchill Company, which had theretofore claimed the land to be

sovereign land, to the effect that there is a relatively high embankment between the open water of the lake and the tule land, which bank is sooner uncovered by the evaporation of the water than the land farther east, and that this relatively high bank is cut by numerous channels, through which the water enters from the open water of the lake to overflow the tule land. We are not called upon to consider the effect of this evidence or whether it was sufficient to sustain the finding of the trial court that this land was swamp and overflowed land. That question was not an issue in the contest, and the introduction of such evidence was therefore wholly ineffectual and immaterial.

[9] The Attorney General appears herein as a friend of the court upon the theory that a decision herein that the land in question is sovereign land might prejudice the rights of the state as against the United States, growing out of a statute passed by our state Legislature in 1905 (Stats. 1905, p. 4), ceding certain sovereign lands in Little Klamath Lake to the United States for reclamation purposes. Our decision on this contest cannot, of course, be binding upon the United States, which is not a party to this proceeding.

The judgment is reversed, with instructions to the trial court to proceed in accordance with this opinion.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; WASTE, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

187 Cal. 555

FRANKLIN v. CHURCHILL CO.
(Sac. 3011.)

(Supreme Court of California. Dec. 13, 1921.
Rehearing Denied Jan. 12, 1922.)

Judgment 707—Refusal of mandamus to compel issuance of patent to public lands is not binding upon party contesting in another suit the right of petitioner to purchase.

The refusal of mandamus to compel the surveyor general to issue a patent to public lands holding that the land was sovereign is not binding on one not a party thereto who is contesting the right of the petitioner for mandamus to purchase the lands.

In Bank.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Contest instituted by W. B. Franklin against the Churchill Company in the office of the surveyor general of the state, and by him referred to the superior court, in accordance with Pol. Code, §§ 3414, 3415. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Jacob P. Wetzel, of San Francisco, for appellant.

A. E. Bolton, of San Francisco, and Tapscott & Tapscott, of Yreka, for respondent.

WILBUR, J. This case is a companion case to *Reynolds v. Churchill Co.* (Sac. 3014) 202 Pac. 865, this day decided. The record of the two cases is somewhat different, owing to the fact that in the trial court the attorney representing Franklin claimed throughout the proceedings that the Supreme Court had definitely determined in *Churchill Co. v. Kingsbury*, 178 Cal. 554, 174 Pac. 329, that the lands were sovereign lands, and that therefore neither party had the right to purchase the same from the state of California. His supplemental complaint based upon the judgment of the Supreme Court in the mandamus case of *Churchill Co. v. Kingsbury*, supra, was not permitted to be filed. By this supplemental complaint the plaintiff in effect contended that the judgment in the mandamus case was conclusive against the defendant and incidentally admitted that it was conclusive against himself. In the latter position he was in error. Acting upon this belief, the plaintiff declined to offer any evidence in the case and contented himself with the record he had made by the motion for leave to file the supplemental complaint and by other motions and proceedings which need not be specifically pointed out. The judgment of the court being in favor of the Churchill Company, the plaintiff appeals to this court. While the more orderly process was that adopted in *Reynolds v. Churchill Co.*, namely, to proceed with the trial of the case and offer in evidence the judgment in the mandamus case (*Churchill Co. v. Kingsbury*, supra), it is clear that the appellant's position was sufficiently made known to the court and that the court decided against his contention and that he had no intention of abandoning his claims to the land except upon the theory that the trial court was bound to hold the land to be sovereign land.

In view of appellant's contention in regard to the conclusiveness of the judgment in the mandamus case, the judgment of the trial court should be reversed, and the case remanded for subsequent proceedings in accordance herewith. If, upon a new trial, the plaintiff concedes, as he did on the former trial, that the land is sovereign land, the court should decree that he is not entitled to purchase the land, and upon presentation of the judgment in *Churchill Co. v. Kingsbury* must also decide against the defendant for the reason stated in *Reynolds v. Churchill Co.*, supra.

Judgment reversed.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.

187 Cal. 523

DOWD v. ATLAS TAXICAB & AUTO SERVICE CO. et al. (two cases).
(S. F. 9463, 9465.)

(Supreme Court of California. Dec. 12, 1921.)

1. Trial ⇐253(9) — **Instruction on contributory negligence of passengers in a taxicab driven at unlawful speed held erroneous, as ignoring facts.**

Instructions in action for injury to taxicab passengers, from driving at excessive speed, in effect charging them with contributory negligence, if they knew the machine was being driven at an unlawful speed, but continued voluntarily to ride therein, having the opportunity to leave it, but not doing so, or, if having such knowledge in time to have objected and to have left the machine, or to have its speed decreased prior to the accident, they made no objection and no effort to be permitted to leave, are erroneous, as eliminating the question of what a reasonable person would do under the circumstances, and also consideration of the shown unsuccessful attempts of the passengers to attract the driver's attention by hammering on the window with their fists and calling to him.

2. Carriers ⇐321(21) — **The words, "by a preponderance of the evidence," properly stricken from instruction as to carrier's burden of rebutting prima facie showing of negligence.**

The words, "by a preponderance of the evidence," are properly stricken from the requested instruction in a passenger's action for injury that, to rebut the plaintiff's prima facie case from his showing that the taxicab was overturned, defendant must make a certain showing.

3. Carriers ⇐316(1) — **Inference and not presumption that overturning of taxicab, injuring passenger, was from driver's negligence.**

It is an "inference," and not a "presumption," from the showing of the overturning of a taxicab injuring a passenger that it occurred through the negligence of the driver.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Two actions, one by Katherine Dowd, the other by Sibyl E. Dowd, both against the Atlas Taxicab & Auto Service Company, a partnership, and the members thereof. Judgments for defendants, and plaintiffs appeal. Reversed.

Ed. F. Jared, S. C. Wright, and Mervyn R. Dowd, all of San Francisco, for appellants.

Ford & Johnson, Geo. K. Ford, and Elliott Johnson, all of San Francisco, for respondents.

RICHARDS, Justice pro tem. These two actions arose out of injuries received by the plaintiff in each through the overturning of

a taxicab of the defendants while the plaintiffs were passengers therein. The accident occurred in the city of San Francisco at an early hour in the morning of January 1, 1919. The defendants were at the time co-partners, owning and operating through their employees certain taxicabs for hire within said city. The plaintiffs, with other members of their family and friends, the party numbering seven in all, entered one of these taxicabs driven by an employee of said defendants, and hired by one of the members of said party, other than said plaintiffs, for the purpose of conveying them from a point on O'Farrell street, near Powell, to their respective homes. The taxicab in question was an inclosed limousine, the seat of the driver being on the outside of its glass inclosure. After being driven for a considerable distance along and across the streets of said city, the taxicab skidded upon a wet and slippery portion of Market street at or near the point of its intersection with Grove street, and was overturned, and each of the plaintiffs was severely injured. They commenced these separate actions to recover damages by reason of their said injuries, and each alleged in her complaint that said accident, with resultant injuries, occurred through the negligence of the employee of the defendant operating said taxicab, which consisted in his having carelessly driven and operated the same at an unlawful and excessive rate of speed, by reason of which, without fault on the part of the plaintiffs, the taxicab turned over, and the plaintiffs were thereby seriously injured. The defendants, in their answer in each case, denied the alleged or any acts of negligence on the part of their said employee, and by way of affirmative defense alleged that the said accident and plaintiffs' consequent injuries were the result of contributory negligence of each of the plaintiffs in said actions. The causes were, by agreement of the parties, tried together before the court, sitting with a jury, which in each case returned a verdict in favor of the defendants. Motions for new trial were made and denied in each case, and appeals taken from the judgments respectively rendered and entered therein, said appeals having, by agreement, been presented together upon identical records and briefs.

[1] The first and main contention of the appellant in each of said cases is that the trial court committed prejudicial error in giving to the jury the following two instructions:

"If you find in this case that the automobile in which plaintiff was riding was driven at a rate of speed prohibited by law, and that plaintiff knew of the fact, but nevertheless voluntarily continued to ride in the automobile (and that she had opportunity to leave the machine and did not do so), and if you further find that the accident was proximately caused or contributed to by reason of the speed that the

automobile was driven, then I instruct you that the plaintiff is not entitled to recover any damages, and your verdict must be in favor of defendant.

"If you find the automobile in which plaintiff was riding prior to the happening of the accident was being driven at an unlawful rate of speed, and if you further find that plaintiff knew that fact in time to have objected and to have left the automobile, or to have the speed decreased to a lawful rate prior to the happening of the accident, and you further find that plaintiff made no objection and made no effort to be permitted to leave the automobile, and if you further find that the accident was proximately caused or contributed to by such unlawful rate of speed, then I instruct you that plaintiff is not entitled to recover in this action, and your verdict must be in favor of the defendant."

It must be conceded that the foregoing instructions, if erroneous, constituted prejudicial error for which a reversal of each of these judgments would be ordered. They are each predicated upon the premise that the defendants' employee was driving said taxicab at an unlawful rate of speed during much of the way from the point where the plaintiffs became his passengers to the place where the accident occurred, and at the very time of its occurrence. The practically undisputed evidence in each of these cases shows this to have been the fact. The plaintiffs therefore would have been entitled to recover damages for their injuries suffered in said accident unless they were each found by the jury to have been guilty of contributory negligence. The trial court charged the jury in the first of these instructions in substance that, if the plaintiff in each case knew the fact that the automobile in which said plaintiff was riding was being driven at a rate of speed prohibited by law, but nevertheless continued voluntarily to ride therein, having the opportunity to leave the machine, but not doing so, she would not be entitled to recover damages, and their verdict must be for the defendants. In the second of said instructions the court charged the jury in substance that, if the plaintiff knew, prior to the happening of the accident, that the automobile in which she was riding was being driven at an unlawful rate of speed, and knew that fact in time to have objected and to have left the automobile or to have the speed thereof decreased to a lawful rate prior to the happening of the accident, but made no objection and made no effort to be permitted to leave the automobile, she would not be entitled to recover damages and their verdict must be for the defendants.

Each of said instructions, in our opinion, constitutes an erroneous statement of the law. These plaintiffs were each passengers for hire in the taxicab owned by the defendants, and driven under their directions by their employee, who was in control of the operation, route and speed of said vehicle,

subject only to the general direction of the plaintiffs as to their respective destinations. It was the primary duty of the defendants herein to furnish a competent driver of the taxicabs they were furnishing to passengers for hire, and it was the primary duty of such driver to exercise, with respect to the safety of said passengers, the highest degree of care. There is no evidence herein other than that deducible from the fact immediately preceding and attending this accident that the driver was incompetent or that he was not at all times up to the moment of such accident in full control of the machine, nor are the instructions criticised herein predicated upon any such assumption.

In the case of *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, Mr. Justice Field, after an exhaustive review of the cases upon the subject up to the time of his decision, states what would seem to be the reasonable rule respecting the duty and responsibility of passengers for hire in public conveyances.

"There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. 'If the law were otherwise,' as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.' New York, Lake Erie & Western Railroad v. Steinbrenner, 47 N. J. L. (18 Vroom), 161, 171."

In the case of *Southern Pacific Co. v. Wright*, 248 Fed. 261, 160 C. C. A. 339, the court lays down what would seem to be the general rule governing the duties of passengers for hire in circumstances of the character of those involved in the instant case as follows:

"Generally it is the duty of the passenger to sit still and say nothing. It is his duty because any other course is fraught with danger. Interference, by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated; in the long run, the greater safety lies in letting the driver alone."

In the case of *Bernhardt v. City & S. Ry. Co.*, 263 Fed. 1009, 49 App. D. C. 265, the general rule is thus stated in a case in many of its aspects identical with the case at bar:

"It seems to us that where, for instance, a person hires a taxicab to convey him from his residence to a depot or some other point, he is not required, save under exceptional circumstances, to be on the lookout for danger, at the risk of being charged with contributory negligence in case of accident if he fails to do so. The primary duty of caring for the safety of the vehicle and passenger rests upon the driver, and unless the danger is known to the passenger he may rely upon the assumption that the driver will exercise proper care and caution. But, if the passenger knows that the driver is incompetent or careless, or that he is not aware of a danger known to the passenger, and is not taking proper precautions, it is his duty to notify the driver of the peril, and it may devolve upon him to insist that the driver shall stop the vehicle and allow him to alight, or take some other suitable action for his own protection. If the passenger fails in any of these respects, he may be chargeable with contributory negligence. *Anthony v. Kiefner*, 96 Kan. 194, 200, 150 Pac. 524, L. R. A. 1915F, 876, Ann. Cas. 1916E, 264."

In the case of *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 Pac. 709, the general principle set forth in the foregoing cases is recognized and restated as follows:

"That the chauffeur operating the automobile was guilty of negligence in running upon the track along which the motorcar was approaching in plain view is too clear for discussion, and is, indeed, conceded by the respondent. But the fact that he was negligent does not, of course, conclude the plaintiff on the issue of her contributory negligence. She was a passenger for hire. The chauffeur was not employed by her, and she did not undertake to direct the manner in which the automobile should be operated. The negligence of the chauffeur is not to be imputed to her. *Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652, 6 Sup. Ct. Rep. 391; *Bresce v. Los Angeles Traction Co.*, 149 Cal. 131, 5 L. R. A. (N. S.) 1059, 85 Pac. 152; *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 218, 107 Pac. 317. It is, of course, true that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety. If such passenger is aware that

the operator is carelessly rushing into danger, it may be incumbent upon him to take proper steps for his own safety. But here there was evidence that Mrs. Thompson was a stranger in San Diego, that she did not know that the road crossed a railway track, and that she was not aware of the approaching car. Under these circumstances it certainly cannot be said, as matter of law, that she was negligent in failing to call the attention of the chauffeur to the danger of the situation. Nor was the evidence such as to compel the conclusion that the chauffeur was manifestly incompetent and inattentive to his duties to such a degree as to impose upon the plaintiff any greater obligation of watchfulness than that which would otherwise have been hers."

In the case at bar there is the added element that the undisputed evidence shows, and the court in its said instructions assumes, that the plaintiffs knew that the automobile in which they were riding was being driven at a rate of speed prohibited by law, and the question which arises is whether mere knowledge of this fact is to be held to cast upon the plaintiffs the duty of objecting to the conduct of the driver in so operating the machine to the extent of either refusing to continue to ride in the automobile or of having the speed decreased to a lawful rate prior to the happening of the accident. The trial court so charged the jury in these instructions, and in so doing omitted, we think, an essential element noted and referred to in the foregoing cases, and particularly emphasized in the case of *Thompson v. Los Angeles, etc., Ry. Co.*, supra. That element consisted in the right of the plaintiffs to have their and each of their duty in the premises measured by the rule of ordinary care. Knowing that the vehicle was being driven at an unlawful rate of speed, they were only bound to take such proper precautions for their own safety as a reasonable person under similar conditions would take. They were not bound to leave the machine unless such act would be the act of a reasonable person. It might well be that for a passenger to attempt to leave a taxicab being driven at an unlawful rate of speed would be a most unreasonable and reckless act. Neither were they bound to attract or distract the attention of the driver simply because he was proceeding at an unlawful rate of speed, unless the taking of steps to that end would, under the circumstances, have been the act of a reasonable person; since it might well be that so to do would involve greater danger than would arise from proceeding at said rate of speed.

The instructions of the court made no allowance for these alternatives, but bound the plaintiffs upon their mere knowledge that the driver was proceeding at an unlawful rate of speed to either leave the machine or compel a reduction of the speed, regardless of whether either of these things could be done or attempted with reasonable safety,

and under penalty of losing their right to recovery in the event of an accident caused by such excessive speed. The result of the adoption of the rule embodied in these instructions would be that of imposing upon every passenger in a public conveyance, whether a railroad train, a street car, or a motor vehicle, the duty, whenever they deemed it was proceeding at an unlawful or excessive rate of speed, of leaving the conveyance, or of pulling the bell cord signaling the motorman, attracting the attention of the driver, or taking such other steps as were available to either leave the vehicle or to compel the engineer, the motorman, or driver to bring the vehicle to a standstill, or at least work a reduction in its speed. No such duty is, in our opinion, imposed upon passengers for hire in a public conveyance, and it follows that these instructions of the trial court, in so far as they attempted to impose such duty, were erroneous.

These instructions were also erroneous for another reason made plain by the evidence in the case, which shows that these plaintiffs, becoming nervous over the rate of speed and zigzagging motion with which the machine was proceeding, began making efforts by hammering on the window with their hands and calling aloud in an effort to attract the attention of the driver and cause him to lessen the speed of the machine. It was for the jury to determine the sufficiency of these efforts to absolve the plaintiffs of responsibility under proper instructions of the court. These instructions leave no room for such interpretation, since in effect they charge the jury that the plaintiffs, knowing that the speed of the car was excessive, must either have left the car or succeeded in compelling a reduction in its speed. They did not do the former, and their effort to do the latter, however reasonable, being unsuccessful, would, under these instructions, avail them nothing. Under the foregoing authorities this cannot be the law.

[2, 3] The appellants further contend that the trial court erred in modifying a requested instruction and in giving said instruction to the jury in its modified form. The instruction as asked by the appellants read as follows:

"I charge you that upon a trial of this character it is only necessary for the plaintiffs, in order to establish a prima facie case, to prove the overturning of the taxicab and the injuries caused thereby. Having done this, they may rest, for the presumption is that the overturning occurred through the negligence of the driver, and the burden of proving that there has been no negligence is then cast upon the defendants. In order to rebut this presumption of negligence the defendants must show by a preponderance of evidence that the overturning was a result of an inevitable casualty, or of some cause which human care and foresight could not prevent. The law holds the defendants responsible for the slightest negli-

gence. It is incumbent upon the defendants to explain how the overturning of the automobile occurred, and, if they fail to do this, the presumption of negligence remains."

The court modified this instruction by changing the word "presumption" where it appears therein to the word "inference," and by striking out the words "by a preponderance of evidence." The instructions as thus modified and then given by the court read as follows:

"I charge you that upon a trial of this character it is only necessary for the plaintiffs, in order to establish a prima facie case, to prove the overturning of the taxicab and the injuries caused thereby. Having done this, they may rest, for the inference then arises that the overturning occurred through the negligence of the driver, and the burden of proving that there has been no negligence is then cast upon the defendants. In order to rebut this presumption of negligence the defendants must show that the overturning was a result of an inevitable casualty, or of some cause which human care or foresight could not prevent. The law holds the defendants responsible for the slightest negligence. It is incumbent upon the defendants to explain how the overturning of the automobile occurred, and, if they fail to do this, the inference of negligence remains."

The trial court committed no error in making the modification above noted in the plaintiffs' requested instruction, and in giving such instruction in its modified form. The instruction as requested by the plaintiffs differs from the instruction approved by this court in the case of *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68, upon which the plaintiffs rely, by the insertion therein of the words "by a preponderance of evidence," which words the trial court properly struck from said instruction. *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481; *Learned v. Penn. Rapid Trans. Co.*, 193 Pac. 591. The trial court also properly modified the plaintiffs' requested instruction by the substitution of the word "inference" for "presumption" therein. *O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674; *Onell v. Chappell*, 38 Cal. App. 376, 176 Pac. 370; *Thomas v. Visalia Electric R. R. Co.*, 169 Cal. 658, 147 Pac. 972; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530. We think the instruction as modified by the trial court, and given in such modified form to the jury, embraced a correct statement of the law.

The judgment in each case is reversed.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.

WILBUR, J. I concur. In view of a new trial, however, I think that it should be stated that the defendant cannot predicate a charge of contributory negligence upon a failure of the plaintiffs to object to the

driving of the car at an excessive speed which caused the accident. In such case the proximate cause of the accident is the negligence of the driver in driving at an excessive speed, and not the failure of the passenger to remonstrate with him for his negligence in so driving. Nor is the failure of a passenger to leave the car because of such excessive speed an act of contributory negligence. The passenger had a right to rely upon the duty of the driver to exercise the highest degree of care for his protection. This obligation was contractual and continuing, and the passenger was not obliged to rescind the contract of carriage because of the misconduct of the carrier, but could rely upon the continuing obligation of the carrier to exercise due care for his protection; and such reliance is not an act of negligence.

187 Cal. 533

TULARE WATER CO. v. STATE WATER COMMISSION et al. (two cases).
(S. F. Nos. 9842, 9845.)

(Supreme Court of California. Dec. 12, 1921.)

1. Waters and water courses — 133—Commission cannot arbitrarily deny application for appropriation.

The State Water Commission cannot, under St. 1913, p. 1012, arbitrarily deny an application made in conformity to the law for the appropriation of water that is subject to appropriation, the positive right to such permit being granted by section 17, no permission at all being required by prior law (Civ. Code, §§ 1410-1422).

2. Waters and water courses — 133—Commission without jurisdiction to finally determine existence of water subject to appropriation.

While St. 1913, p. 1012, authorizes an investigation by the State Water Commission when application is made for a permit to appropriate water, and the exercise of some degree of discretion as to the sufficiency of the application and as to the existence of water subject to appropriation, such Commission is without jurisdiction to finally determine the existence or nonexistence of water subject to appropriation, and in such a case its denial of an application, if held to be a judicial determination of the right, would leave the petitioner without remedy, as no appeal is provided for, and certiorari would only go to the regularity of the proceeding, and not the merits of the ruling.

3. Constitutional law — 318—Waters and water courses — 128—Arbitrary action in refusing permit to appropriate water denial of due process of law.

To conclude the rights of would-be appropriators of water by the extrajudicial, and perhaps arbitrary, action of a state board of water commissioners under St. 1913, p. 1012,

would be to deprive such applicant of a valuable property right without due process of law.

4. Mandamus ☞87—Proper remedy to compel reasonable exercise of discretionary powers by Water Commission.

Mandamus is a proper remedy to compel a reasonable exercise by the State Water Commission of such discretionary powers as are granted it by St. 1913, p. 1012, when an application is made for a permit to appropriate water for the purpose of irrigating agricultural lands, although the obligation of the Commission to perform depends upon the determination of the existence of certain prerequisite facts.

5. Mandamus ☞163—Allegations taken as true on demurrer.

Allegations of petition for writ of mandate must be taken as true on demurrer.

In Bank.

Appeals from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Petition by the Tulare Water Company for a writ of mandate against the State Water Commission of the State of California and others to compel granting of permit to appropriate waters, and also certiorari to review and annul action of the same defendants in denying petitioner's application for leave to make a water appropriation. Judgments for defendants in each case, and petitioner appeals. Judgment in proceeding for writ of mandate reversed, with directions, and judgment in proceeding for writ of review affirmed.

Edward F. Treadwell, of San Francisco (Berkeley B. Blake, of Sacramento, and Forrest A. Cobb, of San Francisco, of counsel), for appellant.

L. D. Bohnett, of San Jose, for respondents.

SLOANE, J. The petitioner, Tulare Water Company, appellant in these actions, applied to the State Water Commission for a permit to appropriate water of the Kern river for the purpose of irrigating agricultural lands.

The application was in due form and in conformity with the provisions of the act of 1913 creating a Water Commission and providing for the presenting and granting of permission to make such appropriations (Stats. 1913, p. 1012).

The application was denied without a hearing by the commissioners, and the petitioner thereupon instituted a proceeding in mandamus before the superior court of the city and county of San Francisco to compel the granting of such permit.

A demurrer was sustained to the petition for writ of mandate, without leave to amend, and judgment was made and entered for the defendants. Petitioner thereupon took an appeal from this judgment to the District Court of Appeal of the First Appellate District.

Being uncertain as to its remedy, petitioner also instituted a proceeding in the superior court for a writ of certiorari to review and annul the action of the Water Commission in denying without a hearing its application for leave to make its water appropriation.

This petition was likewise denied upon the sustaining of demurrer thereto, and an appeal was taken to the Court of Appeal from this judgment also.

Both appeals come to this court upon an order granting a hearing after judgment in the District Court of Appeal in favor of petitioner in the mandamus case and in favor of respondent on the writ of review.

As both appeals involve a general construction of the powers and duties of the Water Commission under the act of 1913, we will consider them together.

The first contention of the petitioner is that upon the presentation of an application in due form and in compliance with the rules of the Water Commission it became the duty of the Commission as a ministerial act to issue a permit for the appropriation asked for, and that the issuance of such permission may be enforced by mandamus; and, secondly, that if the Commission has any judicial function in the matter, there was a refusal to exercise it in passing upon the application presented, and its action in the matter is subject to review by certiorari as being in excess of its jurisdiction.

Section 17 of the Water Commission Act provides that—

"Any person, firm, association or corporation may apply for and secure from the state water commission, in conformity with this act and in conformity with reasonable rules and regulations adopted from time to time by the state water commission, a permit for any unappropriated water or for water which having been appropriated or used flows back into a stream, lake or other body of water within this state. * * *"

Section 15 provides that—

"The State Water Commission shall allow, under the provisions of this act, the appropriation of unappropriated water or of the use thereof, or of water or the use thereof which may hereafter cease to be appropriated, or which may hereafter be declared to be unappropriated, or which, having been used under claim of riparian proprietorship or appropriation finds its way back into a stream, lake or other body of water and also such water as is declared by section 11 of this act to be subject to appropriation."

Section 11 defines with greater particularity what waters are subject to appropriation, including riparian waters that have not been applied to riparian lands within a specified time.

Petitioner claims a full compliance with all the requirements of the act and of the rules and regulations of the Commission in preparing and presenting its application, and no point is made by respondents of any omission in this respect.

It must be assumed, then, on the pleadings, that the petitioner complied with, and has in the pending matter pleaded, all the conditions required to entitle it to a permit to appropriate such quantity of the waters of the Kern river as it could put to beneficial use for the purposes alleged, and which was at the time unappropriated.

If any discretion was vested in the Commission, or any matter submitted for judicial consideration, it was to determine whether there was any unappropriated water in the Kern river at that time subject to this proposed appropriation.

[1] The Commission surely does not possess and could not be invested with power to arbitrarily deny an application made in conformity to the law for the appropriation of water that was subject to appropriation.

The purpose of the act is clearly to permit any person or corporation desiring to make any of the enumerated beneficial uses of waters of the state, not otherwise utilized, to avail itself of this right of appropriation.

Under the law in force prior to the adoption of this act (Civ. Code, §§ 1410-1422) no permission was required for the appropriation of waters of the state. All that was required to create a preferential right to such water was to actually appropriate it to some authorized beneficial use, or to make a water filing to be followed with due diligence by an actual user.

The obvious aim of the Water Commission Act was not to abolish, but to regulate and administer, this privilege.

The positive right to such permit is granted by section 17 of the act to any person who makes application as provided by the act and the rules of the Commission. The mode and manner of making the application is prescribed. But what is the jurisdiction granted to the Commission in determining the status of the water supply or the priority of rights thereto and in ascertaining if the water claimed is subject to appropriation?

The Commission is authorized by section 10—

"to investigate for the purpose of this act all streams, stream systems, portions of stream systems, lakes, or other bodies of water, and to take testimony in regard to the rights to water or the use of water thereon or therein, and ascertain whether or not such water, or any portion thereof, or the use of said water or any portion thereof, heretofore filed upon or attempted to be appropriated by any person, firm, association, or corporation, is appropriated under the laws of this state."

[2] While it appears from the provisions above quoted that the act is intended to au-

thorize an investigation, and the exercise of some degree of discretion by the Water Commission as to the sufficiency of the application, and as to the existence of water subject to appropriation, no formal hearing is prescribed, and no authority granted to judicially determine the fact as to unappropriated water, or to adjudicate conflicting claims that might exist thereto. Even if a hearing could be required, the Commission is without jurisdiction to finally determine the existence or nonexistence of water subject to appropriation, and in such a case its denial of an application, if held to be a judicial determination of the right, would leave the petitioner without remedy, as no appeal is provided for, and certiorari would only go to the regularity of the proceeding, and not to the merits of the ruling.

[3] In view of the several other powers and duties devolving upon the Water Commission under this act in the supervision of the distribution of water subject to appropriation, and in determining the rights and obligations of interested parties, in which hearings of a judicial nature are provided for with much particularity, and provision is made for review of action of the Water Commission by the courts, it is fair to conclude that it was not intended to grant to the Commission in the matter of this preliminary permit to file upon unappropriated water more than a supervisory discretion in the matter of granting such permits. At any rate, it is manifestly impracticable for the Water Commission to authoritatively determine that there is not water in a given stream subject to appropriation. What is unappropriated water is a constantly fluctuating question, depending upon the seasonal flow of the stream, the annual rainfall, the forfeiture of prior appropriations, and default in the use of riparian rights. To conclude the rights of would-be appropriators, by the extrajudicial, and perhaps arbitrary, action of a board of water commissioners, would be to deprive such applicant of a valuable property right without due process of law.

[4] Under such conditions mandamus is a proper remedy to compel a reasonable exercise of such discretionary powers as are granted by the act. It is well settled that mandamus will issue to correct an abuse of discretion, if the case is otherwise proper. *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; *Ex parte Bradley*, 7 Wall. 377, 19 L. Ed. 214; *State v. Lafayette County*, 41 Mo. 226; *Village of Glencoe v. People*, 78 Ill. 382; *People v. Superior Court*, 10 Wend. (N. Y.) 285; *Hammel v. Neylan*, 31 Cal. App. 22, 159 Pac. 618.

As in all cases of ministerial duty, the obligation to perform depends upon the determination of the existence of certain prerequisite facts, but, where such facts exist, the duty is mandatory.

Mere authority to decide as to the existence of a given fact does not necessarily take the official or board so deciding beyond the reach of a writ of mandate, especially where there is no remedy by appeal.

This doctrine is well stated in a note to *Weeden v. Town Council*, 98 Am. Dec. 375, citing in its support *Rex v. Justices*, 1 W. Black, 606, and *Commonwealth v. Justices*, 2 Va. Cas. 9, and is as follows:

"For instance the law may confer a right upon a person or tribunal, judicial or otherwise, which, on being shown that these acts were done, is directed to concede the right, or to issue some evidence of it. In such cases it is manifest that some intelligence and judgment must be employed in determining whether the designated facts exist. But the examining person or tribunal may capriciously determine that the acts have not been performed, and withhold the right, or the evidence of it. If there is no remedy by resort to some appellate proceeding, the courts must either investigate the questions involved, and by mandamus compel appropriate action, or suffer the injured party to be capriciously denied a right to which he shows himself unquestionably entitled, and we think that all fair minded courts will compel the requisite action by mandamus."

The same rule is recognized in *Wood v. Strother*, supra. The action was a proceeding in mandamus to compel the auditor of San Francisco to countersign a street assessment warrant under an act which required that before signing he "shall examine the contract, the steps taken previous thereto, and the record of assessments, and must be satisfied that the proceedings have been legal and fair." The argument against the writ was that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal before signing, and that, if he has examined them and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion. The opinion, however, after reviewing many authorities on the subject, says:

"In view of the foregoing cases, it seems a mere perversion of language to say that the writ will never issue to control judicial action or to compel a tribunal to act in a particular way. It is by no means intended to assert that the writ could issue in this state in all the cases above referred to. The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final, and, if not, upon whether the system of practice furnishes any other adequate remedy. These things might be different in different states; but the cases cited serve to show that the formulas above mentioned are not universally and literally true, and that it is dangerous to reason from them as if they were so.

"In every case the tribunal that is to act must

determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final, and, if not, whether there is any other 'plain, speedy, and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is another 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies. But if the determination was not intended to be final, and there is no other adequate remedy, the writ must issue. Otherwise there would be an admitted wrong without a remedy. The writ issues in such case to prevent a failure of justice. And this is its ancient office. In the language of Lord Mansfield: 'It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one.'"

Stockton Railroad Co. v. Stockton, 51 Cal. 328, 338, was a proceeding by mandamus to compel the delivery to petitioner of certain bonds. It was urged by respondent that under the statute governing the matter the bonds could not be issued until the common council certified to certain facts. This the council refused to do on account of alleged failures to comply with the conditions. Niles, J., writing the opinion in the case, says:

"On this theory the common council might forever defeat the delivery of the bonds, by declining to be satisfied, even though it appeared by the most convincing proofs that the road in every minute particular had been constructed and stocked in the manner and within the time prescribed by the statute. We had a similar question before us in the case of the *People v. Supervisors of Alameda*, 45 Cal. 395. In that case a petition, signed by the requisite number of qualified electors, had been presented to the board of supervisors, requesting that an election be called on the question of removing the county seat. The board refused to order an election, and an alternative writ of mandate was issued out of this court. The proceedings for the removal of the county seat were had under section 3976 et seq. of the Political Code; and in its answer to the suit the board set up as one of its defenses that, under the statute, it was its duty to determine whether the petition was signed by the requisite number of qualified electors, and it was not satisfied from the proofs offered in support of the petition that it was so signed, and for that, among other reasons, had declined to order an election. We struck out this portion of the answer, as constituting no defense, and ordered an issue to be tried whether, in point of fact, the petition was signed by the requisite number of qualified electors. Our view of the law then was, and yet is, that if an official duty is to be performed on the happening of an event, the officer cannot arbitrarily or capriciously refuse to perform it, after the event has hap-

pened, on the plea that he is not satisfied that it has happened. If the fact exists, and is established by sufficient proofs, it is his legal duty to be satisfied, and to act accordingly."

In *Iglin v. Hoppin*, 156 Cal. 484, 105 Pac. 582, a case quite similar in its facts to the one before us, it was there sought by mandamus to compel the supervisors of Yolo county to subscribe a specific order theretofore given by them denying the application of petitioner to have certain lands in a reclamation district, set off into an independent district, and to enter an order granting the petition. A general demurrer was sustained on the ground that exclusive jurisdiction to determine the facts upon which the order was made was vested by the Legislature in the supervisors, and that their action could not be reviewed by mandamus proceedings. The opinion holds that upon the facts pleaded and taken as admitted on the demurrer the petitioners were entitled to relief by mandamus.

In *Puterbaugh v. Wadham*, 162 Cal. 611, 123 Pac. 804, this court has said:

"It is undoubtedly true that the writ of mandamus is not a writ of error, and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi judicial body or officer acting within its or his appropriate jurisdiction; but where the facts are not disputed, and the only matter to be determined is the duty of the body or officer under the law, the court will define such duty and enforce not only its performance, but the carrying out of the obligations of the respondent body or officer in a particular manner."

To the same effect is the decision in *Harrelson v. San Joaquin Irr. Dist.*, 20 Cal. App. 324, 128 Pac. 1010.

[5] These citations are at least sufficient authority for holding in the matter before us that the trial court was in error in sustaining the demurrer to the petition for writ of mandate. All the allegations of the petition must be taken as true on demurrer, and such petition alleged all the facts required to entitle the petitioners to the relief demanded.

The judgment is reversed as to the proceeding for writ of mandate, with direction to the trial court to overrule the demurrer and hear the cause on the merits.

As to the petition for writ of review, there being no judicial powers vested in the Water Commission, so far as applies to the matter before us, the judgment thereon is affirmed.

We concur: WILBUR, J.; LENNON, J.; SHURTLEFF, J.

SHAW, C. J. (concurring). I concur in the opinion of Mr. Justice SLOANE, so far as it deals with the question of the appeal from the judgment of the court below denying a

writ of mandate, being the appeal S. F. No. 9842.

I think, however, that something more may properly be said on the question whether or not the Water Commission, in exercising the power conferred upon it by the sections of the statute particularly considered in the opinion, may, under some circumstances, act in a judicial capacity. It is obvious that, if it does so it will be taking property of one person and giving it to another; in other words, that it will be exercising powers which cannot be exercised except by courts authorized by the Constitution.

Section 1 of article 6 of the Constitution declares that—

"The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts and such inferior courts as the Legislature may establish in any incorporated city or town, township, county, or city and county."

If the Water Commission is acting judicially, it is doing so because it is determining the rights and titles of individuals to private real property, and in that capacity it would be acting as a court as fully as a court of general jurisdiction would be acting when it adjudicates the title to real property. *Quinchard v. Board*, 113 Cal. 669, 45 Pac. 856; *People v. Board*, 122 Cal. 424, 55 Pac. 131; *Rhode Island v. Mass.*, 37 U. S. (11 Pet.) 718, 9 L. Ed. 697; *Prentis v. Atlantic, etc., Co.*, 211 U. S. 226, 29 Sup. Ct. 67, 53 L. Ed. 150; *Marin, etc., Co. v. R. R. Comm.*, 171 Cal. 712, 154 Pac. 864, Ann. Cas. 1917C, 114.

The effect of section 1, art. 6, aforesaid, is to vest in the courts therein mentioned the entire judicial power of the state. It is not within the power of the Legislature to vest in any other body any general judicial power to establish and declare the right and title to private property. The Water Commission is not one of the superior courts of the state and could not be made such court or be given the powers thereof, and it is not an inferior court with jurisdiction limited to incorporated cities, or towns, townships, counties, or cities and counties. On the contrary, its jurisdiction is state-wide. Consequently it is not a court which comes within the purview of said section 1 and it is not within the power of the Legislature to give that Commission such judicial power. *Western, etc., Co. v. Pillsbury*, 172 Cal. 413, 156 Pac. 491, Ann. Cas. 1917E, 390; *Pacific, etc., Co. v. Pillsbury*, 171 Cal. 322, 153 Pac. 24. There is no other section of the Constitution which purports to confer power upon the Legislature to invest such commissions with judicial powers of this nature. Certain judicial powers may be invested in the Industrial Accident Commission and in the Railroad Commission, but, with these exceptions, all the general judicial power of the state must be

vested in the courts named in the Constitution and in such inferior courts of local jurisdiction as may be established under said section 1.

For this reason I am of the opinion that the act confers no judicial power upon the Water Commission, and, if it purported to do and so far as it may purport to do so, it would be and is without effect. The consequence is that any award is assumed to make in the exercise of such purported judicial power would be absolutely void, and that certiorari would not lie to review its action in that regard.

187 Cal. 510

COLDWELL v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 9694.)

(Supreme Court of California. Dec. 9, 1921.)

1. Records — 14—Estimates, plans, etc., prepared by subordinates of city engineer, open to inspection as "other matters in the office of any officer," but not as "public records."

Estimates, plans, drawings, maps, and other data prepared by the assistants and subordinates of the city engineer of the city and county of San Francisco, to be submitted to him for his approval, in connection with the construction of a municipal water supply system of which the engineer had charge as an officer of the board of public works, are not, before such approval by the engineer, "public records" open to inspection by any citizen of the state, under Code Civ. Proc. §§ 1888, 1892, 1893, 1894, and Pol. Code, § 1032, and Charter of the City and County of San Francisco, art. 6, § 6, and article 16, § 16, but may be inspected as "other matters in the office of any officer," within Pol. Code, § 1032, notwithstanding tentative character thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Record.]

2. Records — 14 — That city engineer had communicated matters to city attorney did not affect citizen's right of inspection.

Under Pol. Code, § 1032, the public had a right to inspect public records or other matters in the office of the city engineer, though city engineer had communicated them to the city attorney, notwithstanding Code Civ. Proc. § 1881, subds. 2 and 5, relating to confidential communications.

3. Records — 14—Data in city engineer's office, having once been inspected by some citizens, could not be withheld from inspection of others as confidential matters.

Where data prepared by city engineer's office in connection with construction of city waterworks system had been inspected by some citizens, the right of another citizen to inspect it could not be denied on the ground that it was confidential; the matter having lost its confidential character by the previous inspection.

In Bank.

Appeals from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Petition for writ of mandamus by Colbert Coldwell against the Board of Public Works of the City and County of San Francisco and others. From judgment granting petition with certain exceptions, the defendants appeal, and from such judgment, and also from order denying his motion to vacate and set aside the judgment entered and to amend the conclusions of law contained in the court's findings, the petitioner appeals. Affirmed as modified.

Robert B. Gaylord, of San Francisco, for appellant.

George Lull, City Atty., Robert M. Searls, Special Atty., both of San Francisco, for respondents.

LAWLOR, J. This is an appeal by both petitioner, Colbert Coldwell, and defendants, the board of public works of the city and county of San Francisco, the individual members thereof, and M. M. O'Shaughnessy, the city engineer, from a judgment granting, with certain exceptions, a petition to the superior court of the city and county of San Francisco for a writ of mandate to compel the defendants to allow petitioner to view and take copies of certain documents and data in the office of the city engineer of the city and county of San Francisco, and by the petitioner from an order of the court denying petitioner's motion to vacate and set aside the judgment entered and to amend the conclusions of law contained in the court's findings. As the same questions are involved in both appeals, they may be considered together.

The petition alleged that the city and county of San Francisco was engaged in the acquisition and construction of a municipal water supply with engineering works at Hetch Hetchy, in the state of California; that in connection with the Hetch Hetchy project the board of public works and M. M. O'Shaughnessy as city engineer had done a large amount of work; that the board of public works had in its possession a large number of plans, specifications, reports, contracts, estimates, certificates, receipts, surveys, field notes, maps, plats, profiles, and other papers relating to the Hetch Hetchy project, which included records of certain specified structures, drill borings, and a proposed section of the dam; that petitioner, a citizen of the city and county of San Francisco, desired to inform himself and others with regard to the work; that he desired to investigate the records of the Hetch Hetchy project, including both those generally described and those specifically described; that

he had made demand on the defendants that he be given access to and inspection of the records mentioned, which demand had been refused; and petitioner prayed that defendants be ordered to allow petitioner to inspect all the records mentioned, with the privilege of taking notes, copies and other data therefrom.

In their answer, the defendants alleged that—

"There are in the office of the city engineer a large number of incomplete and unapproved maps, plans, estimates, studies, reports, and memoranda relating more or less directly to the Hetch Hetchy project, some of which have been prepared or are in the course of preparation by the city engineer's assistants, some of which have been left there by employees of previous administrations, but none of which have been finally approved by the city engineer or filed with the board of public works or made a part of any public or official transaction. As to the last-described maps, plans, estimates, studies, reports and memoranda, defendants allege that the city engineer has not had the opportunity of passing on such data either in the way of approval or disapproval; that as at present constituted, said data is of the kind and type which may be modified, corrected or destroyed at the will of the city engineer or the assistant in charge of the same; that they have not been made the basis of and are not records of any public or official acts or transactions; that they are not public records, public books, public writings, public documents or public matters; that the interests of the public and the Hetch Hetchy project require that said data be kept and withheld from inspection by the petitioner or his agents"; that defendants deny that "until the city engineer completes, approves, and files said data or other matter with the board of public works, that the same passes into the possession, custody, or control of the board of public works, or becomes a part of any public record whatever. Defendants deny that they, or either or any of them, have ever refused or still refuse to petitioner or his representatives or agents access to that portion of the hereinabove described data which is a matter of public record, and allege that all such data or matter which constitutes part of the public records of the city and county of San Francisco has at all times been, and is still open to said petitioner."

Then followed certain allegations that it was necessary to keep private the information concerning the work on the Hetch Hetchy project until the plans for it had been approved, and impugning the motives of petitioner in seeking the information he wanted, and that "part of the data in the city engineer's office to which access is sought by petitioner consist of confidential reports, estimates and data collected and compiled by assistants and other engineers employed for that purpose, and held for use in pending litigation and investigations affecting the Hetch Hetchy project; that it would be extremely detrimental to the interests of said project and the interests of

the people and citizens of the city and county of San Francisco if such data should be given publicity"; and that in refusing inspection of the data asked by petitioner, defendant city engineer was acting under authority and instruction from the board of supervisors of the city and county of San Francisco.

The court found that all the allegations of the petition were true, except those of paragraph X, which concerned the making of a demand for inspection by petitioner, his agents and representatives. In that connection the court found in detail that petitioner had demanded of defendants that he, his agents and representatives, be given access to and inspection of all the records mentioned, with the privilege of taking copies, notes, and data therefrom, but that the defendants had refused such demand, except that petitioner had been accorded the right to inspect the detailed specifications of the tunnel aqueduct between Early Intake and Moccasin creek, including the record of certain drill borings and the city engineer's estimate thereon, and other records which defendants admitted constituted public records. It was also found that the purpose of the petitioner was not to mislead or prejudice the public mind against the Hetch Hetchy project, and that it was not the petitioner's motive to find in the records to which access was sought a basis for unfair or sinister criticism of the Hetch Hetchy project; that there was data consisting of confidential reports, estimates, and data prepared for use in pending litigation, which it would be detrimental to the interests of the people of the city and county of San Francisco to disclose prior to the time at which it would become necessary to use it in connection with the litigation; that the city engineer had permitted all of the records and other matters mentioned in the petition to be examined by an investigating committee from the Civic League of Improvement Clubs, and that they had been examined by such committee; that the board of supervisors had instructed the city engineer to refuse inspection to petitioner, as alleged in the answer.

The conclusions of law were to the effect that petitioner was entitled to a writ of mandate as prayed, "except that such writ shall not decree to said petitioner the right to inspect or take copies, notes or data from any of the confidential reports, estimates or data, collected or compiled by assistants or other engineers employed for that purpose for the use of the city attorney of the city and county of San Francisco, or other attorney at law acting for said city and county, in advising the defendants in respect to their official rights and action or for use by said attorneys or either of them in legal proceedings * * * to which proceedings the defendants or any of them in their official capacity,

or the city and county of San Francisco are or may be parties litigant; except further from said writ any advice given in reference to such privileged data by the city attorney or other attorney in the course of his professional employment as attorney for said city and county of San Francisco, or for said defendants in their official capacities."

Defendants state:

"We may summarize the description of this data by saying that it consists of maps, plans, estimates and studies in the possession and control of the city engineer and his assistants upon which no official judgment or action had been taken at the date of the petition. It was and is defendants' contention that a public record is not made every time a public employee puts his pencil on paper; that it must be a record of some official act and not merely a tentative study or design concerning which no official action has been taken either in the way of approval or rejection;" that "the data to which access is sought is not required by law to be kept, has not been approved by the city engineer, has not been filed with the board of public works, has not been made a part or basis of any public transaction. For the most part it consists of preliminary maps lacking detailed drawings and working plans necessary to make it available for use even if officially approved and filed. The line of demarcation between public records and documents and data or memoranda in the course of preparation must, of course, be drawn somewhere," and that "the tentative conclusion of an assistant may or may not be correct, and until the city engineer finally passes upon it, it does not become a record of the opinion of his office."

Petitioner's contention is:

That "the fundamental issue on this appeal is not the right of these petitioners to inspect the Hetch Hetchy records. The question is whether the citizens of San Francisco, in their capacity as citizens and distinguished from their corporate entity, have a right to see these records, whether they have a right to go behind the conclusions of the city engineer and whether they have the right to see the work for which their money was paid." That "we believe that any document prepared in a public office within the scope of the duties of that office, for the purpose of conducting public business and the expense of which is borne by the municipality, belongs to the municipality. That it is a matter of public interest and that the citizens of the municipality by virtue of their citizenship are entitled to inspect that document and draw from it such conclusions as they choose. We submit that it is immaterial whether one branch of a particular department has transmitted the document to another or not, and that it is immaterial whether in the course of days or months or years, the head of the subordinate department has, or has not, seen fit to stamp it with his mental approval. It makes no difference whether it is a correct or erroneous document; it is a document which belongs to the public, and if it belongs to the public, the citizens have the right to inspect it," and that "the real rule, however, is that

a document prepared by a public official or his subordinate in the course of duty and at public expense, is a public document and every citizen has the right to inspect it."

Section 1888, Code of Civil Procedure, is as follows:

"Public writings are: (1) The written acts or records of acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive. * * * (2) Public records, kept in this state, of private writings."

Section 1892 provides that—

"Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."

And section 1893 that—

"Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor."

Section 1894 provides in part that—

"Public writings are divided into four classes: * * * (3) Other official documents; (4) public records, kept in this state, of private writings."

Section 1032 of the Political Code provides that—

"The public records and other matters in the office of any officer are at all times, during office hours, open to the inspection of any citizen of this state."

Section 6 of article 6 of the charter of the city and county of San Francisco is as follows:

"The board [of public works] shall keep and preserve a record of all its proceedings, and copies of all plans, specifications, reports, contracts, estimates, certificates, receipts, surveys, field notes, maps, plats, profiles, and of all papers pertaining to the transactions of the board."

Section 13 of article 16 provides that—

"All books and records of every office and department shall be open to the inspection of any citizen at any time during business hours, * * * but the records of the police department shall not be subject to such inspection except permission be given by the police commissioner or by the chief of police."

On appeal the defendants waived the objection they made in the court below on the score of petitioner's motives, so even if the motives of a citizen have any place in the consideration of such a question, the point is eliminated here.

Although there is no express finding that all documents to which access is sought are public records or "other matters" which the public is entitled to inspect, such a finding is to be implied from the conclusion of law

that petitioner is entitled to inspect all of them, with the exception of those which were prepared for the use of the city attorney in litigation. An examination of the authorities shows that there is no single test which can be applied to determine what are and what are not "public records." In *Barrickman v. Lyman*, 155 Ky. 710, 160 S. W. 267, the distinction was held to rest on whether or not the documents were required by law to be kept. In the case of *Kyburg v. Perkins*, 6 Cal. 674, cited by petitioner, it was said that—

"To entitle a book to the character of an official register it is not necessary that it be required by an express statute to be kept."

And as pointed out, petitioner insists that all documents, prepared by public officials at public expense, are public documents.

In *Musket v. Department of Public Service of the City of Los Angeles*, 35 Cal. App. 630, 170 Pac. 653, petitioner, a taxpayer, brought an action to compel the defendant department of public service to allow him to inspect certain books of account, records, papers, and documents connected with an electric heat, light, and power system which the city was operating. The inspection was allowed over the objection of defendants that the documents were not public records. In that case it was said:

"The appellants, it is true, are by the charter of Los Angeles made officers of the municipality; but the books and papers which respondent seeks to examine are not made official documents merely because they are kept under the direction of city officials. Their character is fixed by the considerations which we have already advanced."

The considerations advanced to determine whether or not the documents were public records were as follows:

"Returning to the language of sections 1894 and 1888 of the Code, it is plain that the books and papers mentioned in the petition are not described in either subdivisions 1, 2 or 4 of section 1894, or subdivision 2 of section 1888. If the sections cover them at all they must fall within the language of the one remaining subdivision of each; in other words, consolidating the language of those subdivisions, they must answer this description: They must be 'official documents' other than laws or judicial records, and must be the 'written acts or records of the acts * * * of official bodies' or 'tribunals' or 'of public officers * * * of this state.'"

In that case it was held that the documents were public records, although the city in operating the electric system was engaging in a private enterprise as a proprietor. It appears from that case that the only means of deciding whether or not a document is a public writing is by determining

whether or not it falls within the statutory definition.

In *Egan v. Board of Water Supply of the City of New York*, 205 N. Y. 147, 98 N. E. 467, 41 L. R. A. (N. S.) 280, Ann. Cas. 1913E, 56, petitioner asked for and was allowed inspection of certain correspondence which would tend to show why the board had failed to grant a contract to the lowest bidder. The court said in part:

"It may not be denied that there are papers concerning governmental matters which are properly treated as secret and confidential, such for example as diplomatic correspondence and letters and dispatches in the detective police service."

[1] In the case at bar the record shows that the city engineer, as an officer of the board of public works, is in charge of the Hetch Hetchy project, and that he is assisted by a large number of assistants and subordinates. These assistants prepare data connected with the project, which consists of estimates, plans, drawings, maps, or the like. This data is all submitted to the city engineer for his approval, unless a subordinate is formally appointed to take charge of a particular branch of the work, in which case the subordinate's approval of such work is final. When an estimate of the plan, which is considered acceptable, is completed it is approved by the city engineer, and usually is at once forwarded to the board of public works. Defendants concede that after such approval the documents are public records. Until finally approved by the city engineer, with the exception noted, all the data is but tentative, and is liable to change, and much of it is destroyed when it is refused approval. It is this preliminary matter which defendants, as stated above, contend should not be submitted to public inspection. Defendants do not contend that surveys and maps, complete in themselves, of the territory which the project will occupy are not open to public inspection. The data referred to here, consisting of preliminary estimates, plans and the like, are computations based on such surveys.

We are of the opinion that the preliminary estimates and details which form this incomplete data are not of such a character as would constitute them public records. Until they receive some official approval the documents cannot be considered the act or the record of an act of the city engineer or the board of public works. They cannot be considered the official acts of the city engineer because compiled in his office, for he testified that "I don't allow anything to go out of my office except it has my final, definite approval." Before approved they have not attained the character and dignity of completed acts or documents of any kind.

Until a satisfactory plan or estimate is completed, the documents are but preliminaries in the course of what will eventually be an act of the city engineer. When a satisfactory plan is adopted, all the others are discarded unless, as testified by the city engineer, they relate to the plan which is finally adopted, in which case they are included in the files with the accepted plan. Therefore these preliminary matters are not "public records in the office of an officer," within the meaning of the sections of the Codes and the charter.

We are of the opinion, however, that these documents and data are of such character as constitutes them "other matters" within the meaning of section 1032 of the Political Code. In *Whelan v. Superior Court*, 114 Cal. 548, 46 Pac. 468, petitioner sought to be allowed to inspect certain instructions given to a sheriff by an execution creditor. In refusing the inspection, the court said:

"It does not by reason of being in writing, become a 'public record,' or any other public matter, in the office of the sheriff. The 'other matters' referred to in section 1032 [of the Political Code] which a citizen is entitled to inspect, is a matter which is 'public' and in which the whole public may have an interest."

The word "public" is defined in both the *Standard* and *Webster's* dictionaries as "of, pertaining to, or affecting, the people at large or the community." That the Hetch Hetchy project is a public matter, in which the public has an interest, cannot be doubted. It follows that the public has an interest in the plans and designs which are adopted for the completion of the project. The preliminary specifications and estimates are all steps in the process of forming an acceptable plan for carrying out the work. Although many of them are never completed, and many are destroyed, they all represent work which is being done in the course of completing the project. Not only is the work being done in the course of completing a public project, but it is being done by public officers and employees at public expense. That these plans are tentative and are subject to error or alteration cannot change their character, for, while they may not represent the final result of the work of the city engineer's office, they are important parts of that work. As such they are matters which affect the public, and in which the public has an interest, if that interest is only to see that the city engineer is taking steps toward the completion of the Hetch Hetchy project. It must be held that the implied finding of the trial court that they are of such a character was justified. It is therefore unnecessary to consider whether these documents are such as the board of public works is required to keep.

[2] As pointed out, there was a finding to the effect that "There exists data in said city engineer's office consisting of confidential reports, estimates and data collected and compiled by assistants and other engineers employed for that purpose and held therein for use by the attorneys for said city and county of San Francisco in pending litigation and anticipated litigation affecting the Hetch Hetchy project," and that "defendant M. M. O'Shaughnessy, as city engineer of said city and county of San Francisco, has permitted all of the records and other matters to which access is sought by the petitioner in this proceeding to be examined by an investigating committee appointed by the Civic League of Improvement Clubs of said city and county of San Francisco, and that the same have been examined by such committee." In support of that portion of the judgment which exempts from petitioner's right of inspection all this data, we are referred to subdivision 2 of section 1881 of the Code of Civil Procedure, which provides that—

"An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of his professional employment."

And to subdivision 5, to the effect that—

"A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

The first of these provisions applies to the examination of an attorney as to communications made to him by his client. The right of the city attorney to refuse to testify, if he were examined concerning the documents under consideration here, is not involved. If the documents are public records or "other matters" which the public has a right to inspect, the fact that the city engineer had communicated them to the city attorney cannot prevent a citizen from inspecting them.

[3] In *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 220, 152 Pac. 452, 562, it was said:

"It is argued that the court erred in admitting in evidence certain letters written by and to officials and employees of the Southern Pacific Company. While some of these communications were originally privileged, there was evidence justifying the court in concluding, in each case, that the privilege had been waived by voluntarily giving the letter into the hands of third persons."

The record in the case at bar shows that the city engineer testified:

"Q. You would have been willing to have any committee of the Civic League of Improvement Clubs go through all this data? A. I would, and they did. Q. And they did? A. And they

did. Q. How long did it take them to go through it? A. They took part of one day and pretty nearly the whole of another. Q. Examined it quite exhaustively? A. Examined it quite exhaustively."

This testimony sustains the finding that the city engineer has permitted this data to be inspected. Since it has been opened to inspection, it cannot be claimed that it is any longer confidential, as was held in *Title Insurance & Trust Co. v. California Development Co.*, supra, and the finding to that effect is erroneous.

Inasmuch as the data is not privileged merely because communicated to the city attorney, and as it has lost its confidential character because already made public, it follows that that portion of the judgment excepting it from the matter which petitioner is entitled to inspect cannot be upheld.

The judgment must be modified to omit from the writ the exception of all confidential reports, estimates, or data collected or compiled by assistants or other engineers for the use of the city attorney or other attorneys representing the city and county of San Francisco in legal proceedings, and, as so modified, the judgment is affirmed.

In view of the foregoing conclusions, it becomes unnecessary to consider the contentions of petitioner relating to his appeal from the order denying his motion to vacate the judgment and amend the conclusions of law.

The judgment is affirmed as above modified.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.

187 Cal. 795

SAN FRANCISCO BUREAU OF GOVERNMENTAL RESEARCH v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 9695.)

(Supreme Court of California, Dec. 9, 1921.)

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Petition by the San Francisco Bureau of Governmental Research for mandamus against the Board of Public Works of the City and County of San Francisco and others. From

judgment rendered, both parties appeal. Affirmed as modified.

Robert B. Gaylord, of San Francisco, for petitioner.

George Lull, City Atty., and Robert M. Searls, Special Counsel, both of San Francisco, for defendants.

LAWLOR, J. This is a companion case to *Coldwell v. Board of Public Works of the City and County of San Francisco et al.* (S. F. No. 9694) 202 Pac. 879, decided this day, and the same issues are involved here as were involved in that case. The two cases were tried together, the pleadings are identical except for necessary minor differences, the judgments are the same, and on appeal the briefs of the respective parties were consolidated.

Petitioner here is alleged to be a nonprofit corporation, having no capital stock, organized under the laws of California, with its principal place of business in San Francisco, and a citizen of the city and county of San Francisco. The objects and purposes of petitioner, as set forth in the petition, are:

"To act as an unincorporated, nonpolitical, nonprofit-making citizens' agency for securing the highest obtainable degree of efficiency and economy in the transaction of public business, particularly in the municipality of San Francisco, through investigating, collecting, classifying, studying and interpreting facts concerning the powers, duties, actions, limitations, methods, and problems of the several departments of government, and making such information available to public officials and citizens, and promoting the development of a constructive program for the city and county of San Francisco that shall be based upon adequate knowledge of community needs, thereby encouraging economy and efficiency in the conduct of public business in order that the taxpayers may be assured full return value in services rendered for taxes paid and money spent in governmental cost payments."

Defendants make no objections to the interest of the petitioner in the data which is sought to be inspected other than those advanced in the case of *Coldwell v. Board of Public Works et al.*, supra.

On the authority of that case, the judgment in the case at bar is modified to omit from the writ the exception of all confidential reports, estimates, or data collected or compiled by assistants or other engineers for the use of the city attorney or other attorneys representing the city and county of San Francisco in legal proceedings, and, as so modified, the judgment is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.

54 Cal. App. 684

PEOPLE v. CARROLL. (Cr. 827.)

(District Court of Appeal, Second District, Division 1, California. Oct. 28, 1921. Hearing Denied by Supreme Court Dec. 27, 1921.)

1. Gaming —73—Statute punishing gambling on horse racing held not to require proof of actual running of race on which pools were made or bets accepted.

Under Pen. Code, § 337a, providing for prosecution of persons engaged in making pools or accepting bets or purported bets on trial or contest of skill, speed, power of endurance, etc., or purported trial or contest, it is not necessary to prove that the accused sold pools and accepted bets upon a race which had been actually run.

2. Criminal law —1169(1)—Gaming —97(2)—Admission of race program in evidence held immaterial and harmless.

In a prosecution under Pen. Code, § 337a, for making pool, and accepting bets on a race or a purported race between horses, the admission in evidence of a race program used by a witness who attended the race in connection with which the offense was committed was immaterial, but harmless.

3. Criminal law —1036(3)—Admission of evidence of former arrest, where accused asked no instruction limiting it, was not prejudicial error.

Where a witness, replying to questions of accused's counsel, testified to a former arrest of the accused on a charge similar to the one for which he was being prosecuted, the admission of testimony of another witness that on a prior occasion he had made bets with the accused on races, and that the accused was at that time arrested, in the absence of a request by the accused for an instruction limiting the testimony, was not prejudicial error.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Frank Carroll was convicted of violation of Pen. Code, § 337a, and he appeals. Affirmed.

Shreve, Dorn & Shreve, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

JAMES, J. Appeal from a judgment directing that the defendant be imprisoned in the county jail of the county of San Diego for a period of four months, and from an order denying his motion for a new trial.

Defendant was informed against by the district attorney, who charged that the offense, as differently defined in the several subdivisions of section 337a, Penal Code, had been committed by him on the 31st day of December, 1920. It was first charged that defendant on the day mentioned engaged in pool-selling and bookmaking; second, that he received, held, and forwarded money and

considerations of value to be wagered and bet upon the result of a purported horse race; third, that he recorded and registered bets and wagers upon the result and purported result of a contest and purported contest of speed between horses; fourth, that he made, offered, and accepted bets and wagers upon a like hazard. The jury in the case returned a verdict finding defendant guilty of having done the particular acts charged, except those specified in the second paragraph of the information.

A police officer of the city of San Diego testified that, upon the date mentioned in the information, he visited a cigar store where defendant was apparently employed, and observed three men making a bet; that the defendant was recording the bet; that the betting was on horses which were to race at Tia Juana; that he saw three \$2 bets made; that defendant took the money from the men and put it in his pocket, wrote upon slips which he set behind the counter on a shelf; that he heard the name of a horse, "Little Jake," mentioned and saw race-form charts lying on the counter; that the defendant, while engaged with the three men, made the remark that they "would have to close up as the police was liable to drop in." This witness stated on cross-examination that he knew that the business being done by the defendant was of the kind charged because of his observation of the transaction referred to, and also because the defendant had been arrested before for the same thing. He further stated that the former case had not been tried so far as he knew. Defendants' counsel then asked the question: "Q. On that event and on this event you are basing your judgment that his business was that of taking bets on the races?" to which the witness answered, "Yes, sir." The witness was further allowed to testify without objection that on the 31st of December races upon which the bets were made were being run at Tia Juana. Another police officer testified, from a program that had been used by him at the races on said date, that a horse called "Little Jake" was among the entries for that day. This race program, together with a "bookmaker's chart," the latter having been found at the place of business of defendant at the time of his arrest, were introduced in evidence, together with certain tickets bearing memoranda which were procured at the same time and place.

[1, 2] Defendant first contends that it was essential that the prosecution make proof that a race upon which the defendant sold pools and accepted bets had been actually run, and that the evidence was insufficient to show that fact, and that the various documents introduced were incompetent for that purpose. The statute, in our opinion, does not require that the prosecution shall make

proof that a race or contest upon which bets are taken or pools made shall be an actual one. The statute has been subjected to several amendments which have changed its original form and make inapplicable decisions rendered prior to the amendments. The words "purported bet or bets" and "purported trial or contest" have been carefully placed within each subdivision of the section. Those terms must be given the meaning which the words ordinarily imply, and it seems quite plain that the Legislature intended that the offense as defined in the section should be complete whenever it was shown that a person engaged in any of the acts described, having reference to a race or contest, actual or pretended. With this construction in mind, while the race program used by the officer who visited the race track on the 31st of December, 1920, would be immaterial, nevertheless its reception in evidence would be harmless.

[3] Over the objection of the defendant the prosecution was allowed to prove that on the 16th and 17th days of December, 1920, another police officer had made with the defendant two separate bets on races to be run at Tia Juana, and that the defendant was at that time arrested. Defendant did not request an instruction to be given to the jury regarding this evidence. We are of the opinion that its introduction should not be considered as of such prejudice to the defendant's rights as to require a new trial to be ordered. The testimony was in line with the statements of the first witness, who, upon the questions of defendant's counsel, testified to the fact of the former arrest of defendant on a charge like that made by the information in this case. It would have been entirely appropriate for the court in the instructions to have limited the effect of this evidence, and, had the defendant requested such an instruction, prejudicial error might have been predicated upon the refusal of the court to give it. The instructions as given were in exceedingly brief form, but counsel for the appellant makes no complaint as to the soundness of the law enunciated therein, or that they were not sufficiently comprehensive.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

55 Cal. App. 81

POLLARD v. BURGER. (Civ. 4034.)

(District Court of Appeal, First District, Division 2, California. Nov. 4, 1921.)

1. Trial $\hookrightarrow$ 377(2)—Trial balance by counsel to aid calculation may be submitted after evidence.

In an action for breach of contract for farming on shares, where substantial evidence

was offered to show the acreage planted, the probable crops, and the market value thereof, and the court requested counsel to submit a trial balance merely to aid him in the mathematical calculation of the damages, the fact that the trial balances were not submitted before the actual trial was closed does not make the evidence insufficient to support the finding as to the amount of damages.

2. Appeal and error $\hookrightarrow$ 1011(1)—Trial court's findings supported by evidence cannot be disturbed.

Where there was sharp conflict in the evidence, but there was sufficient evidence to support the findings of the trial court, the findings will not be disturbed on appeal.

3. New trial $\hookrightarrow$ 101 — Properly denied where evidence was known to party before first trial.

A new trial in an action for breach of a contract for farming on shares, based on newly discovered evidence as to expenditures made by the applicant for new trial for the benefit of the other party under the contract, was properly denied, since it is apparent such evidence was within the knowledge of the applicant at the time of the first trial.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Action by Walter D. Pollard against F. M. Burger to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Jos. F. Seymour, Jr., of El Centro, O. V. Willson, of Los Angeles, and H. B. Ellison, of El Centro, for appellant.

Conkling & Brown, and Harry W. Horton, all of El Centro, for respondent.

NOURSE, J. Plaintiff sued defendant upon a complaint setting forth three causes of action, the first in damages for breach of contract, the second in quantum meruit for work and labor performed, and the third upon an assigned claim for services performed by plaintiff's wife. Plaintiff had judgment on his first and second causes of action in the sum of \$548.55, and the defendant had judgment on the third cause.

The facts of the case as found by the trial court are that on the 27th day of November, 1918, plaintiff and defendant entered into an oral contract for the farming of defendant's ranch, and therein defendant agreed to furnish the land and all tools, horses, and other equipment necessary for the farming of the ranch, and also to furnish such poultry and hogs as were on the ranch and should be raised thereon. In consideration thereof plaintiff agreed to prepare the soil, plant, irrigate, and harvest the crop. The parties also agreed that they should each have one-half of all the crops raised during the term of the agreement and one-half of the profits from the sale of eggs, poultry, and increase of the hogs. Each

party was to bear one-half of the current expenses, such as water for irrigation, groceries, and other living expenses, but the defendant alone was to pay all other expenses in the nature of water assessments, taxes, and matters of that nature. That the plaintiff entered upon the premises in pursuance of the agreement, prepared the soil on a great portion of said ranch, planted 30 acres thereof in alfalfa and 20 acres in milo maize, and prepared 40 acres more ready to be planted in maize or such other crop as might be advisable. There were on the ranch at the time of filing the complaint poultry and hogs to the number of 315, from which plaintiff was entitled to receive one-half of the net profits. The life of the contract was to be one year from November, 1918. On the 14th day of May, 1919, defendant breached the contract and ordered and directed plaintiff to leave the premises, and forced plaintiff to discontinue performance on his part. The court also found that, if plaintiff had been allowed to continue under the terms of his contract for the life thereof, the plaintiff would have made a profit, and that his damages resulting from defendant's breach of the contract was the sum of \$825; that he had received from defendant a portion of this amount, leaving due the sum of \$548.55, for which judgment was given. As to the second cause of action, it was found that the facts were the same as those set out in respect to the first cause of action.

[1] Appellant attacks the finding as to the matter of damages as not being sustained by the evidence. Substantial evidence was offered to show the acreage planted in both alfalfa and maize, the probable crops which would have been realized therefrom, and the market value of the same. During the course of the trial the court requested counsel to prepare and submit to him a trial balance and summary of the evidence, apparently for the purpose of enabling him to make the necessary mathematical calculations. No objection was made to this being done after the actual trial of the case was closed, and it is fair to assume that both parties complied with the request, and that the amount of judgment was calculated by deducting from the value of the crops to which respondent was entitled the portion of the expense chargeable to him. The evidence was before the court. The purpose of the trial balance was to aid in making the mathematical calculations.

[2] It is also urged that the evidence is insufficient to warrant the court's construction of the contract; also its finding as to which party rescinded. As is usual in cases of this kind, there is a sharp conflict in the evidence on both of these points, and upon each there was sufficient evidence to support the finding of the trial court. Under

such circumstances it should not be disturbed on appeal.

[3] There is no merit in appellant's criticism of the action of the trial court in denying his motion for a new trial on the ground of newly discovered evidence. The evidence which it is claimed was discovered after the trial related to the expenditures made by appellant for the use and benefit of the respondent growing out of the contract. The expenditures were made a year or more before the trial. This matter was in issue from the beginning of the action, and testimony was taken upon the issue throughout the trial. There is not the slightest showing on the part of appellant that this evidence was not in his possession at all stages of the trial, and from the very facts of the case it is apparent that it was within his knowledge at that time and was not discovered after the trial.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 732

SAUCER et ux. v. GIROUX. (Civ. 3749.)

(District Court of Appeal, Second District, Division 1, California. Oct. 29, 1921.)

Libel and slander  73 — Defamatory statement, blackening memory of relative, not actionable.

An action for damages for libel will not lie for publication of false statement that deceased adult brother of plaintiff was the illegitimate son of her deceased mother, though it caused plaintiff grievous mental and physical suffering, under Code Civ. Proc. § 460, though made a crime by Penal Code, § 248, punishable as provided by section 249.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. H. Saucer and wife against Joseph L. Giroux. Judgment for defendant, and plaintiffs appeal. Affirmed.

Earl Newmire, of Los Angeles, for appellants.

Joseph Scott, of Los Angeles, for respondent.

SHAW, J. Plaintiffs appeal from a judgment in favor of defendant, entered upon an order of court sustaining a general demurrer to the complaint.

The action is based upon the alleged act of defendant in causing to be published in a newspaper false and libelous statements that the deceased adult brother of plaintiff Virginia Saucer was an illegitimate son of her deceased mother, which false statements, it is alleged, have caused plaintiff grievous

mental and physical suffering, for which she asked judgment for \$500,000.

The demurrer was properly sustained. While the publication of malicious defamatory statements "tending to blacken the memory of one who is dead" is made a crime (section 248, Pen. Code), punishable as provided in section 249, Penal Code, it gives rise to no cause of action in favor of a relative of such deceased for the recovery of damages. While section 460, Code of Civil Procedure, provides that in an action for libel it is not necessary to state in the complaint any extrinsic facts for the purpose of showing application to the plaintiff of the defamatory matter out of which the cause of action arose, it must contain an allegation to the effect that the libelous statements were published concerning the plaintiff. Not only is there an absence from the complaint of such allegation so required by this section, but it is manifest that such fact could not be alleged. The charge concerning the deceased mother and brother of Virginia Saucer could have no reference to the latter. There was nothing in the article published which tended in any manner to reflect on the plaintiffs, or either of them, and the alleged grievous mental sufferings of Virginia Saucer were of the same kind as that produced by the publication upon any of the other relatives of the deceased. Hence, if a cause of action exists in her favor, then manifestly any relative, or even friend, of the deceased who had likewise suffered might maintain a cause of action for damages. In his brief, counsel for appellants admits his inability to find any authority sustaining his contention, while concededly many authorities exist to the contrary, among which see *Bradt v. New Nonpareil Co.*, 103 Iowa, 449, 79 N. W. 122, 45 L. R. A. 681; *Sorensen v. Balaban*, 11 App. Div. 164, 42 N. Y. Supp. 654; *Wellman v. Sun Printing, etc.*, Ass'n, 66 Hun, 331, 21 N. Y. Supp. 577; *Skrocki v. Stahl*, 14 Cal. App. 1, 110 Pac. 957.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 786

PEOPLE v. PLUMEYER. (Cr. 783, 784.)

(District Court of Appeal, Second District, Division 1. California. Nov. 1, 1921. Hearing Denied by Supreme Court. Dec. 29, 1921.)

1. Criminal law § 829(8)—Refusal of instruction as to effect of evidence of good character held not prejudicial, in view of instruction given.

Where the court instructed the jury to consider evidence of good character for the

traits involved in the offense charged as tending to show from the improbability that a person of good character would have so conducted himself that there was some mistake or misrepresentation, but to find him guilty notwithstanding, if satisfied beyond a reasonable doubt that he was guilty, the refusal of an instruction that if defendant's good reputation was sufficient to create a reasonable doubt of his guilt, though no such doubt would have existed otherwise, the jury must acquit him, was not prejudicial error.

2. Criminal law § 829(9)—Refusal of instruction on presumption of innocence held not erroneous, in view of instruction given.

Where the court advised the jury that every presumption of law was in favor of accused's innocence, and that, to convict him, every material fact necessary to constitute the crime charged must be proved beyond a reasonable doubt, the refusal of an instruction that the jury must reconcile all the circumstances shown with defendant's innocence and account for all facts, if possible, on the hypothesis that he was not guilty, was not error.

3. Criminal law § 829(19)—Refusal of instruction that no jurymen should vote to convict because of opinion of other members held not erroneous, in view of instruction given.

Where the court correctly and sufficiently advised the jury that a verdict of guilty must be founded solely on the evidence and the law as declared by the court, the refusal of an instruction that defendant was entitled to the individual opinion of every member of the jury, and that no member should vote for a conviction because of the opinion of other members, was not error.

4. Criminal law § 829(9)—Refusal of instructions as to presumption of innocence held not prejudicial, in view of instructions given.

Refusal of instructions as to the presumption of innocence, and that, as between two reasonable interpretations of the evidence, one pointing to guilt and the other to innocence, the former should be rejected, held not prejudicial, being sufficiently covered by general instructions as to presumption of innocence, reasonable doubt, and burden of proof.

5. Criminal law § 829(17)—Instructions specifically treating of defendant's testimony properly refused, in view of instruction given.

Where the court fully instructed the jury that defendant's testimony should be weighed by the same standard as that of other witnesses, an instruction, specifically treating of defendant's testimony, was properly refused.

6. Criminal law § 829(12)—Refusal of instructions as to insufficiency of mere probabilities, etc., held not prejudicial, in view of instruction given.

Refusal of instructions that mere probabilities, a mere preponderance of the evidence, or evidence establishing only a suspicion of guilt, would not warrant conviction, held not prejudicial, being sufficiently covered in the court's instruction as to reasonable doubt.

7. Criminal law — § 1186(4)—Error in instruction as to impeachment of witness held not reversible, where testimony corroborated by others.

In a criminal prosecution, the court's error in failing to instruct the jury that a witness may be impeached by evidence of inconsistent statements, made at other times, as provided by Code Civ. Proc. § 2052, held no ground for reversal, in view of Const. art. 6, § 4½, where there was ample evidence to warrant the verdict, and the testimony of the witnesses sought to be impeached was corroborated in material respects, so that no miscarriage of justice occurred.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Carl Plumeyer was convicted of lewd and lascivious acts on a child, and he appeals. Affirmed.

Davis, Rush & MacDonald, Alfred F. MacDonald, William B. Beirne, and S. W. Thompson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged in an indictment of the grand jury in case No. 783 with having committed the crime denounced by section 288, Penal Code. The indictment contained two counts, charging separate offenses. By an information of the district attorney like charges were made in two counts, as is shown in case No. 784. The trial of the charges contained in both the indictment and information was, by agreement between the people and the defendant, had before one jury, which jury returned a verdict finding the defendant guilty upon all counts. The judgments of the court and orders denying motions for new trial followed, from which judgments and orders appeals were taken. All of the matters which are made the subject of the questions contained in the appellant's brief relate to the instructions as given and refused at the trial.

[1] The defendant, having presented witnesses who testified that his character, as to the traits involved under the charge, had previously been good, offered an instruction in the following terms:

"You are instructed that in all criminal cases the law permits the defendant to introduce evidence concerning his general reputation for the trait or traits of character involved in the special case under consideration, and in this case, morality and chastity are the special traits involved, and the law permits the defendant to introduce—and he has introduced—evidence tending to show his good reputation for morality and chastity, and you are instructed that if such good character and reputation for morality and chastity has been satisfactorily shown it is a fact which must be taken into consideration in determining the guilt or innocence of the defendant, and you are instructed

ed that such reputation and character of the defendant in the respects above stated may, if established to your satisfaction, of itself, be sufficient to create and generate in your minds a reasonable doubt of his guilt, although no such doubt would have existed but for such evidence of good character and reputation, and if in view of such evidence you have a reasonable doubt as to his guilt, it is your duty under the law to acquit him."

The trial judge refused to give this instruction, indorsing upon it, "Refused as covered." The instruction given on the same subject, and which was evidently regarded by the judge as sufficient, read as follows:

"Evidence of good character for the traits involved in the offense with which a defendant stands charged is relevant to the question of guilty or not guilty, and is to be considered by you in connection with the other facts and circumstances in the case. One object in laying it before the jury is to induce the jury to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and in this connection you must take it into consideration. If, however, you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty as charged, it will be your duty to so find him, notwithstanding such evidence of good character."

It is insisted, first, that it was prejudicial error to have refused to give the instruction offered by the defendant in the terms stated, particularly that clause which was to advise the jury that the good character of the defendant being established as to the traits involved might be sufficient to create in the minds of the jury a reasonable doubt as to his guilt. Attention is called to language used in the case of *People v. Wilson*, 23 Cal. App. 523, 138 Pac. 971. It was there held that the court erred in refusing instructions offered by the defendant on the question of his good character. By an examination of the decision in the *Wilson Case* it will be found that the error noted consisted, not so much in failing to give the precise instruction asked for by the defendant, but because the court, with evidence before it touching the character of the defendant, failed to give any instruction relative to the matter, for in the decision it is stated:

"The defendant having requested the court to give the jury certain instructions pertinent to this evidence, the court refused to give any of them, and failed to give to the jury any instructions whatever on the subject of the good character of the accused."

We have here a different case, and need only determine whether the instruction as given by the trial judge sufficiently expressed to the jury the law relative to the evidence of good character. In the case of

People v. Von Perhacs, 20 Cal. App. 48, 127 Pac. 1048, the precise instruction which the court gave in this case was read to the jury, with the exception that there was here added the word "however" after the first word in the last paragraph. In the *Von Perhacs* Case it was complained that the last paragraph, which was added by the trial court as a modification of an instruction offered by the defendant, rendered the instruction bad, in that its effect upon the jury might be to lead it to believe that it was at liberty to entirely disregard the evidence of good character. The court disposed of that matter against the claim of the defendant by saying:

"The instruction as modified by the court correctly and without conflict stated the law (*People v. Shepardson*, 49 Cal. 630; *People v. Ashe*, 44 Cal. 288; *People v. Bell*, 49 Cal. 485); and no confusion as to its meaning could possibly arise in the minds of the jury except upon a strained and unreasonable interpretation of the language employed. The plain meaning of the instruction as a whole was that if, after weighing all the evidence, including that of the good character of the defendant, the jury believed him guilty beyond a reasonable doubt, they should bring in a verdict accordingly, notwithstanding the fact that the defendant had previously borne a good reputation."

We do not consider that the addition of the word "however" in the last paragraph either limits or adds to the sense of the instruction as a whole. By the last paragraph, considering the language in its reasonable sense in connection with what had preceded it, the jury was advised simply that, notwithstanding that the good reputation and character of the defendant might have been established, if such evidence did not create a reasonable doubt of his guilt, it would be its duty to find him guilty. In the body of the instruction there was sufficiently expressed in sense and meaning that proof of good character, if it induced in the minds of the jury a belief that there was mistake or misrepresentation in the evidence of the prosecution, would create a reasonable doubt as to the guilt of the accused. Such would be the necessary interpretation to be given the language employed by the ordinary reasoning mind.

The trial judge instructed the jury, in terms which have long been approved by judicial decisions, as to the presumption of innocence and the requirement that the guilt of the accused be establishment beyond all reasonable doubt.

[2] Appellant complains that an instruction which he offered, containing the statement as to the duty of the jury to reconcile all circumstances shown in evidence with the innocence of the defendant, and to account for all facts, if possible, upon the hypothesis that defendant was not guilty, should have been given. In one of the instructions

given at the request of the defendant the court advised the jury that:

"Every presumption of law is in favor of his innocence and in order to convict him of the crime alleged in the indictment every material fact necessary to constitute such crime must be proved beyond a reasonable doubt, and if the jury entertain a reasonable doubt upon any fact or element necessary to constitute such crime, it is your duty to give the defendant the benefit of such doubt and acquit him."

While the instruction refused contained proper matter which might have been made a part of the charge to the jury, still the duty of the jury as therein explained would be no different from that which was indicated under the general instruction given on the subject of the presumption of innocence and the requirement that the defendant's guilt be proved beyond all reasonable doubt. To illustrate: If the evidence presented such a state of the case that one construction would lead to the conclusion that defendant was innocent, and another construction lead to the contrary conclusion, then it would seem to follow as a natural consequence that no reasonable mind would be left in such a state that it would affirm that no reasonable doubt remained as to the guilt of the defendant. The sum and demand of the law, as the court properly declared it, is that the minds of the jury must be convinced beyond a reasonable doubt of all facts essential to show guilt before such a verdict may be returned. So if the jury interpreted the instructions as given correctly, it was furnished a definite guide which would induce the placing of the weight of evidence precisely on the side that the refused instruction indicated it should be placed.

[3] The refusal to give the instruction following is also assigned as error which prejudiced the defendant in his right to a fair trial:

"You are instructed that the defendant in this case is entitled to the individual opinion of every member of the jury, and that no member of this jury should vote for a conviction of the defendant because of the opinion of other members of the jury as long as he himself has a reasonable doubt as to the guilt of the defendant."

In support of his claim that it was error to refuse this instruction appellant cites *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; *People v. Howard*, 143 Cal. 316, 76 Pac. 1116; *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829. The case of *People v. Perry*, 144 Cal. 748, 78 Pac. 284, which intervenes in the chronology of the cases cited by appellant, is a case in point as against this claim for error. The court there declares that, where the instructions given to a jury correctly and sufficiently advise it that a verdict of guilty must be founded solely on the evidence and the law as de-

clared by the court, no error will be held to have been committed for the refusal to give the additional advice that a defendant is entitled to the opinion of every member of the jury, and should not vote for a conviction because of the opinion of other of his fellow members. The logic of the decision in the Perry Case is inescapable; necessarily, if a jurymen is made to understand that his verdict is to be founded upon the evidence and the law as given by the court only, he must understand that all other considerations, items and factors, such as the opinions of other jurymen, are to be excluded.

[4-7] The offered instruction as to the presumption of innocence accompanying the defendant throughout the trial contained a correct statement of law; nevertheless, the general instruction as given, and hereinbefore noted, was sufficient to the point sought to be covered by the instruction which was refused. The offered instruction that as between two reasonable interpretations of the evidence, one pointing to guilt and the other to innocence, the one indicating guilt should be rejected, we think was not necessary to be given in view of the general instructions on the question of reasonable doubt and as to the burden of proof. The further instruction offered, specifically treating of the testimony of the defendant, who was a witness in the case, was properly refused in view of the fact that the court did very fully instruct the jury that the testimony of the defendant should be weighed by the same standard and measure as that of other witnesses in the case. Instructions offered and refused, stating the propositions that mere probabilities, nor a preponderance of the evidence merely, nor evidence establishing only a suspicion of guilt, would not warrant conviction, contained nothing not sufficiently covered in the instruction given by the court on the matter of reasonable doubt. The court properly advised the jury that it was the exclusive judge of the credibility of the witnesses, and in that connection gave the following further instruction:

"And the jury may scrutinize, not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity or by contradictory evidence."

Complaint is made because the court did not include in this instruction the statement contained in section 2052, Code of Civil Procedure, that—

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony."

To make pertinent the point that the court erred in refusing to cover the matter of impeachment in the regard mentioned in the Code section, appellant's counsel direct attention to the fact that in the examination of the two boys who testified to incriminating acts, their testimony as to the number of times certain of such acts had been done by them at the request of the defendant differed from statements made before the grand jury. The refusal to cover the proposition adverted to in the manner requested by the defendant, in view of such testimony, was error. And we would conclude that this error was of such a prejudicial character as to entitle defendant to a new trial were it not for the provisions of section 4½ of article 6 of the state Constitution. The record in the case shows that there was ample evidence to warrant the verdict of the jury, and that the testimony of the boys referred to was in material respects corroborated. In that condition of the case it cannot be said that by the conviction of the defendant a miscarriage of justice has occurred.

The judgments and orders are affirmed.

We concur: CONREY, P. J.; SHAW, J.

55 Cal. App. 114

NEWBY v. NEWBY. (Civ. 3740.)

(District Court of Appeal, Second District, Division 1. California. Nov. 8, 1921.)

1. Appeal and error $\S$ 931(7)—In absence of evidence, appellate court must presume no evidence offered on issue as to which no finding made.

In support of a judgment, the appellate court must presume, in the absence of evidence brought up in the record, that no testimony was offered touching an issue as to which there is no finding.

2. Divorce $\S$ 38½, New, vol. 19 Key-No. Series—That parties lived apart when acts of cruelty committed no justification therefor.

The fact that when acts of cruelty charged against defendant in a divorce case were committed the parties were living apart affords no justification for such acts.

3. Divorce $\S$ 298(1)—Parent has paramount right to custody of child.

In view of Civ. Code, §§ 138, 197, 246, and Code Civ. Proc. § 1751, as to custody and guardianship of children, the father or mother of a minor child is entitled to the custody of the child as against a stranger, unless the father and mother are found unfit or improper custodians.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by Helen N. Newby against George W. Newby for divorce and custody of child. Decree for plaintiff, and defendant appeals. Decree of divorce affirmed, and order awarding custody of child reversed, with directions.

McNabb & Hodge, of San Bernardino, for appellant.

Allison & Dickson, of San Bernardino, for respondent.

SHAW, J. Defendant appeals upon the judgment roll alone from an interlocutory decree of divorce granted plaintiff upon the ground of alleged cruelty.

[1] The contention is that the court failed to find upon material issues, in that defendant alleged desertion on the part of the plaintiff. In support of the judgment we must presume, in the absence of the evidence brought up in the record, that no testimony was offered touching such issue, as to which there is no finding.

[2] Conceding that at the time when the acts of cruelty were committed by defendant the parties were living separate and apart from each other, such fact could afford no justification for defendant's acts of cruelty.

[3] It appears there was a minor female child of the parties, aged six years, the custody of which was asked by each of the parents upon the ground of alleged unfitness of the other, and as to which issue the court made no finding, but, as a conclusion of law, found that it is for the best interest of the child that its custody be awarded to a third person, and thereupon made an order awarding its custody to a stranger. As father of the child, appellant attacks this order, claiming that in the absence of a finding of unfitness, the custody of the child should have been awarded to one of the parents. In this we agree with appellant. Section 138, Civil Code, provides that in such actions the court may make an order for the custody, care, and support of minor children of the marriage; and section 246 of said Code provides that the court, in the determination of such matters, shall be guided, first, "by what appears to be for the best interest of the child," and, second, "as between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother." It is apparent that in making the order the court was controlled by subdivision 1 of said

section. The law, however, presumes that the interest of a child will be best subserved by awarding its care to a parent, unless he or she is unfit to have its care. Section 197, Civil Code, provides, "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings," unless, as further provided, they are unable or refuse to take the custody, or have abandoned his or her family, in which cases, as well as for other causes, they should be deemed unfit as such custodians. This section should be construed with subdivision 1 of section 246, and, so read, they contemplate that the natural right of the parent to the care of a minor child, if a fit and proper person, shall prevail as against an entire stranger. In the absence of either evidence or finding showing the contrary, the law presumes that either parent is a proper person to whom its care should be awarded. And where, as here, since in the absence of a finding upon the issue of fitness either is presumably a proper person, the court, guided by subdivision 2 of section 246, should have awarded the custody of the minor child to one of its parents. By reason of the right which the law presumes to be vested in the parent, the rule declared in section 1751, Code of Civil Procedure, as to guardians, read with and modified by the provisions of section 246, Civil Code, is applicable, viz. that under section 1751 "the father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person." Guardianship of Mathews, 169 Cal. 26, 145 Pac. 503; In re Mathews, 174 Cal. 679, 164 Pac. 8; In re Campbell, 130 Cal. 380, 62 Pac. 613. And under section 246, by reason of the presumptive right thereto, unless found by the court to be an unfit and improper person, the father or the mother is entitled to the care and custody of the minor child.

The interlocutory decree of divorce is affirmed. The order awarding the custody of the minor child of the parties is reversed, with direction to the trial court, upon a further hearing of the matter as to the custody of the minor child, to make a finding upon the issue as to the alleged unfitness of the respective parties to have the care of the child, and award its custody in accordance with such finding.

We concur: CONREY, P. J.; JAMES, J.

55 Cal. App. 73

CURRIE v. LANDES. (Civ. 3761.)(District Court of Appeal, Second District,
Division 1, California. Nov. 4, 1921.)**1. Executors and administrators — 44—Interest in partnership is salable asset.**

Though the surviving partner is entitled, under Code Civ. Proc. § 1585, to the possession, management, and disposition of the business and property of the firm, the right of the deceased partner in the partnership, which is a right to the division after the business is closed, is an asset of his estate which the administrator can sell, under section 1524, or without application to the court under section 1522.

2. Executors and administrators — 168—Refusal of surviving partner to accept purchaser from administrator as partner does not defeat sale.

The refusal of a surviving partner to accept as a partner and continue the business with the purchaser of the interest of the deceased partner in the firm does not defeat the sale by the administrator of such interest, since the purchaser thereof was charged with knowledge of the law, and must be content with the right he acquired to share in the distribution of the firm's assets.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Fred H. Currie, as administrator of the estate of James H. Currie, deceased, against G. C. Landes, to recover the balance of the purchase price of certain personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

Turnbull, Heffron & Kelley and Rupert B. Turnbull, all of Los Angeles, for appellant.

John C. Miles and Charles W. Hackler, both of Los Angeles, for respondent.

SHAW, J. It appears from the findings that at the time of his death James H. Currie left as part of the assets of his estate an undivided one-half interest in and to a restaurant with its equipment and fixtures, which he and Norris Rauch owned and conducted as equal partners; that on July 19, 1920, plaintiff then being the duly appointed and acting administrator of the estate of deceased, the defendant agreed for a consideration of \$5,100 to purchase the interest of the estate in and to said restaurant, equipment and business, and thereupon paid to the administrator of said estate the sum of \$1,000 on account of the purchase price thereof, it being agreed that the balance should be paid upon an order of court confirming the sale so made by plaintiff to defendant; that on August 27, 1920, at a hearing duly had, the court made its order approving the sale; notwithstanding which facts, so found to be true, defendant on de-

mand therefor refused to consummate the purchase and pay said balance of \$4,100.

As to matters alleged as a separate defense and by way of counterclaim, the court likewise found adversely to defendant. Appellant makes no attack upon any of the findings for insufficiency of the evidence to justify them. His contention is that they do not support the conclusion of law that plaintiff is entitled thereon to judgment.

[1] While Rauch as the surviving partner was, as provided by section 1585, Code of Civil Procedure, entitled, without interference or participation on the part of the plaintiff as administrator, to the possession, management, and disposition of the business and property of the firm for the purpose of paying its debts, nevertheless the interest of deceased therein was part of the assets of his estate, to be inventoried and appraised as other property. This interest was the residuum of the partnership property and business after the partnership affairs should be wound up and the debts paid. *Tompkins v. Weeks*, 26 Cal. 51. This interest, subject to the rights of the surviving partner as shown by the findings, was the subject of sale. Being an asset of the estate, though in the control and management of Rauch as surviving partner and subject to the payment of the firm's debts and expenses in connection therewith, it was, like any other property of a personal character belonging to the estate, the subject of sale by the administrator, as provided by section 1524, Code of Civil Procedure. *Cooley v. Miller & Lux*, 168 Cal. 120, 142 Pac. 83. Indeed, under section 1522, Code of Civil Procedure, the administrator possesses the power to make such sales without an application to the court for an order so to do, in which case, however, he is held responsible for his act until, upon a proper showing, the court shall have approved the same. In the instant case, as appears from the findings, the sale was made and the \$1,000 by defendant paid on the purchase price thereof, subject to the sale being confirmed by an order of court, upon which the balance of \$4,100 was to be paid. The sale was confirmed, and therefore it was incumbent upon defendant, as purchaser of the interest of the estate in said partnership property, to pay the balance of the purchase price in accordance with his agreement so to do.

[2] Under the law he was chargeable with knowledge of the fact that he could not, as against the will of Rauch as surviving partner, be given possession of the property, or have any voice in the control, management, and disposition thereof, but that his right as purchaser of the interest of the estate in and to said property was such only as the estate had, and, as stated, this was one-

half of the surplus over the amount required in the payment of debts of the firm. Whether or not the purchase would, under the circumstances, be profitable, was, like the purchase of anything else, a question for him to determine. In buying the interest he may have been actuated by the belief that Rauch would accept him as a partner; but, as found by the court, such belief was not justified by any act on the part of plaintiff, and since, as alleged in his answer, Rauch would not accept him as a partner, or permit him to participate in the management and control of the business, he must be content with the receipt of that which the estate would have received, had he not purchased its interest therein, namely, its share in the proceeds of the sale of the copartnership assets and business after the payment of partnership indebtedness.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

55 Cal. App. 12

DAHNKE v. DAHNKE. (Civ. 3755.)

(District Court of Appeal, Second District, Division 1, California. Nov. 1, 1921.)

1. Divorce ☞ 27(13)—Affliction with a noncontagious skin disease and neglecting to bathe frequently held not to constitute sufficient ground for divorce; "extreme cruelty."

Where plaintiff had lived with defendant nearly seven years as his wife, the fact that he was afflicted with a noncontagious skin disease, which caused his skin to scale off more rapidly than under normal conditions, and did not bathe as often as plaintiff thought necessary, does not amount to a cause for divorce on the ground of "extreme cruelty," under Civ. Code, § 94.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

2. Divorce ☞ 130—Evidence held not to prove unnatural acts by defendant.

In wife's suit for divorce on the ground of extreme cruelty, consisting of unnatural acts by defendant, evidence held not to prove such acts.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Suit by Selma Dahnke against Henry Dahnke for divorce. From judgment for plaintiff, defendant appeals. Reversed.

Eden & Koepsel, of Santa Ana, for appellant.

Head & Rutan and Chas. D. Swanner, all of Santa Ana, for respondent.

SHAW, J. Defendant appeals from an interlocutory decree of divorce granted plaintiff upon the ground of extreme cruelty.

The parties were married on October 19, 1910, and lived together as husband and wife until May 11, 1917, at which time plaintiff left defendant. As alleged in the complaint and found by the court, defendant at the time of the marriage was afflicted with a loathsome, incurable skin disease, of which fact he did not acquaint plaintiff before the marriage and knowledge of which plaintiff did not obtain until after the marriage, that during the time plaintiff and defendant lived together he would go unbathe for several weeks at a time and his diseased skin would become very offensive and loathsome, and that he was given to the practice of masturbation.

The contention of appellant is, first, that these findings are not justified by the evidence; and, second, that, if so warranted, they are insufficient to support the judgment. It appears from the testimony of Dr. Doman, called as a witness by plaintiff, that defendant was afflicted with a skin trouble which the witness described as a dry skin; that is, a dry condition of the epidermis, due to lack of oil secretions, and differed from other persons in that his skin was less oily, causing a tendency to dryness, due to which fact it would scale; that it did not affect defendant in any way at all; that, while it was without odor, "some people might consider it disagreeable and others wouldn't pay any attention to it"; that, as to cleanliness, the condition did not render it necessary for a person to be more than ordinarily careful in bathing and care of the person; that he had for years been the physician of defendant and his family; and that his condition as to cleanliness was that of the ordinary rancher. Further describing defendant's condition, he said that there was "a little flaking all the time, just the same as you or I are shedding our skin all the time, only to a greater degree than you or I shed our skin; * * * there is a certain amount of desiccation or shedding off of the skin with any one all the time, only on Mr. Dahnke it was of a greater degree, I would say as much as three or four times greater and a little larger flakes"; that, while the trouble was incurable, it could be relieved by the use of oil which, under his advice, the defendant at times used.

The testimony of plaintiff is that her husband's body was in a scaly condition and dark from dirt, and that the scales would come off in the bed and in his clothes; that she slept with her husband for some two years, until the baby was born, at which time she ceased to occupy the same bed with him, because she could not stand it any longer, after which, and prior to her leaving him, she found indications of the practice of self-abuse; that the cause for leaving him was that she could not stand it any longer on ac-

count of the way he acted and insisting upon her sleeping with him; that he refused to properly bathe himself "unless she positively insisted upon it and got the water ready"; but that none of his alleged acts or his condition endangered her health. Another witness, Blanche Smith, on behalf of plaintiff, testified that defendant never looked clean to her, and when around him she noticed an odor like that perceptible in a man working out of doors and sweating in the dust and dirt and taking care of horses, and which is common in such cases where the man does not take a bath every evening when he comes in from work.

It is apparent from this résumé of the testimony, which in substance, other than the fact that defendant bared his arm for the inspection of the trial judge, is all the evidence presented by the plaintiff touching the question, that defendant was afflicted with a skin trouble, which, however, as testified to by the physician, was not contagious, and, according to plaintiff, did not endanger her health or prevent the consummation of the marriage relation. It is also apparent from the record that, due to such fact, or for other reasons, she formed a violent dislike for her husband, with whom she lived as husband and wife for nearly seven years.

[1] By section 94, Civil Code, extreme cruelty is defined as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." The language of the statute would seem to import acts directed toward the other party and with a malevolent motive. While it is conceivable a case might be imagined which would fall within the meaning of the words without such motive, nevertheless as to self-directed acts or omissions which do not impair or constitute a menace to the health of the other spouse or interfere with the consummation of the marriage relation, the language used should not be construed as referring to traits of character, habits of cleanliness, or conditions of bodily health, as to all of which, unless otherwise provided by statute, the parties must be deemed to have assumed the burden of informing themselves by association, acquaintance, and inquiry before entering into a contract of such vital importance, not only to themselves, but to society in general.

Conceding that marriages may be annulled for the causes specified in section 82, Civil Code, the action is not for the annulment of the marriage on account of fraud practiced by defendant upon plaintiff in withholding from her information as to his condition, but on account of his condition of health, the character of which she had been fully cognizant of for a number of years, during which she lived and cohabited with defendant. It may be that defendant did not bathe as often

as plaintiff thought he should. This, however, is a subject upon which a diversity of opinion might well exist, depending upon facility therefor, environment, and nature of employment, and should be left to individual taste; at all events, the frequency with which either spouse should take a bath should not, in such cases as this be made the subject of judicial cognizance.

Conceding defendant's failure to bathe as often as his wife thought necessary, unless she, as stated, prepared the bath and insisted upon his so doing, and the fact that he was afflicted with the skin trouble described by her witness, Dr. Doman, which condition differed from that of normal individuals only in the degree of exfoliation or rapidity with which nature eliminated the outer cuticle of the body, it furnished no ground for the claim that defendant was guilty of extreme cruelty towards plaintiff; and her living with defendant for some seven years after discovering the condition, during all of which time she (though, according to her testimony, reluctantly) cohabited with him as his wife without injury to her health or menace thereto, is evidence of the fact that it did not interfere with the discharge of her duties as such, or defeat the purpose of the marital relation, without which she has no cause for legal complaint.

[2] As to the other finding upon which the court based the judgment, there is no evidence, even on the part of the plaintiff, other than her testimony, that she saw indications of defendant's alleged unnatural and disgusting acts. They were not committed in her presence. *Wood v. Wood*, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491; *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282. Moreover, there is not the slightest testimony in corroboration thereof. While this court in the case of *Perkins v. Perkins*, 29 Cal. App. 77, 154 Pac. 483, held that where the alleged cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff, but it is a sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or circumstantial evidence offered which tends to strengthen and confirm the statements of the plaintiff, the case as presented here does not fall within the rule so announced. As stated above, the fact that defendant was afflicted with a skin trouble is insufficient to support the judgment; hence the judgment depends for its sole support upon the other finding, as to which there is not only no corroboration, but the acts are denied by defendant.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

55 Cal. App. 131

WINKIE v. RALEY. (Civ. 3917.)

(District Court of Appeal, First District, Division 2, California, Nov. 9, 1921. Rehearing Denied Dec. 7, 1921.)

1. Brokers — 88(12)—Instruction as to principal's right to rescind contract for false representation held properly refused.

In broker's action for commissions, refusal of the trial court to give defendant's requested instruction as to defendant's legal right to rescind the contract of sale if plaintiff had falsely represented to him the value of the property proposed to be taken by defendant in exchange was proper, where the instruction omitted the elements of knowledge of the falsity of the representations by plaintiff and reliance upon them by defendant, and also assumed that the representations were statements of fact rather than expressions of opinion.

2. Trial — 260(1)—Requested instruction already covered properly refused.

Where the subject-matter of a requested instruction is fully covered in another instruction given, denial of the request is not error.

3. Brokers — 88(12)—Instruction as to broker's duty to honestly inform principal of value of property held properly refused.

Where broker's contract did not cast upon him any duty of ascertaining the value of the property to be exchanged, or of informing defendant, his principal, thereof, it was proper in the broker's action for commissions to refuse defendant's instruction that it was plaintiff's duty to honestly inform his principal of the value of such property, and that, if he failed to do so, but falsely represented the value to his principal, the latter was not required to examine the property, but could rely upon plaintiff's statements, for such instruction, as respects false representations, omitted the essential elements of plaintiff's knowledge of their falsity and defendant's reliance.

4. Brokers — 88(12)—Elimination of part of requested instruction as to false representations held proper.

Where broker's action for commission was defended on the ground that the contract of sale was rescinded on discovery of falsity of plaintiff's representations as to the value of the property to be taken in exchange, a modification of an instruction as to plaintiff's false representations by eliminating the words "or was made in reckless disregard of its truth or falsity" was proper, where there was no evidence of plaintiff's reckless disregard of the truth or falsity of statements made by him.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by H. J. Winkie, doing business under the firm name and style of H. J. Winkie & Co., against Walter Raley. From judgment for plaintiff, defendant appeals. Affirmed.

Owen D. Richardson, of San Jose, for appellant.

Ralph C. McComish and W. R. Biaggi, both of San Jose, for respondent.

NOURSE, J. Plaintiff sued to recover a broker's commission on an express contract to procure the acceptance of defendant's offer to trade certain real property for certain described real property belonging to one Turner. The complaint alleged the execution of the contract by which plaintiff agreed to procure the acceptance by Turner, that plaintiff did procure such acceptance in accordance with the terms of the contract, but that defendant refused to effect the trade and has failed to pay the commission agreed upon. The answer admitted the execution of the contract, but alleged that it was procured by the fraud of plaintiff, consisting of misrepresentations made by plaintiff to defendant of the value of the property which Turner proposed to trade to defendant, and that prior to the acceptance by Turner the defendant on discovering the alleged fraud rescinded the contract and gave notice of such rescission to the plaintiff. The case was tried before a jury, and plaintiff obtained a verdict for \$1,200, the amount of the commission agreed upon, and from the judgment following the verdict defendant has prosecuted this appeal. Three grounds of error are assigned, all relating to instructions which the trial court gave or refused to give to the jury.

[1, 2] The first assignment of error covers the refusal of the trial court to give to the jury the instruction requested by defendant as to the legal right of the appellant to rescind the contract if respondent had falsely represented to him the value of the Turner property which was proposed to be taken in the exchange. The instruction proposed omits the elements of knowledge of the falsity of the representations on the part of the respondent and reliance upon them by appellant. It also assumes that the representations as to the value of the property were statements of fact rather than expressions of opinion. But the subject-matter of these representations was fully covered in the instruction which the court gave, and which was most favorable to appellant.

[3] The second assignment of error relates to the refusal of the trial court to give an instruction proposed by the appellant to the effect that it was the duty of respondent to honestly inform his principal of the value of the Turner property, and, if the jury should find that he did not do so, but that he falsely represented the value to his principal, the appellant was not required to make an examination of the property, but that he could depend upon the statements of his agent. This instruction, like the one just considered, omits the essential element of knowledge on the part of respondent and reliance upon the part of appellant. It is subject to the further objection that the contract did not cast upon respondent any duty of ascertaining the value of the property proposed to be exchanged or

of informing appellant of such value. The evidence plainly showed that appellant was given every opportunity to inform himself on the matter of value, and that respondent did not at any time pretend to represent to appellant that he had made any examination for the purpose of determining the value of the property or that he had any independent knowledge thereof.

Furthermore, in the instruction which will hereafter be considered the trial court did, on the request of appellant, instruct the jury that, if they found that the representations as to value were made by respondent, that they were false, that respondent knew them to be false when made, and that appellant was induced to enter into the contract by reason of such false representations, the jury should find for the appellant. This was all that appellant could ask for on the issue of false representation, because by this the jury was instructed to find for the appellant even though he had not rescinded the contract before complete performance.

[4] The third assignment of error relates to the modification of the instruction just considered, whereby the trial court eliminated from the instruction as proposed by appellant the following words: "Or was made in reckless disregard of its truth or falsity." There was no evidence of any nature which would have justified the jury in finding that the statements as to the value of the property were made in reckless disregard of their truth or falsity, and the trial court properly modified the instruction as proposed.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

55 Cal. App. 734

CARVELL v. WEAVER. (Civ. 3909.)

(District Court of Appeal, First District, Division 1, California. Oct. 29, 1921.)

1. Judgment $\S$ 590(1)—For defendant in replevin, failing to direct return of property, not bar to action for conversion by defendant.

Where, in rendering judgment for defendant in replevin, court failed to direct return of property, and plaintiff was unable to return the property, such judgment did not constitute a bar to a subsequent action by defendant for damages for conversion.

2. Judgment $\S$ 590(4)—Rendered outside issues held at most erroneous, and not void, so as to be open to collateral attack.

Where conditional seller of automobile sued purchaser in replevin, and defendant did not demand a return of the automobile or its value, contenting himself with a demand for payment to him of the sum of installments paid, with damages for the detention, and the

court went outside of the issues, and directed a return of the automobile to the purchaser on payment of the balance due under the contract, such seller cannot maintain, in a subsequent action by the purchaser for conversion, the seller being unable to return the automobile under the judgment, that the judgment in the replevin action was void; such judgment being at most only erroneous.

3. Sales $\S$ 481—Trover and conversion $\S$ 16—Action for conversion maintainable without legal title.

Legal title is not always necessary to an action for conversion, but any special valuable interest in the property, accompanied with the right of possession, is sufficient, and the conditional vendee of an automobile was entitled to maintain such action, where vendor unlawfully deprived him of right of possession and disposed of the automobile.

4. Appeal and error $\S$ 1035—Judgment not reversed by reason of technical character of action.

Where conditional vendee brought action in conversion against vendor, who wrongfully deprived him of possession of the property and disposed of it, so that he could not return it, a judgment for the vendee for an amount which he was entitled to receive under the facts of the case will not be disturbed, although conversion was not technically the proper action to bring.

Appeal from Superior Court, City and County of San Francisco, Henry C. Gesford, Judge.

Action by W. S. Carvell against L. F. Weaver. Judgment for plaintiff, and defendant appeals. Affirmed.

Franklin T. Poore, of San Francisco, for appellant.

Milton A. Nathan, of San Francisco, and W. C. Wilde, of San Diego, for respondent.

KERRIGAN, J. This is an action for damages for the conversion of a Ford automobile. On October 25, 1915, under a conditional contract the plaintiff W. S. Carvell, purchased from the assignors of defendant, L. F. Weaver, an automobile for which Carvell agreed to pay the sum of \$508.50. Of this sum \$200 was paid at the date of the contract, and the balance, with interest upon its diminishing residuum, was to be paid at the rate of \$35 per month. None of these monthly payments were made upon their due date, but when tendered were accepted by the vendor of the automobile. On the 22d day of April following, there being overdue \$20 upon an installment of said purchase price falling due in March, Weaver commenced an action in claim and delivery in the justice's court, and under a writ of possession the automobile was delivered to Weaver. Carvell in his answer to the complaint in said action did not pray for its return, but denied the allega-

tions of the complaint, and in addition alleged that Weaver had repudiated the contract. He accordingly demanded judgment for the sum of the payments made by him, and damages for the detention of the motor car.

The justice of the peace, proceeding doubtless upon the theory that Weaver had a right to enforce the literal terms of the contract, notwithstanding that under the authorities there had been by reason of the vendor's acceptance of overdue payments a waiver of the forfeiture clause of the contract, until reasonable notice was given to the vendee that the terms of the contract as to time of payment would be strictly enforced. But the superior court, on appeal, applying this doctrine of waiver, rendered judgment in favor of Carvell for the return of the automobile upon payment of the balance due under the contract and costs. Thereafter Carvell tendered Weaver such balance, but Weaver, while paying the costs, refused to accept such balance, stating that he did not have possession of the car and did not know its whereabouts, and refused to deliver it.

In rendering its judgment on appeal the superior court failed to direct that, if a return of the property could not be had, Weaver should pay to Carvell its value fixed at a certain amount. Hence, when it appeared that Weaver was unable to return the property, and that Carvell's interests had not been fully protected by the judgment, the latter about a year after the rendition of the judgment commenced this action against Weaver for damages for the conversion of said automobile, and obtained judgment.

[1] It is not claimed upon this appeal that the judgment in the former action constituted a bar to this action. Carvell's damages for the conversion of the automobile it appears were never actually litigated or passed upon. This action, therefore, is clearly maintainable. *Nickerson v. Cal. Stage Co.*, 10 Cal. 520. In the case cited the plaintiff brought an action of replevin against the defendant to recover certain property, and obtained judgment for its restitution and damages for the illegal detention thereof. Defendant paid the damages, but the property was not restored. Plaintiff then brought an action of trover to recover its value, to which action the defendant pleaded the former judgment as a bar. It was held that the judgment in the replevin suit did not constitute a bar to the action of trover, the judgment in replevin not having been satisfied.

[2] It will be noted, as already stated, that Carvell in the claim and delivery action commenced against him by Weaver did not demand a return of the automobile or its value, contenting himself with a demand for the repayment to him of the sum of his installment payments with damages for the detention of the car. The superior court,

however, on appeal went outside of the issues, and directed such return upon payment by Carvell of the balance due under the contract. For this reason Weaver claims that the judgment in that action was void.

[3, 4] Conceding that in an action of claim and delivery, in which the plaintiff has obtained possession of the property, where the defendant makes no claim or demand for the return of the property or its value, a judgment for its return or its value is not within the issue, and is not permissible (*Banning v. Marleau*, 101 Cal. 238, 35 Pac. 772), still it appears that the court had jurisdiction of both the parties and the subject-matter; hence at most the judgment was only erroneous and not void (*Hogue v. Fanning*, 73 Cal. 54, 14 Pac. 560). And, granting that the legal title to the automobile was in Weaver, still we have no doubt that Carvell's interest in the property was such as to entitle him to maintain this action for its conversion. The legal title is not always necessary to an action for conversion, but any special valuable interest in the property accompanied with the right of possession is sufficient to form the basis of such an action. *Bowers on the Law of Conversion*, §§ 123, 383, 434; *Middleworth v. Sedgwick*, 10 Cal. 392; *Green v. Burr*, 131 Cal. 236, 63 Pac. 360; *Hilmer v. Hills*, 138 Cal. 134, 70 Pac. 1080. However this may be, here the plaintiff alleged the facts of the case; and as the relief granted was, regardless of the technical character of his action, no more than he was entitled to receive, the action of the trial court will not be disturbed.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

55 Cal. App. 84

JOHNSON v. BABCOCK. (Civ. 3723.)

(District Court of Appeal, Second District, Division 1, California. Nov. 5, 1921.)

Process  149—Finding of due service of summons and complaint held supported by evidence.

In action to annul a judgment against plaintiff on the ground that there was no service upon plaintiff of any summons or complaint, finding that there was such service held supported by evidence, consisting of a return contained in the judgment roll and testimony of the process server from such return, under Code Civ. Proc. § 2047.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Fannie Johnson against Geneva G. Babcock. From judgment for defendant, plaintiff appeals. Affirmed.

D. F. Glidden, of San Diego, for appellant.
Dennison & Towner, of Los Angeles, for respondent.

CONREY, P. J. Action to annul a judgment of the superior court upon the ground that appellant, who was a defendant in that action, and who never appeared therein, was never served with any summons or complaint in that action.

On the trial of this present action the court found that in the former action a true and correct copy of the summons and complaint was served, as shown by the return contained in the judgment roll, and that the default and judgment were regularly and duly entered. The appeal rests entirely upon the contention that the evidence is not sufficient to sustain the findings of fact.

Appellant testified that she never was served with a copy of summons and complaint, or with a summons and complaint, in the former action, and did not learn that there had been any such action until a time nearly three years after the judgment had been entered. The testimony of her brother and of her husband is corroborative of appellant's testimony in this, that she never mentioned the said former action to either of them, and that their relations with her were such that probably the case would have been discussed with them if the summons had ever been served upon Mrs. Johnson. Such, at least, appears to have been the opinion of those witnesses.

On the other hand, the judgment roll in the former action contains a return in the form of an affidavit made by one Harry C. Clark, subscribed and sworn to by him on the 4th day of January, 1916, wherein he stated that on that day he personally served the summons on the defendants therein named (who were Fannie and Emery F. Johnson) by delivering to and leaving with each of said defendants personally in the county of San Diego, Cal., a copy of the summons attached to a copy of the complaint in that action. Sworn as a witness in the present case, Mr. Clark, having first examined the return on the summons, testified that he did serve the summons and that he did deliver a copy of the summons and complaint to the said defendants in that action and made his return accordingly.

"Q. Was that done upon both of them? A. It was.

"Q. And you made your return accordingly? A. Yes, sir."

Answering as to the place of service, he said, "My memory would be it was a residence." But he admitted that he could not remember the details of the service, and that he did not have any distinct recollection concerning the same; that he had no

recollection except from that return; that in making his statements he was going by the return.

The foregoing evidence is sufficient to sustain the findings of the court.

"A witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution." Code Civ. Proc. § 2047; Estate of Moore, 180 Cal. 570, 585, 182 Pac. 285; People v. McFarlane, 138 Cal. 481, 488, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

55 Cal. App. 67

TODD v. LYON et al. (Civ. 3724.)

(District Court of Appeal, Second District, Division 1. California. Nov. 4, 1921.)

1. Sales ⚡200(2)—Where goods identified, future invoicing to determine price does not delay passing of title.

Under Civ. Code, § 1140, as to time of passing of title, where the contract identifies the existing goods sold, the fact that the price to be paid depends upon some unit of measurement or invoicing thereafter to be made does not affect the transfer of title.

2. Sales ⚡218½—Intent to presently transfer is question of fact where contract not clear.

Whether the parties intended a present transfer of title is a question of law where the intention clearly appears from the written contract, but, if not clear, it is a question for the jury or trial court to determine from all the facts and circumstances.

3. Sales ⚡218½—Evidence held to show intent to make present transfer.

In action for price of a stock of goods destroyed by fire before defendant buyers had invoiced them to determine their cost, and therefrom the purchase price, evidence held to support finding that the goods were delivered to defendants with the intent of both parties that title should then vest in defendants.

4. Evidence ⚡158(28)—Books of plaintiff seller held best evidence of value of stock of goods lost in fire before buyers' invoice.

In action for price of a stock of goods destroyed by fire before defendant buyers had invoiced them to determine their cost, and

therefrom the purchase price, plaintiff's books, showing the cost of goods in stock on the preceding January 1st, and the difference between the cost of goods purchased and sold between that time and the time of the sale, held the best evidence as to the cost of the goods.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Edward Todd against Horace T. Lyon and others. From judgment for plaintiff, defendants appeal. Affirmed.

Wright & McKee, of San Diego, and L. N. Turrentine, of Escondido, for appellants.

Charles C. Crouch, of San Diego, for respondent.

SHAW, J. From a judgment entered in favor of plaintiff, for the purchase price of a stock of merchandise alleged to have been sold and delivered to defendants, they have appealed.

It appears that plaintiff was a merchant at La Mesa, Cal., where, in a storeroom owned by him, he carried a stock of goods necessary in conducting the business; that on November 1, 1919, he and defendants entered into a written agreement as follows:

"This agreement entered into between the Escondido Mer. Co. hereafter known as the parties of the first part, & E. Todd, hereafter known as the parties of the second part.

"The parties of the second part does by this agreement sell to the party of the first part their entire stock of merchandise located in La Mesa at 85 ct. on the dollar, the goods to be invoiced at what they cost the party of the second part.

"The party of the first part has deposited with the party of the second part \$250.00 on the purchase price of the goods.

"Edward Todd,
"Escondido Mer. Co."

On November 6th, five days after the execution of the contract, and prior to the invoicing of the goods, the entire stock of merchandise was destroyed by fire.

The complaint alleges the making of the contract, which is admitted, and the delivery of the stock of merchandise referred to in said agreement to the defendants, the value thereof, and a demand for payment made upon defendants which was refused. In their answer defendants denied that the stock of merchandise had ever at any time been inventoried or invoiced as provided by the terms of the contract, or that any delivery thereof was ever made to them, or that the title thereto ever at any time passed from plaintiff to defendants.

The court found that on the date of the execution of the contract plaintiff delivered the stock of merchandise referred to in the agreement to the defendants, and that, at the time, "both parties to said contract intended to and did transfer the title and possession

thereof to the defendants," which finding is attacked by appellants upon the ground that the evidence is insufficient to support the same.

The court also found that the actual cost to plaintiff of said stock of merchandise was the sum of \$8,799.53, which finding appellants attack upon the ground that it is predicated upon testimony in support thereof which the court erroneously admitted over defendants' objection.

Basing their contention upon conceded authorities of other states which hold that, where anything remains to be done for the purpose of ascertaining the prices, as by weighing, measuring, or invoicing the goods, the performance of such things so to be done shall be deemed a condition precedent, even though identified and in condition for acceptance to the transfer of title, appellants insist there could be no passing of title in the instant case because the goods were never invoiced as provided by the contract "at what they cost plaintiff." This rule, however, is modified by section 1140, Civil Code, which provides:

"The title to personal property sold * * * passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

In construing this section of the Code, the Supreme Court, in *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199, while recognizing the rule stated as being supported generally by American cases, said that—

"If the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity."

In *Lassing v. James*, 107 Cal. 348, 40 Pac. 534, in a case where a certain amount of hay contracted to be sold was never measured and the amount ascertained as provided in the contract, the court, in response to the claim that title did not pass because of such failure to measure, said:

"We are clear that the agreement to ascertain the number of tons of hay at some future time by weight and measurement in no way affected the question as to the present passing of the title."

In *Fiddymont v. Johnson et al.*, 18 Cal. App. 342, 123 Pac. 343, it is said:

"If the goods are identified and the parties agree upon a present transfer, it does not matter that weighing or measuring is necessary to ascertain the price to be finally paid."

To like effect are the cases of *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722; *Gianelli et al. v. Globe Grain & M. Co.*, 191 Pac. 720; *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592.

[1] It thus appears from the authorities

cited that, where the contract identifies the existing goods sold, and the price to be paid depends upon some unit of measurement or invoicing thereafter to be made, such fact in itself does not affect the transfer of the title. There is no question in the instant case as to the identity of the stock of goods sold. They are sufficiently described as being the entire stock of merchandise located in the store of plaintiff at La Mesa, which is a city or town in San Diego county, Cal. As against the cases cited in support of the rule announced, appellants direct our attention to the case of *Young v. New Pedrara Onyx Co.*, reported in 192 Pac. 55, 61, where the court (division 2 of this district), in discussing a similar question, quoted with approval the rule announced by the Supreme Court of the United States in the *Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863, to the effect that—

“where the buyer is by the contract bound to do anything as a consideration either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.”

There is nothing inconsistent between the rule so stated and the rule prevailing in California, since, by virtue of section 1140 of the Civil Code, the passing of the title did not depend upon the taking of the invoice.

[2] Since, as we hold, the goods were sufficiently identified, and the taking of the invoice was not necessary to the transfer of title, the question presented to the trial court for solution was whether or not the parties agreed upon a present transfer of the title, which fact must be ascertained from the intention of the parties at the time. Where such intention clearly appears from a written contract, it is a question of law; if not clear, it is a question for the jury or trial judge to determine from all the facts and circumstances touching the question. *Fiddymen v. Johnson*, supra.

[3] As stated, the court found the goods were by plaintiff delivered to the defendants with the intent of both parties that title thereto should vest in defendants. Conceding the existence of facts and circumstances from which conflicting inferences might be drawn, there is, in our opinion, evidence which clearly tends to establish the finding as made by the court. The contract cannot be construed as an agreement to sell for it in express terms declares that plaintiff “does by this agreement sell” to defendants “their entire stock of merchandise,” etc. The language employed in the writing imports an absolute sale of the property, which is fully identified as being “their entire stock of merchandise located in La Mesa.” *Gianelli & Barmann v. Globe Grain & M. Co.*, 191 Pac. 720. Upon its execution defendants demanded the keys of the storeroom wherein the

goods were located, and in accordance with such demand plaintiff delivered two keys to the door, and thereafter, awaiting the taking of the invoice of the goods, which was to determine the amount to be paid therefor, he ceased conducting the business and exercised no right or control over the same. As against these facts, it appears that at the time of the fire plaintiff held an insurance policy upon the property, insuring it against loss by fire, and that he attempted to collect the same upon the theory that the title to the goods was vested in him at the time they were destroyed; that, while he testified that it was his intention when he signed the contract to deliver the goods to defendants as absolute owners in control thereof, he also stated that he expected payment therefor before the goods were removed; that, after surrendering the two keys, which he thought were all he had to the door of the storeroom, his wife discovered a third key which he did not send to defendants; to which may be added the facts that the parties were strangers at the time the agreement was made, and that plaintiff posted upon the door a notice reading, “Closed for Inventory.” The most that can be said is that inferences might have been drawn from these circumstances which were in conflict with evidence upon which the court, well within its province, made the finding that the stock of merchandise was delivered to defendants with the intention to transfer the title. Such conclusion, since reached upon evidence of a substantial character, must be deemed conclusive upon the question.

The contract contemplated the ascertainment of the cost of the goods by an invoice thereof, in the taking of which both parties should participate, and defendants obligated themselves to pay 85 per cent. of the total cost of the goods so ascertained. Since it was impossible to obtain such invoice of the goods, plaintiff was permitted to establish the cost thereof from his books of original entry and oral testimony in connection therewith. As shown by his books, the cost of the goods in stock on January 1, 1919, was \$7,913.45. Between that date and November 1, 1919, the date of the sale to defendants, he purchased goods at a cost of \$6,386.85, and during the same period sold goods at a price aggregating \$7,426.05, the cost of which goods so sold and disposed of he testified was \$5,500.77. Deducting this last sum from the cost of the goods in stock on January 1, 1919, which, added to purchases thereafter made, aggregated a total of \$14,300.30, left a balance of \$8,799.53, constituting the total cost of the stock of goods sold to defendants, 85 per cent. of which is \$7,469.60, for which judgment was rendered.

[4] Plaintiff's books from which these facts appeared, and his oral testimony in connection therewith, were admitted over the ob-

jection of defendants, who strenuously insist that the court erred in the ruling. While this was not the method agreed upon for ascertaining the cost of the stock, and conceding that to some degree it is unsatisfactory, nevertheless the failure to invoice the goods was not due to any fault of plaintiff, and it was, under the circumstances of the case, the best—indeed the only—evidence that could be produced touching the issue as to the cost of the property. There was no error on the part of the court in overruling defendants' objection to the admission of the evidence, and since, though to some degree unsatisfactory, it clearly tended to establish the cost of the goods, title to which was vested in defendants, it must, on review thereof, be deemed sufficient to support the finding that the cost of the stock of merchandise was the sum of \$8,799.53.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 715

JOCHIMSEN v. CITY OF LOS ANGELES
et al. (Civ. 3742.)

(District Court of Appeal, Second District, Division 1, California. Oct. 28, 1921.)

1. Waters and water courses $\S$ 203(6) — Rates chargeable by city not subject to regulation by Railroad Commission.

Const. art. 12, $\S$ 23, giving the Railroad Commission power and jurisdiction to supervise public utilities and fix rates to be charged, does not vest in such commission authority to regulate the rates to be charged by the city of Los Angeles in the sale of water to its inhabitants.

2. Constitutional law $\S$ 211—Waters and water courses $\S$ 132 — Constitutional provision exempting city from regulation by Commission does not deny equal protection of the laws.

Const. art. 12, $\S$ 23, providing for the regulation of public utilities by the Railroad Commission, though construed as inapplicable to municipally owned public utilities, does not deny the equal protection of the laws to corporations or persons engaged in operating public utilities, in violation of Const. U. S. amend. 14, as applied to the sale of water by the city of Los Angeles, in view of St. 1917, pp. 1694, 1695, relative to the rates to be charged for water, etc., as such city in furnishing water for public use is not engaged in such business under the same conditions pertaining to a private corporation or person.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by E. P. Jochimsen against the City of Los Angeles and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Harry Lyons, of Los Angeles, for appellant. Jesse E. Stephens, City Atty., W. B. Mathews, Ray C. Eberhard, and Trent G. Anderson, all of Los Angeles, for respondents.

CONREY, P. J. This action was brought to obtain an injunction restraining the city of Los Angeles, and the board of public service commissioners thereof, from increasing the rates charged for water furnished through and by means of its municipally owned water system, without the consent of the Railroad Commission of the state. The court having sustained a general demurrer to the complaint, judgment was entered in favor of the defendants. The plaintiff appeals from the judgment.

[1] Only two questions are presented for decision. Appellant first contends that, by virtue of the Constitution of the state of California and the acts of the Legislature, exclusive jurisdiction has been conferred upon the Railroad Commission to establish the rates to be charged in the sale of water as a public utility; and that by consequence the city of Los Angeles, while engaged in the business of furnishing water to the public in said city, may charge only such rates as have been established by order of the Railroad Commission. The Supreme Court of California, in a decision covering this same question, has determined the matter adversely to the contentions of appellant here. For reasons fully set forth in that decision, we are satisfied that section 23 of article 12 of the Constitution of California was not intended to and does not vest in the Railroad Commission authority to regulate the rates to be charged by the city of Los Angeles in the sale of water to its inhabitants. *City of Pasadena v. Railroad Commission*, 192 Pac. 25, 10 A. L. R. 1425.

[2] The second contention of appellant is that, if it be held that municipally owned public utilities are not brought within the jurisdiction of the Railroad Commission by section 23 of article 12 of the Constitution, then that section should be held void as in violation of the Fourteenth Amendment to the Constitution of the United States, because it denies to the plaintiff, or to any corporation or person who would be engaged in the operation of such public utility, the equal protection of the laws, in this, that it attempts to create an arbitrary discrimination and classification between persons engaged in the same kinds of business and under the same conditions. But we are of the opinion that a municipality engaged in the business of furnishing water for public use is not engaged in such business under the same conditions as those pertaining to a private corporation or person furnishing water to the public.

The state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.

"Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 19 Sup. Ct. 281, 282, 43 L. Ed. 552, 554.

The classification under consideration in the case at bar is practical, and is based upon a reasonable exercise and discretion of the legislative power. Without attempting to exhaust the list of possible illustrations, we will adopt that used by the Supreme Court of Illinois in *Springfield Gas, etc., Co. v. City of Springfield*, 292 Ill. 236, 126 N. E. 739. We are informed that that case is now pending in the Supreme Court of the United States on writ of error. Nevertheless, we rely upon the state decision at this time because its reasoning appears to us to be correct upon the question now under consideration. The court said:

"Municipalities under the Municipal Ownership Act are limited in rates and charges for the product furnished by their public utilities, and cannot operate them at a profit to the same extent as can private corporations, associations, or persons owning like utilities. They are required, under the act governing them, to keep separate accounts of the moneys received from the operation of their utilities, and such funds cannot be used as revenues except to discharge their obligations and expenses in the operation of the utilities. Their charges for such services are simply to be high enough to produce revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund sufficient to meet all outstanding bonds or certificates at maturity issued on account of such utilities. The statute does not contemplate that the rates shall be higher or lower than for the purposes aforesaid, no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities. * * * It is contemplated that private corporations and persons shall realize profits. The Legislature had the right to assume that the rates and charges of each of these two classes of public utilities would not and could not be the same to consumers. It is clear, therefore, that the Legislature acted within its constitutional rights and powers in enacting the two statutes and making different provisions in so far as the same were necessary to accomplish the purposes for which the two acts were enacted. It is equally clear that the Legislature had the right and power to delegate to the municipalities the right of regulation and control of such municipally owned plants."

So, here, the charter of the city of Los Angeles, which vests in the board of public

service commissioners the right to regulate the use, sale, and distribution of water belonging to the city, and to fix the rates to be charged therefor, declares that such rates "shall be of uniform operation, as near as may be, and shall be fair and reasonable, taking into consideration, among other things, the nature of the use, the quantity supplied, and the value of the service." The same section of the charter further provides, with respect to moneys received from the sale or use of water, "that all such moneys shall be deposited in the treasury of the city to the credit of a fund to be known as the 'Water Revenue Fund,' and shall be kept separate and apart from other moneys of the city. * * *" Here follow statements governing the manner of paying out moneys from the water revenue fund, which shall be so paid for the stated purposes, "and for no other purpose." *Stats. 1917*, pp. 1694, 1695. We are satisfied that the nature of the business of furnishing water as a public utility by a private person or corporation differs from the nature of that business when conducted by a municipal corporation, both with respect to the differences inherent in a municipal corporation as distinguished from a private person or corporation, and in the purposes for which the business is conducted and the methods of conducting such business. These differences are amply sufficient to justify the classification made by the laws of this state.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

55 Cal. App. 144

HARRIS v. MT. WASHINGTON CO. et al.
(Civ. 3750.)

(District Court of Appeal, Second District, Division 1, California. Nov. 10, 1921. Hearing Denied by Supreme Court Jan. 5, 1922.)

1. Executors and administrators $\S$ 228(2) — Claim against estate may be assigned and proved by assignee.

A trust company holding a note guaranteed by a decedent could assign its claim against the estate on the guaranty, and its assignee could make proof of the claim under Code Civ. Proc. $\S$ 1494, 1497, and, although the assignment was made for the purposes of collection merely, it was effective to transfer the legal title to the demand.

2. Executors and administrators $\S$ 438(7) — On rejection of assigned claim, either the claimant or his subsequent assignee as "holder" of the claim could sue thereon.

Upon the rejection of an assigned claim based upon a contract, proof of which claim was made by the assignee under Code Civ. Proc. $\S$ 1494, 1497, suit could be brought thereon

by the assignee claimant or, without making any new demand against the estate or the executrix, by the claimant's subsequent assignee; the latter being a "holder" of the claim within the meaning of section 1500.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder.]

3. Limitation of actions ⚡83(2)—Statute as to administration only enlarges period.

Where it was not contended but that action against a decedent's estate was brought within the four years after maturity of the debt evidenced by the note sued on, or that the action was not brought within the time required by Code Civ. Proc. § 1498, after rejection of the claim, the right to sue was not lost by limitation under section 353, which covers a case where the ordinary period of limitation has run against a cause of action after the debtor's death, and in such case extends the time for suit for one year after letters issued.

4. Executors and administrators ⚡451(4) — Finding claim not barred by limitations held sufficient.

In action on contract claim against a decedent's estate, where, although the court did not make a finding in direct terms negating the plea of limitations in the form it was made, it did, in the findings, set forth the different proceedings had in the matter of the estate and further recited that "within the time required by law, to wit, on" a named date, the claim was presented, rejected, and notice of rejection given claimant, such finding on the plea was sufficient, under the rule that, if the truth or falsity of each material allegation can be demonstrated from the finding, the law is complied with.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by William H. Harris against the Mt. Washington Company, Florence A. Andrews, executrix, and others. From judgment for plaintiff, defendant Florence A. Andrews, executrix, appeals. Affirmed.

Willedd Andrews and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Alfred Wright, of Los Angeles, for respondent.

JAMES, J. Appeal by defendant executrix from a judgment entered in favor of the plaintiff.

[1, 2] J. E. Marsh was a guarantor on a promissory note executed by the Mt. Washington Company in favor of the Title Insurance & Trust Company. The note was payable one day after date and was executed on April 15, 1916. On the 1st day of April, 1917, Marsh died, and on the 30th day of July of the same year Florence A. Andrews was appointed executrix under the will. She qualified on August 2, 1917, and caused notice to creditors to be published. The date of the first publication of said notice was June 19, 1919.

There being owing on account of the promissory note mentioned the sum of \$7,727.98, the Title Insurance & Trust Company on the 15th day of January, 1920, assigned to D. A. Anderson, one of its employees, its claim against Marsh's estate, and on the 20th day of January, 1920, Anderson presented to the executrix a claim in due form showing all of the facts required to be set forth under the provisions of sections 1494 and 1497, Code of Civil Procedure. The claim was rejected by the executrix on the day of its presentation, whereupon Anderson reassigned the claim to the Title Insurance & Trust Company, which in turn and on the 1st day of February, 1920, assigned and transferred the same to the plaintiff. At the trial proof was made of the amount of the claim and the fact that there were no offsets existing either as against the nominal plaintiff or the original payee of the note, and that no security had been given. It is the contention of appellant that the Title Insurance & Trust Company should have made proof of the claim, and that the assignment to Anderson and his verification of the demand did not entitle suit to be brought after rejection of the claim. The second point made is that the subsequent assignment to plaintiff did not carry with it the right to prosecute this action. The point of the latter contention is that this plaintiff, in order to maintain suit, must have made a claim against the estate in the manner provided by the Code. The third contention relates to the statute of limitation, it being insisted that the action was barred by reason of provisions of section 353, Code of Civil Procedure. We think that the Title Insurance & Trust Company had a plain right to assign its contract demand against the estate of Marsh, and that the assignee was entitled to make proof of the claim as he did. In the claim as filed the executrix was given full information as to the nature of the demand and the conditions of the obligation. The assignment to Anderson was made for the purposes of collection merely. Such assignment nevertheless was effective to transfer the legal title to the demand (Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Hopkins v. Contra Costa Co., 106 Cal. 566, 39 Pac. 933), and at the same time there was preserved to the estate, under those conditions, the right to urge any equities which it might hold as against the payee of the note. There existed no such equities, and the court so found. Counsel for appellant have not attracted our attention to any authorities sustaining the contention that an assignee of a contract demand may not properly make and verify the claim on the account as against the estate of a deceased person, and we think that none are to be found. The demand constituted a chose in action of an assignable kind:

"Assignability of things in action is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature." *Rued v. Cooper*, 109 Cal. 682, 34 Pac. 98; *Simmons v. Zimmerman*, 144 Cal. 256, 79 Pac. 451, 1 Ann. Cas. 850; *Ruling Case Law*, vol. 2, p. 395; *Civ. Code*, § 954.

Upon the rejection of the claim by the executrix, the claimant became entitled to bring suit thereon. This right could be exercised by the claimant Anderson or his subsequent assignee. No new demand was required to be made against the executrix, who had already been fully and formally apprised of the facts constituting the claim. The plaintiff as a subsequent assignee was a holder of the claim within the meaning of section 1500, *Code of Civil Procedure*.

[3, 4] Defendant pleaded, as stated, the further defense that the cause of action was barred by the provisions of section 353, *Code of Civil Procedure*. It is not contended but that the action was brought within the four years after maturity of the debt evidenced by the promissory note, or that the action was not brought within the time required by section 1498, *Code of Civil Procedure*, after rejection of the claim. Under this state of facts, plainly the right to prosecute the suit was not lost by limitation. Section 353 covers a case where the ordinary period of limitation has run against a cause of action after the death of a debtor, in which case the time for commencing the action is extended to include the end of the period of one year ensuing after the issuance of letters testamentary or of administration. Another complaint made by appellant under this head is that the trial judge failed to make a finding on the affirmative plea of the statute of limitation. It is true that a finding was not made in direct terms negating the plea in the form it was made, but the court did, in the findings, set forth the several dates of the different proceedings had in the Estate of Marsh, and further recited that "within the time required by law, to wit, on the 20th of January, 1920," claim was presented to the executrix and rejected on the same day, notice of which rejection was given to Anderson, the claimant. From the facts found it appears that the plea as to the bar of the statute was not sustained by the evidence. "The court did not find in direct language that the action was not barred by the statute, but it found facts which show that it was not so barred. * * * If the truth or falsity of each material allegation * * * can be demonstrated from the findings, the law is complied with." *Ready v. McDonald*, 128 Cal. 663, 61 Pac. 272, 79 Am. St. Rep. 76. See, also, *Woodham v. Cline*, 130 Cal. 499,

62 Pac. 822; *Millard v. Council Legion of Honor*, 81 Cal. 340, 22 Pac. 864.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

55 Cal. App. 176

DEOVLETIAN et al. v. WHITNEY et al.
(Civ. 3903.)

(District Court of Appeal, First District, Division 2, California. Nov. 4, 1921. Hearing Denied by Supreme Court, Jan. 3, 1922.)

1. Brokers ⇐52—Real estate agent entitled to commission for producing purchaser though sale consummated by owner.

In absence of any contrary contract, a real estate agent to be entitled to his commission need only produce a purchaser able, ready, and willing to purchase on the terms exacted by the owner, though the sale is eventually consummated by the latter.

2. Brokers ⇐66—What must have been done in effecting a sale pursuant to a contract to divide commissions, and what not required in assisting to sell, stated.

Under an express contract between plaintiffs and defendants allowing plaintiffs half the commission for selling property listed with defendants, but providing that defendants should assist plaintiffs as much as possible in closing deals effected by plaintiffs, plaintiffs in order to "effect a deal" must have secured a binding preliminary contract or at least have brought the buyer and seller together so that they might themselves negotiate and execute such a contract, and the assistance to be rendered by defendants did not require them to do everything in connection with a sale of land except what plaintiffs did by finding a listing card in which the customer might be interested, and carrying abstracts from one office to another after the preliminary agreement was signed and a deposit made on the purchase price, the contract also providing that plaintiffs were to have no commissions on sales by defendants, and that customers coming into their office belonged to defendants, and that, if plaintiffs gave up any "individual deal" and it was taken up and closed by defendants, plaintiffs were entitled to no commission unless the property was exclusively listed with them.

3. Brokers ⇐86(4) — Evidence held not to show sale effected by agents pursuant to contract to divide commission.

Evidence held not to show that real estate agents effected a sale of land so as to entitle them to half the commission under a contract with other agents with whom the land was listed.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. P. Deovletian and another against W. J. Whitney and another, individually, and as Watson & Whitney, a copartnership, to recover commissions upon the

sale of real estate. Judgment for the plaintiffs, and defendants appeal. Reversed.

Lewis H. Smith, of Fresno (Frank H. Marvin, of San Francisco, of counsel), for appellants.

Ohannesian & Ohannesian, of Fresno, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment for \$2,000 against them, in an action to recover commissions upon the sale of real estate. Defendants were in the real estate business and plaintiffs were working for them under a contract which, in so far as it is relevant here, reads as follows:

"Pursuant to our conversation of even date, beg to advise that during the period that you continue to carry on the general real estate business in the connection with us, as our representative, we will pay the following commission:

"(1) On property listed through this office and sold by yourself, we will pay you 50 per cent. of the gross commission derived from the sale. * * *

"(4) On property listed by this office and sold by this office without any effort on your part you will receive no commission.

"(5) We agree to give you as much assistance as possible in closing deals that may be effected by you, and any assistance which we may render you in this manner will not affect the scale of commission. We will also expect you to render such assistance to this company as you conveniently can in the matter of listing any property from clients who shall come into this office for the purpose of listing property. It being understood, however, that such listing shall be considered as having been listed by this company. It is also understood that any property which you may list outside of this office where this company shall have been instrumental in aiding you to secure said listing, said property shall be considered as having been listed by this company.

"(6) Customers coming into this office for the purpose of purchasing property, or, in fact, any customer which you may secure through this office, shall be considered as belonging to this office, and on sales made by you to them we will pay you 50 per cent. of the gross commission received regardless of whom the property shall have been listed by. * * *

"(9) In the event that you fail to close any individual deal and give the deal up as lost that one of the firm, or in fact any one representing this firm pick up the deal then, and finally close same you are entitled to no commission whatever unless it be your exclusive listing which then you will be entitled to 15 per cent. only."

From the record it appears without contradiction that the defendants had listed in their office, independently of any efforts of plaintiffs, a certain 80-acre tract of vineyard belonging to J. J. Bolitho. Late in the afternoon of February 24, 1920, Kaloust Nazarian and his son entered defendants' office and asked about land listed there for sale. One of the salesmen in the office, Sam

Matthews, took out some listing cards and attempted to interest Nazarian in the property there offered. Nazarian found none of these attractive. Matthews then introduced Nazarian to one of the plaintiffs, B. P. Deovletian, who brought forward another box of listing cards, on one of which the Bolitho property was listed. Nazarian said he knew something of this property through some other source, but had never seen it and desired to do so; that he did not have time to go out to see the property that day, as it was already late in the day, but stated that he would come in at another time and go out to see the property. In accordance with this understanding, he arrived at the office of the defendants on Saturday afternoon, February 28, 1920. There he met the plaintiff B. P. Deovletian, and asked to be taken to see the Bolitho property. Said plaintiff, however, stated that he had an engagement to take another customer out and could not go with Mr. Nazarian. Because of this fact, he introduced Nazarian to the defendant Whitney, explaining that he (Deovletian) could not take Nazarian out to see the property. Thereupon, Mr. Whitney said he would take him out, which he did. Whitney introduced Nazarian to the owner of the property, and, after a personal examination and some negotiations, Nazarian deposited \$1,000 upon the contract price of the property and signed a preliminary agreement for the purchase of the same. As to the details involved in the execution of the final contract, it appears that most of the complications which arose as to the acceptance of certain securities as part of the first installment payment for the property, and disposing of certain property owned by Nazarian to enable him to meet the first payment of \$35,000, were met and solved by Mr. Whitney. Mr. Bolitho, the owner of the land, stated that he had never known the plaintiffs in connection with the transaction; that Mr. Whitney had conducted all the negotiations and closed the transaction, except for the part which his attorneys had taken in the matter. According to the testimony of B. P. Deovletian, his connection with the transaction was as herein stated, and he does not claim to have had any further part in it except to say that he went to the abstract office and took abstracts back and forth from there to the attorney's office, and asked Mr. Whitney at different times how the matter was getting along. His brother, A. P. Deovletian, stated that he had been away from the city until after the preliminary agreement was signed, and that his part in the transaction was:

"That I have handled the contracts from Mr. Cook's office for investigation down to our office then to Mr. Willey's office and then the abstract was lost at one time, misplaced rather, and we went around and found the abstract and brought

it to your (the attorney's) office, and such details like that. * * *

Upon this evidence, the trial court gave judgment for the plaintiffs, who were working as partners in their real estate transactions.

[1,2] We are of the opinion that, under their contracts, the plaintiffs have not earned the commission they seek to recover. In many of the cases cited by the respondent, the rule with reference to commissions to be paid by an owner to a real estate dealer is discussed. In such cases, of course, the rule is well settled that the agent need only produce a purchaser, able, ready, and willing to purchase upon the terms exacted by the owner, and that, even though the transaction be eventually consummated by the owner, the agent is entitled to his commission, in the absence of any contrary contract provisions. In the present case, however, the situation is different. The plaintiffs and defendants are all real estate agents, and the plaintiffs were working under express contracts requiring them to do certain things. They were required to sell the property—to effect a deal, in order to receive one-half of the commission. It is true that the contract provides that the defendants shall give to plaintiffs as much assistance as possible in closing deals after they have been effected by the plaintiffs. But we think that in order to “effect a deal” the plaintiffs must have secured a binding preliminary contract, or at least brought the buyer and seller together, so that they might themselves negotiate and execute a valid preliminary agreement. We are not disposed to construe the above-quoted provision of the contract requiring the defendants to render assistance to the plaintiffs in closing deals after they had been effected by the plaintiffs, in such an unreasonable manner as to require the defendants to do everything in connection with the transaction except to find in their own files a listing card in which the customer might possibly be interested, and to carry abstracts from one office to another after the preliminary agreement had been signed and a deposit made upon the purchase price of the property. The contract clearly states that the plaintiff was to have no commission upon property sold by the defendants and that customers coming into the office were to be considered as customers belonging to the office of defendants. The contract also provides that in the event plaintiffs give up any “individual deal” and it is taken up by any member of the firm and finally closed, plaintiffs are to be entitled to no commission unless there was involved property which had been listed exclusively with the plaintiffs.

[3] We think it clearly appears from all the testimony in the record, indeed it is ap-

parent from the testimony of plaintiffs themselves, that they did not effect any sale; that they never brought the buyer and seller together, or caused a meeting of their minds upon this transaction; and that they are not entitled to any commission under the terms of their contract. *Wright & Kimbrough v. Dewees*, 197 Pac. 957; *Naylor v. Ashton*, 20 Cal. App. 544, 546, 130 Pac. 181; *N. W. Packing Co. v. Whitney*, 5 Cal. App. 105, 110, 89 Pac. 981; *Ayres v. Thomas*, 116 Cal. 143 et seq., 47 Pac. 1013; *Mattingly v. Pennie*, 105 Cal. 514, 519, 39 Pac. 200, 45 Am. St. Rep. 87; *Gunn v. Bank of California*, 99 Cal. 349, 353, 33 Pac. 1105.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

55 Cal. App. 37

PEOPLE v. HAMBY. (Cr. 808.)

(District Court of Appeal, Second District, Division 2, California, Nov. 2, 1921. Hearing Denied by Supreme Court Dec. 29, 1921.)

1. Criminal law — 1159(5) — Jury finding on issue of intent conclusive on appeal.

Jury's finding on the issue of intent was conclusive on appeal from conviction for passing fictitious check.

2. False pretenses — 49(2) — Evidence held to sustain conviction for issuing a fictitious check.

Testimony that all the handwriting on the face and back of a check, including the signature and the indorsement by defendant, was that of defendant, and that the bank named in the indictment was named as drawee, and prosecutor cashed it, justified the jury in finding intent on his part to defraud prosecutor and the bank.

3. False pretenses — 49(1) — Evidence held to sustain finding that defendant had no funds in bank on which fictitious check was drawn.

On prosecution for issuing a fictitious check under Pen. Code, § 476a, evidence, from which the jury might have found that defendant forged the signature of one C. to the check; that there was no account standing on the books of the bank under that name; that the check was cashed through prosecuting witness, instead of being presented to the bank; and that payment was refused when it finally reached the bank—sustained a finding that the defendant had no funds in the bank.

4. False pretenses — 49(1) — State need not show whether name signed by defendant to the check was that of fictitious person.

In a prosecution for issuing a fictitious check signed with the name of one C., it was immaterial that evidence did not show that no such person as C. existed, where it was shown that no such person had an account in the bank, and that defendant forged the name on the check.

5. Criminal law — 371(3), 372(9)—Evidence of issuance of other fictitious checks admissible to show system and intent.

In an action for issuing fictitious checks, receiving several other checks, admitted by defendant to have had similar origin with the one for which he had been prosecuted, and to have been passed to various persons as it was passed, and at about the same time, were receivable to show system and intent.

6. Witnesses — 301 — Refusal to postpone cross-examination held not compelling defendant to testify against himself.

Where direct examination of defendant was finished immediately before recess, he was not compelled to testify against himself by being compelled to take the stand for cross-examination on the reconvening of court, as against a request not to resume until the coming into court of another person not his counsel.

7. Criminal law — 409—Admissions of defendant held competent without preliminary evidence as to warning and intimidation.

It was not error to permit the sheriff to testify as to a conversation between himself and defendant without proof that defendant's statements were voluntary and made without intimidation or promise, where the statements were merely admissions not amounting to a confession, and laid the foundation for introduction of certain writings by defendant.

8. Criminal law — 773(1)—Evidence held to warrant instructions on temporary insanity.

Testimony of intoxication of defendant held sufficient to warrant instructions on temporary insanity.

9. Criminal law — 1137(3)—Defendant might not complain of instructions requested by him.

Defendant could not complain that there was no such issue presented by the evidence as was submitted by certain instructions, where the instructions were requested by him and given as submitted.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Guy Hamby was convicted of passing a fictitious check, and appeals. Affirmed.

E. C. Jennings, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and R. L. Chamberlain, of San Francisco, for the People.

WORKS, J. This is an appeal from a judgment of conviction of the crime of issuing a fictitious check. According to the information the alleged spurious paper was issued over the name O. D. Cook, and was made payable to the order of appellant. One Freidman cashed the check for appellant and presented it to the bank on which it was drawn, when it was dishonored. The information charges that the paper was forged by appel-

lant, through the use of the fictitious name O. D. Cook, with intent to defraud Freidman and the bank.

[1, 2] Appellant first contends for a reversal of the judgment on the ground that the prosecution failed to prove an intent on his part to defraud Freidman and the bank. There was testimony from an expert to the effect that all the handwriting on the face and back of the check, including the signature "O. D. Cook" and the indorsement "Guy Hamby," was that of appellant. This evidence, taken in connection with the fact that the bank was named as drawee of the instrument and the further fact that Freidman cashed it, was sufficient to justify the jury, its members being the judges upon the question of intent (*People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009), in finding that appellant's intent in uttering the paper was as charged.

[3] Section 476a of the Penal Code, under which appellant was informed against, provides that one making, drawing, uttering, or delivering a fictitious check is within the inhibition of the section if at the time "he has not sufficient funds in or credit with" the bank on which the paper is drawn to meet it; and the section also provides that the word "credit," as used in it, "shall be construed to be an arrangement or understanding with the bank or depository for the payment" of the check. Appellant makes the point that no evidence was produced at the trial tending to show that, at the time of passing the check to Freidman, he had no funds in or credit with the bank, that being an item to be proven in order to establish the corpus delicti in a prosecution under the section. *People v. Frey*, 165 Cal. 140, 131 Pac. 127. There was evidence from which the jury might justly have concluded that appellant forged the signature O. D. Cook to the check; that there was no account standing on the books of the bank under that name; that the check was cashed through Freidman instead of being presented to the bank for payment, and that payment was refused when it finally reached the bank. This chain of evidence furnished a basis upon which the jury might have found, very properly, that appellant had no funds in or credit with the bank.

[4] It is next contended that there was no evidence to show that O. D. Cook was a fictitious person. It is sufficient, on this head, to assert that, as the case finally developed, it was not incumbent upon the prosecution to show that no such person as Cook existed. Granting his existence, there was, as we have stated, positive evidence that he had no account in the bank, and that appellant forged his name to the check. There being evidence on those points, it was immaterial to the case of the prosecution whether Cook was a myth

or not. There was, however, some evidence that he had no existence.

[5] The trial court received in evidence several checks other than the one on which the prosecution was grounded, checks which were admitted by appellant on his cross-examination to have had a similar origin with that one and to have been passed to various persons as it was passed to Freidman and at about the same time. It is claimed that the trial court erred in admitting these other checks, but they were properly receivable to show system and guilty intent. *People v. Weir*, 30 Cal. App. 766, 159 Pac. 442; *People v. Berecovitz*, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667.

[6] It is contended that appellant was forced by the trial court to testify against himself. The occurrence out of which it is sought to make so much was after appellant had taken the stand in his own defense; his direct examination having been concluded just preceding the noon recess. Upon the reconvening of court appellant expressed a desire not to resume the stand at once, but to await the coming into court of another person, not his counsel. At this juncture, and after some protest from appellant, the court required him to resume the stand so that the cross-examination might proceed. It is plain to be seen that there was no error in such a course.

[7] Appellant insists that the trial court erred in permitting the sheriff to testify to a conversation between him and appellant without proof that the statements of appellant during the conversation were free and voluntary and were made without fear, intimidation, or promise of benefit. Such matters as these are required to be shown only as a basis for the introduction of a confession coming from one charged with crime, and it was not sought to show a confession by the testimony of the sheriff. His recital merely brought out certain admissions of appellant, not amounting to a confession, and, as well, laid the foundation for the introduction of certain writings admitted by appellant to be in his handwriting, and which were thereafter used as exemplars. There was no error in receiving the sheriff's testimony.

[8, 9] Appellant claims that there was error in the giving of two certain instructions on the subject of temporary insanity, not because the instructions were inherently wrong, but because, as we understand it, there was no such issue presented by the evidence. In this, however, counsel is mistaken. A witness for the people was asked on cross-examination if appellant were not drunk at a time when the witness cashed one of the checks received in evidence for the purpose of showing intent, one of appellant's witnesses testified that appellant was drunk on a cer-

tain occasion, and appellant himself swore that the alleged O. D. Cook was plying him with a decoction of vanilla extract and wintergreen at the time when he contends Cook gave him the various checks received in evidence, including the one upon which the charge against him was based. Further, and enough in itself to settle the question now under consideration, the instructions inveighed against were requested by appellant, and were given as submitted by him.

Several other points are presented by appellant, but they are devoid of merit and require no special consideration.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

55 Cal. App. 33

FALLON v. SOCKOLOV et al. (Civ. 4012.)

(District Court of Appeal, First District, Division 1, California. Nov. 1, 1921.)

1. Bankruptcy ☞302(1)—Complaint by trustee to collect assets held sufficient.

In an action by a trustee in bankruptcy to recover property alleged to be assets of the estate, an allegation that claims of creditors had been filed and proved, that there were no assets in the trustee's hands to meet the claims, and that the claims could not be met unless recovery be had, was sufficient against demurrer for not stating that creditors remained unpaid.

2. Pleading ☞124—Answer of wife, claiming ownership of money sued for by husband's trustee in bankruptcy, was a denial of plaintiff's claims.

In an action by a trustee in bankruptcy against the bankrupt and his wife to recover assets of the estate, where the answers of defendants interposed no equitable defense, the answer of the wife alleging facts which presented no other issue than the claim of defendant that she was the owner of the money was only a method of denying plaintiff's claim.

3. Bankruptcy ☞302(4)—Proof of fraud, in action by trustee against bankrupt and wife, admissible, though not pleaded.

In an action by a trustee in bankruptcy against the bankrupt and his wife to recover assets of the estate, proof of fraud may be made at trial without any special pleading of the facts constituting the fraud.

4. Husband and wife ☞264—Evidence sufficient to show that property claimed by wife community property.

In an action by a trustee in bankruptcy to recover from the bankrupt and his wife assets of the estate, evidence held sufficient to show that money was community property of defendants, subject to husband's debts.

5. Appeal and error 761—Objections to refusal of instructions must be designated.

Where objections to the refusal to give instructions are stated without citation of authority or argument, they will not be considered.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Frank J. Fallon, as trustee of the estate of Joseph Sockolov, bankrupt, against Rose Sockolov and another. From judgment for plaintiff, defendants appeal. Affirmed.

Wal J. Tuska, of San Francisco, for appellants.

Brownstone & Goodman, of San Francisco, for respondent.

WASTE, P. J. The plaintiff, as trustee of the estate of Joseph Sockolov, a bankrupt, brought this action to recover of the bankrupt and his wife the sum of \$14,000, alleged to be the bankrupt's property and an asset of his estate. Trial was had with a jury, which rendered a verdict in favor of plaintiff. From the judgment entered thereon, defendants have appealed.

The amount in controversy was received by the defendant Rose Sockolov, the wife, from C. A. Hooper & Co., a corporation, and was claimed by her as her separate property. The circumstances attending its receipt by her were as follows: Joseph Sockolov, as contractor and builder, constructed the Chancellor Hotel for the owner, the C. A. Hooper Company. Upon completion of the building Sockolov was unable to pay the materialmen more than 75 per cent. of their claims. Thereafter he did not conduct or engage in any business, and remained unemployed. Defendant Rose Sockolov, wearying of her husband's inactivity, concluded that she had better earn something with which to obtain proper subsistence, and meet the house and family obligations, and pay the debts incurred for the household. She talked the matter over with her husband, with the result that in November, 1916, and at a time when Rose Sockolov knew her husband was insolvent, and unable to pay his creditors, with his full knowledge and consent she borrowed from the C. A. Hooper Company the sum of \$25,000, giving her promissory note for that amount. Simultaneously with the execution of the note, and at her direction, there were issued by the Chancellor Hotel Company, in the name of C. A. Hooper & Co., pledgee, certain shares of stock in the hotel company, which stock the C. A. Hooper Company took as security for the payment of the note. In other words,

C. A. Hooper & Co., advanced the money for its purchase and kept the stock as security for the payment of the loan. The hotel was a success, and in October, 1919, C. A. Hooper & Co. offered to buy the stock issued by the hotel company to Mrs. Sockolov. It agreed to cancel the note for \$25,000, and pay \$14,000 cash in addition, for the stock. After some negotiations with the Hooper Company in which Mrs. Sockolov did not appear, but which were carried on by Joseph Sockolov and an attorney, the note was canceled, and three checks totaling \$14,000 were delivered to Joseph Sockolov. He in turn delivered them to his wife. Less than a month thereafter Joseph Sockolov filed his petition in bankruptcy, and in due time the plaintiff brought this action to recover the \$14,000 paid by the C. A. Hooper Company in the transaction, upon the ground that the money was the property of Joseph Sockolov, and an asset of the insolvent's estate.

[1] Several contentions are advanced by the appellants in support of the appeal. They contend that the demurrer to the complaint should have been sustained. There is no direct averment that any creditor of Joseph Sockolov remained unpaid at the time of the commencement of this action. There is an allegation that claims of the creditors, amounting to more than \$15,000, had been duly filed and proved in the United States court, and that there are no assets in the hands of the trustee with which said claims can be met, and that these claims cannot be paid unless recovery can be had in this action. If it be essential that such fact should be made to appear in the complaint, the allegation noted implies that the claims have not been paid, and was sufficient in the face of the demurrer.

[2] The cause was properly submitted to a jury. The complaint, in substance and effect, stated an ordinary cause of action by way of assumpsit for the direct recovery of a specified sum of money. The answers of the defendants interposed no equitable defense. That of the defendant Rose Sockolov merely alleged a fact which presented no other issue than the claim of the defendant that she was herself the owner of the money, and that her husband was not, which was only another method of denying the plaintiff's claim. *Swasey v. Adair*, 88 Cal. 179, 182, 25 Pac. 1119.

[3] Fraud on the part of the defendants was not alleged in the complaint. In his opening statement to the jury, counsel for the plaintiff stated that he expected to prove fraud on the part of the defendants in the transaction. Counsel for the defendants objected to the remark, claiming that fraud should have been alleged in or-

der to be a material issue in the case. The objection was properly overruled. In actions such as this, proof of fraud may be made at the trial without any special pleading of the facts constituting the fraud. *Minor v. Baldridge*, 123 Cal. 187, 190, 55 Pac. 783.

[4] On the merits of the case we think the verdict was correct. There was testimony from which the jury might well infer that the entire transaction, which resulted in the payment of the \$14,000, was actually conceived and initiated by Joseph Sockolov himself. If that be not true, there is ample support in the evidence for the conclusion that the scheme was undertaken by Mrs. Sockolov with her husband's full knowledge, acquiescence, and consent, and was, in effect, a transaction of the husband conducted in the wife's name. Whether the profit accruing from the purchase and sale of the hotel company stock was separate or community property was a matter to be determined from the mode in which the property was acquired. *Estate of Granniss*, 142 Cal. 1, 4, 75 Pac. 324. Any presumption arising in favor of the appellant Rose Sockolov, from the nature of the transaction, that the stock purchased from the hotel company, and the profit on the investment, constituted separate property, was but a rebuttable presumption, to be disputed, and overthrown by other evidence in the case. Whether or not it was dispelled and overcome by other testimony was a question the solution of which rested solely with the jury. *Volquards v. Myers*, 23 Cal. App. 500, 504, 138 Pac. 963. The weight to be given to the testimony of the two defendants, that Sockolov said to his wife that, if she "got something" out of the transaction with the Hooper Company, she might "keep it" herself, was also a matter for the jury to determine. From the facts and circumstances laid before it, the jury has determined that the \$14,000 accruing as profit in the transaction with the C. A. Hooper Company was not the separate property of Mrs. Sockolov. Consequently it was community property of the appellants, and, by reason of the insolvency proceedings, became a part of the bankrupt husband's estate, which the respondent, as trustee in bankruptcy, had the right to recover.

[5] Appellants assert that the trial court erred in refusing to give certain instructions. The objections are stated without citation of authority, or argument. Points so presented will not be considered. What we have already said disposes of all other contentions made in support of the appeal.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

55 Cal. App. 17

HOOPER v. LOS ANGELES VALVE & FITTING CO. (Civ. 3758.)

(District Court of Appeal, Second District, Division 1, California. Nov. 1, 1921. As Modified, Nov. 5, 1921.)

1. Landlord and tenant ⇐201—Appraisal agreement held to require appraisers to hear evidence.

Under a contract appointing appraisers "to fix a time for hearing proofs" by the parties of the value of the property as a basis for determining the rent, and providing that "when said appraisers hear the evidence" their agreement should be binding, etc., it was the intention of the parties, not that the appraisers should fix the value on their opinion, but that they should afford the parties an opportunity to offer evidence.

2. Trial ⇐396(2)—Findings held unresponsive to issue as to whether party to agreement had notice of hearing or was given opportunity to present evidence.

In an action to set aside an award and appraisal as to rent on the ground plaintiff was not notified of meetings and had no opportunity to be present to present evidence, findings of the court that the appraisers met and received and considered evidence submitted by the parties *held* not responsive; there being nothing in the findings showing that notice was given plaintiff of time fixed for such hearing, or that she was afforded an opportunity to present evidence.

3. Landlord and tenant ⇐201—Findings that appraisers received and considered evidence held not supported by evidence.

In an action to set aside an award and appraisal on the ground plaintiff was not notified of the time fixed for meetings of the appraisers and was given no opportunity to present evidence, the court's findings that the appraisers met and received and considered evidence submitted by the parties *held* not supported by the evidence.

4. Appeal and error ⇐1071(1)—Error in findings that appraisers heard evidence not harmless because court in action to set aside award heard evidence.

Where the parties to a lease agreed to the appointment of appraisers "to fix a time for hearing proofs" by the parties of the value of the property, as a basis for the determination of the rent, and that, "when said appraisers hear the evidence," their agreement should be binding on the parties, error in the court's findings, in an action to set aside the appraisers' award, that they met and received and considered evidence, was not rendered harmless because the court heard testimony, even though the lease itself provided for the appointment of appraisers to fix the valuation in accordance with their own opinion and judgment, without taking evidence, where the court found merely that the sum fixed by the appraisers was a fair, just, and equitable valuation; the parties, having agreed on a method of ascertaining the value, being bound thereby and not entitled

in lieu thereof to maintain an action to have the court fix the value.

5. Landlord and tenant — 201—Under lease held that appraisers could fix value without notice of hearing or receiving parties' evidence.

Under a lease providing for the ascertainment of the value of the property, as a basis for determining the rent, by appraisers, who, if they could not agree, should select a third, the decision of the majority of whom should rule, the appraisers may fix the value in accordance with their own opinion and judgment, without notice of the hearing and without affording to either party the privilege of offering evidence.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Jennie B. Hooper against the Los Angeles Valve & Fitting Company. Judgment for defendant, and plaintiff appeals. Reversed.

Scarborough & Bowen, of Los Angeles, for appellant.

Wm. B. Ogden, of Los Angeles, for respondent.

SHAW, J. Defendant, as a tenant of plaintiff under a lease, occupied a tract of land upon an agreement to pay in quarterly installments as rental therefor, during a period of five years from January 1, 1917, a sum equivalent to 5 per cent. of its appraised value. For the purpose of having such value determined, the parties, on January 2, 1917, executed a contract wherein, after reciting the execution of the lease under which defendant held possession of the property and the fact that it provided for an appraisement to be made, it was agreed that—

"Whereas said parties are desirous of appointing appraisers to make the appraisement provided for under the terms of said lease: Now, therefore, it is agreed that the lessors have and do hereby appoint Guy S. Garner as appraiser for the lessors, and Leo V. Youngworth as appraiser for the lessee under said lease, and they are hereby empowered to proceed to fix a time for hearing proofs by the respective parties in accordance with said lease as to the value of the property covered by the same, and when said appraisers hear the evidence produced by the respective parties hereto, if they can agree upon the value of said property, their agreement shall be binding upon, and the parties hereto agree to abide by the same. If, however, they cannot agree, then they are to select a third appraiser, as in said lease provided, and the decision of two of said appraisers shall be binding upon the parties hereto."

The two appraisers named in the contract were unable to agree upon a valuation of the property, and thereupon they, as authorized to do, appointed H. J. Lelande as a third appraiser; and thereafter Lelande and Young-

worth, under date of April 11, 1917, joined in an appraisement of the land at the sum of \$35,531.25. This action was brought to annul and set aside the award and appraisement so made and to have the court fix the value of the land in question; the ground therefor being that in the consideration and determination of the question submitted to the appraisers no meetings were held upon any notice to plaintiff thereof and no opportunity was given her to be present at any hearing of the matter submitted for determination, nor was she given an opportunity to present any testimony or evidence to any of them at any time, at a meeting or otherwise, touching the question as to the value of said property.

Upon trial of the case the court made findings upon which, as a conclusion of law, it found that plaintiff was not entitled to any relief, and entered judgment in favor of defendant, from which plaintiff has appealed.

[1] The submission was made upon terms and conditions contained in the instrument wherein Garner and Youngworth were appointed as appraisers. It was clearly the intent of the parties, as expressed therein, that the two persons named should fix a time for the hearing of proof submitted by plaintiff and defendant touching the value of the property, which implied that notice should be given of the time when and place where such meeting would be held for such purpose in order that they might be present and present such evidence as they deemed proper. The lease in express terms provided that—

"When said appraisers hear the evidence produced by the respective parties hereto, if they can agree upon the value of said property, their agreement shall be binding upon, and the parties hereto agree to be bound by, the same. If, however, they cannot agree, then they are to select a third appraiser, * * * and the decision of two of said appraisers shall be binding upon the parties hereto."

Under this provision it was clearly the duty of Garner and Youngworth, and as a prerequisite condition of appointing a third appraiser, to hear the evidence produced by the parties, and, if upon a consideration thereof they were unable to agree, to then appoint a third appraiser. They were not authorized to make such appointment in the absence of a hearing, with notice to the parties, thus giving them an opportunity to submit evidence as to the value of the property, and if upon such evidence, if any, so submitted, they were unable to agree, they were authorized to appoint a third appraiser, after which, as provided by the agreement, the three appraisers, or at least a majority of them, should have fixed a time and place, with notice thereof given to the parties, for a hearing at which evidence might be produced, upon a consideration of which the

value of the property should be fixed. As we construe the agreement, it was not the intent of the parties, as expressed therein, that the appraisers should fix the value in accordance with their own opinion and judgment. (*M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839), but that they should "afford the parties a hearing, and an opportunity to offer evidence." *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

[2] Upon this question the court found:

"That it is not true that neither said Garner nor said Youngworth prior to the appointment of said Harry J. Lelande failed or refused to meet for the purpose of fixing said valuation, or failed to receive and consider evidence submitted by the respective parties, but that, on the contrary, said Garner and said Youngworth did meet for the purpose of fixing said valuation and did receive and consider evidence submitted by the respective parties."

And further found:

"That it is not true that at no time did said Garner nor said Youngworth nor said Lelande, or all or any of them, meet for the purpose of hearing or considering evidence for the purpose of fixing the value of said property, but, on the contrary, said meetings were so held for the said purpose; * * * that in fixing said valuation said appraisers considered the evidence as to values submitted by the respective parties."

[3] Appellant not only challenges the findings so made for the reason that they are not responsive to the issue, but claims that if so construed they are not justified by the evidence. In our opinion, both contentions should be sustained. There is nothing in the findings showing that notice was ever at any time given to plaintiff of the time fixed for the hearing or that she was afforded an opportunity to present evidence as to the value of the property. Indeed, the findings are wholly consistent with the fact that the hearings were had in the absence of plaintiff, or any opportunity given her to be present or to present any testimony or evidence in opposition to that offered by defendant.

The testimony of Mr. Garner is that on March 19th, after a number of futile efforts on the part of himself and Mr. Youngworth, the latter said to him that "he didn't want a meeting to hear testimony and wanted to have a third appraiser appointed"; and that he and Mr. Youngworth never at any time held a meeting to take testimony relative to the value of the property; that upon Mr. Youngworth's statement that he did not need any testimony, he (Garner) insisted upon having a third appraiser appointed and then have a meeting at which the parties, if they desired, might ask any questions of the witnesses testifying. The testimony of plaintiff is that she was not present or represented at any meeting, and, although she requested that she be permitted to present evidence as

to the value of the property, she was denied opportunity so to do and never had notice of any meeting called for that purpose either before or after appointment of the third appraiser. The testimony of Mr. Youngworth is that he visited the property and made inquiries of a number of persons as to the value of the same, and reported the result of his investigation and exchanged notes with the other appraisers. This was before the appointment of Lelande, after whose appointment it was agreed by himself and Garner that each of them should furnish Lelande with the data which they had and each present to him his side of the case. He further testified that, while they held meetings, no witnesses were examined and nothing considered except statements as to the data obtained by their personal investigations; that he was uncertain as to whether notice of any meeting was given to plaintiff, but "inclined to believe we agreed we would communicate with our principals and keep them advised of our proceedings. * * * I wouldn't say that positively, but I think that was the case." Lelande's testimony is to the effect that the plaintiff and defendant were never present at any hearing by the three appraisers; that the recital in the award to the effect that the referees proceeded to hear the testimony of the respective parties relative to the value of the property is not true, in that no testimony was taken; that Youngworth and Garner left the matter entirely in his hands; and while it appears that he met and talked with them casually in regard to the matter, no meetings were held after his appointment of which notice was given to either party and an opportunity afforded for presenting evidence. Other than as to proceedings had and taken in appraising the property in January, 1912, which, of course, furnished no rule as to the value of the property five years later, there is no evidence on the part of defendant controverting that quoted. The findings are not only insufficient, but, as made, they are not supported by the evidence.

[4] Conceding this to be true, respondent insists that the error is harmless, for the reason that the court heard testimony touching the question and upon which it fixed the value independently of any action on the part of the appraisers. While it appears that the court did hear evidence as to the value of the property, there is nothing in the findings responsive to such issue, other than a finding by the court to the effect that "said sum of \$35,331.25 so fixed by said appraisers was a fair, just, and equitable valuation, and was the value of the property on said date." Conceding that the lease provided for the appointment of appraisers who should fix the value of the property in accordance with their own opinion and judgment, without taking evidence, such provision was, by mu-

tual consent of the parties, modified by the contract wherein they determined upon the method therein provided. Having agreed upon such method of ascertaining the value, the parties, in the absence of an annulment of the contract, or facts relieving them from its operation, such as that the appraisers so appointed refuse to act, were bound thereby and were not entitled, in lieu of such method, to which they had thus given their solemn assent, to maintain an action to have the court fix the value of the property.

[5] If the appraisers refuse to act, then, since the contract is rendered inoperative, the clause in the lease, in the absence of any modification thereof, as here, by mutual agreement prescribes the method for ascertaining the value of the property, viz., "by appraisers selected, one by the lessor and one by the lessee, and if those two cannot agree, they two to select a third, and the decision of the majority shall rule." Under this provision, if not modified, the appraisers, if appointed thereunder, are authorized to fix the value in accordance with their own opinion and judgment, without notice of the hearing and without, unless they so choose, according to either party the privilege of offering evidence upon the question.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

55 Cal. App. 86

NEWELL v. REDONDO WATER CO.
(Civ. 4037.)

(District Court of Appeal, First District, Division 2, California. Nov. 5, 1921. Hearing Denied by Supreme Court Jan. 3, 1922.)

1. Waters and water courses ☞201—Company held not to have dedicated all its water to public use.

Where a company engaged in subdividing, platting, and selling lands in a town site and constructing a system of waterworks furnished water free to persons to whom it contracted to so do in consideration of a conveyance and also to a hotel, flower garden, railway station, and offices owned by itself, the water being furnished from the same system, it had not dedicated all its water to public use.

2. Dedication ☞41—Dedication to public use not presumed.

A dedication of a system of waterworks to the public use is not to be presumed.

3. Waters and water courses ☞201—Dedication held subject to rights under contract.

Where owners of land agreed to sell it for purposes of subdivision on condition that six lots should be reserved to the owners, and that they should be entitled to water for domestic purposes free of charge from any waterworks erected on the premises, and the land was sub-

sequently conveyed by the owners to the purchaser by a deed reciting that they had agreed to convey on certain conditions, any subsequent dedication of the purchasers' water system to the public use was made subject to the terms of the contract.

4. Waters and water courses ☞201—Owner may dedicate part of water supply to public use.

The owner of a water supply can dedicate part of its plant to public use and reserve the remainder for private purposes or private sale.

5. Waters and water courses ☞156(4)—Covenant to furnish water free of charge on lots reserved by vendor held to create easement.

Where purchasers of land for purposes of subdivision agreed that the seller should be entitled to water for domestic purposes free of charge, on lots reserved by them, and the subsequent conveyance of the property provided that it was in fulfillment of an agreement to convey on certain conditions, and the purchasers installed service pipes to such lots and furnished water free of charge for more than 24 years, an easement was created.

6. Waters and water courses ☞156(1)—Contract to furnish water free of charge to vendor on lots reserved held not illegal.

Where purchasers of land for purposes of subdivision agreed to furnish water free of charge to lots reserved by the sellers, and when a deed referring to this agreement was subsequently made the purchaser was using a portion of its water supply on its own property and had reserved an easement in the public streets for that purpose, the contract was valid, and not contrary to law.

7. Evidence ☞444(4)—Contract referring to conveyance may be examined to ascertain conditions.

While a contract to convey, when followed by a conveyance, is merged into the conveyance, which becomes the measure of the rights of the parties, when the conveyance makes special reference to the conditions of the contract and recites that it is made for the purpose of fulfilling the same, it is proper to examine the contract to see what conditions are referred to.

8. Evidence ☞461(2)—Contract of sale held admissible to show intention of parties to deed.

Where a contract for the sale of land for purposes of subdivision provided that the vendor should be entitled to water for domestic purposes for lots reserved by them, and the deed subsequently made provided that it was in fulfillment of an agreement to convey on "certain conditions," the contract was admissible to show the intention of the parties as to the conditions on which the conveyance was made.

9. Evidence ☞461(2)—Subsequent deeds held admissible to show construction by parties.

In a suit to establish a right to water free of charge under a contract of sale providing for the furnishing of water to lots reserved by the vendors, and a subsequent deed providing that it was in fulfillment of an agreement to

convey on "certain conditions," subsequent deeds conveying the lots reserved to the vendors and reciting that the conveyance included water rights for domestic purposes free of charge was admissible to show the construction placed on the first deed.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. B. Newell against the Redondo Water Company. From a judgment for defendant, plaintiff appeals. Reversed.

Porter & Sutton, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued in equity to have it adjudged that he was entitled to receive from the defendant, a public service corporation, water for domestic purposes, free of charge, to be used on two certain lots of land in the city of Redondo Beach. The complaint and the amendment thereto alleges that on August 5, 1887, three sisters by the name of Dominguez, owners of a tract of 1,000 acres, situated in what is now Redondo Beach, entered into an agreement with two parties by the name of Silent and McFarland to sell the land to them for the purpose of subdividing, platting, and offering the land for sale to the public. One of the conditions of the agreement was that 6 acres in one-acre lots should be reserved to the owners, which "shall be entitled to water for domestic purposes (not to exceed one residence for each acre lot) free of charge from any waterworks which may be erected upon said premises." This agreement was duly recorded and thereafter, on September 29, 1890, the said owners conveyed the land to the Redondo Beach Company, the assignees of Silent and McFarland, "in fulfillment of an agreement entered into on the 5th day of August, 1887, * * * whereby the parties of the first part to said agreement agreed to convey upon certain conditions" the land described.

Following this deed and on June 10, 1891, the Redondo Beach Company conveyed back to one of the original owners and her husband two separate tracts which she had selected under her reservation in the contract. This deed expressly recited that it included "two water rights for domestic purposes free of charge." Similar deeds were made to the other sisters or their representatives, one in November, 1890, and the other in July, 1892. Plaintiff is the successor in interest of Susana D. Dominguez de del Amo under the deed of June 10, 1891, above mentioned.

The parties stipulated that the Redondo Beach Company entered into possession of the premises under its deed of 1890, recorded a map of the town site it had laid out, sold lots therein, and commenced the development

of a water supply with which it furnished water to the lot owners. In February, 1899, the company sold its property to the Redondo Improvement Company, which in September, 1908, conveyed to the defendant Redondo Water Company. The complaint alleges, and it is not denied, that shortly after the conveyance of June, 1891, the defendant's predecessor, the Redondo Beach Company, installed two service pipes, one running to each of the two tracts conveyed by said deed. The parties stipulated that from that date until November, 1915, said company and its successors continuously furnished water free of charge to said premises; that the use of such water by plaintiff and his predecessors was open, notorious, peaceable, adverse and under claim of right; and that in November, 1915, the defendant shut off the water from said premises and refused to furnish any water for use on the premises unless plaintiff paid therefor the rates established by the State Railroad Commission.

There is no controversy as to the facts related above, but the defendant, by its answer and by objections made at the trial, put in issue the relevancy and legal effect of the agreement of 1887 and the subsequent reconveyances to the original owners. It was also alleged in the answer that prior to the date of the deed to plaintiff's predecessor the defendant was a public utility corporation and had dedicated all its water system to the public. The real issue between the parties is whether plaintiff has obtained the right to have water delivered to him free of charge, or whether he must pay the rates fixed by the Railroad Commission to be charged the customers of the defendant company.

The case was tried on an agreed statement of facts and upon additional evidence offered by plaintiff in support of the amendment to his complaint. Judgment went for defendant and plaintiff appeals.

[1-4] The trial court found that prior to the year 1891 the Redondo Beach Company constructed a system of waterworks in the town site (now city) of Redondo Beach, and that all its property used in connection with the water supply was devoted and dedicated to public use in the supplying of water to the inhabitants of said town site as a public utility. This finding is not supported by the evidence, which is that during all this time the company also furnished water to appellant and his predecessors free of charge and also to the hotel, flower garden, railway station, and offices owned by itself and successor. By the agreed statement of facts it is admitted this water was so furnished from the same system, and it necessarily follows that the company had not dedicated all the water to the public use. In fact, the evidence does not show when any of the system was dedicated to public use. Such dedication

is not to be presumed. *Allen v. Railroad Commission*, 179 Cal. 6885, 175 Pac. 466, 3 A. L. R. 249. It is clear that no dedication was made until after the deed to the company in 1890 which referred to the agreement of 1887. By this agreement the owners retained the right to select six lots with perpetual water rights after the company platted the entire tract. Any dedication to the public was made subject to the terms of that contract. In recognition of this obligation and to make certain its right to continue the private distribution of water, the company, in dedicating its town site, expressly reserved the right to lay water pipes in the public streets—a reservation which would have been unnecessary if the entire water system had been dedicated to public use. That the owner of a water supply can dedicate part of its plant to public use and reserve the remainder for private purposes or private sale has been settled by the decisions. *Del Mar Water, etc., Co. v. Eshleman*, 167 Cal. 666, 681, 140 Pac. 591, 948; *Allen v. Railroad Commission*, 179 Cal. 68, 82, 175 Pac. 466, 3 A. L. R. 249.

[5] Appellant attacks the finding that he is not the owner of any easement or right to be supplied with water as not supported by the evidence. The finding covers the main issues raised under appellant's theory of the case. It is alleged in the complaint, and not denied, that in 1891 the Redondo Beach Company conveyed the lots of land to appellant's predecessor, and that shortly after said deed was made the grantor installed two service pipes, one running to each of said lots, through which water was furnished to appellant and his predecessors free of charge for more than 24 years. The parties stipulated that throughout that period this water was furnished appellant and his predecessors free of charge, and that it was so used on the premises openly, notoriously, peaceably, and uninterruptedly. It was also stipulated that the principal business of the Redondo Beach Company was "subdividing, improving, and selling" its lands in the town site. Now a transfer of real property containing a covenant to furnish water free to the land conveyed creates an easement in favor of the grantee upon the land and upon the water system of the grantor. *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 724, 93 Pac. 858, 15 L. R. A. (N. S.) 359; *Palermo L. & W. Co. v. Railroad Commission*, 173 Cal. 380, 386, 160 Pac. 228; *Allen v. Railroad Commission*, 179 Cal. 68, 73, 175 Pac. 466, 3 A. L. R. 249. Unless therefore, the Redondo Beach Company was prohibited by law from making the grant, it would necessarily follow that an easement was created which has come down to appellant.

[6] In this connection respondent argues that the Redondo Beach Company could not create an easement, because it was a public

utility corporation and, as such, was required to serve all consumers of water on equal terms. Putting it in another way, the argument is that, if the corporation at the time of entering into the contract was a public service corporation, the contract was subject to modification at the instance of the Railroad Commission. *S. P. Co. v. Spring Valley Water Co.*, 173 Cal. 291, 298, 159 Pac. 865, L. R. A. 1917E, 680; *Limtoneira Co. v. Railroad Commission*, 174 Cal. 232, 238, 162 Pac. 1033. This proposition is sound when applied to a public utility which has dedicated its entire plant to the service of the public. *Allen v. Railroad Commission*, 179 Cal. 68, 80, 175 Pac. 466, 3 A. L. R. 249. But the rule has never been applied to a land-selling corporation which furnishes water to some of its grantees as an incident to its main business, reserving a portion of its supply for private use or sale. It is undisputed that when the deed was made the company was using a portion of its water supply upon its own property and had reserved an easement in the public streets for that purpose. There was nothing to prevent it from making a valid contract to divert a portion of such water to private sale or to free distribution. Thus the contract was good when made and the easement attached as of that date.

[7, 8] The only other point requiring consideration is the question of the admissibility of the evidence of the contract of 1887 and the subsequent deeds to the original owners. This evidence was offered for the purpose of showing the ambiguity in the deed of 1890, which recited that it was made in fulfillment of the contract of 1887 by which the grantors agreed to convey "upon certain conditions." It is true that when a contract to convey is followed by a conveyance the terms of the contract are merged into the conveyance and the latter becomes the measure of the rights of the parties. *Bryan v. Swain*, 56 Cal. 616, 617. But, when the conveyance makes special reference to the conditions of the contract and recites that it is made for the purpose of fulfilling the same, it is proper to examine the contract to see what conditions are referred to. But in any event the contract gave the right to select the lots after the land had been deeded to the company and platted for sale. This contract was valid when made because the company was not then a public utility. The subsequent deeds to the original owners were merely evidence of the company's recognition of its contractual obligation. The original contract was admissible to show the intention of the parties.

[9] The evidence relating to the execution of the deeds to the sisters of appellant's predecessor was of importance for the purpose of showing that the construction placed upon the deed of 1890 by respondent was the same

as that contended for by appellant and acquiesced in for more than 24 years. This evidence might properly have been received. Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

55 Cal. App. 50

GASH v. HAMMER et al. (Civ. 3773.)

(District Court of Appeal, First District, Division 1. California. Nov. 2, 1921.)

1. Evidence ⇐450(8)—Contract held ambiguous so as to authorize evidence as to variety sold.

Where a contract for the sale of cranberry beans, though it did not use the precise phrase "California cranberry beans," referred to such beans when read as a whole, and there was evidence that there were two varieties of beans grown in California, one of which was definitely known in the market as the California cranberry bean, the contract was ambiguous, and parol evidence was admissible to show that the variety known in the market was the one intended.

2. Customs and usages ⇐10—Contract held governed by New York custom.

A contract for the sale of California cranberry beans executed in New York, to be performed by the seller by delivery of the beans to ship in California, and by the buyer by payment of draft with bill of lading attached in New York, was to be performed in New York, so that evidence as to the kind of bean understood in the New York market by the term used in the contract was admissible to explain the contract's meaning.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Abraham Gash against Frank G. Hammer and another, copartners doing business under the firm name and style of Hammer & Co., to recover damages for breach of contract. Judgment for the plaintiff, and defendants appeal. Affirmed.

F. M. Parcels, of San Francisco, for appellants.

Robert B. Gaylord, of San Francisco, for respondent.

RICHARDS, J. This action is one in which the plaintiff seeks to recover the sum of \$1,610, damages for the alleged breach of a written contract between the parties hereto for the sale and delivery by the defendants to plaintiff of a carload of California cranberry beans. The complaint alleges that on the 2d day of August, 1913, at the city of New York, the plaintiff and the defendants entered into a written contract whereby said defendants agreed to sell and deliver and said plaintiff agreed to purchase a car-

load containing 40,000 pounds of new crop choice re-cleaned California cranberry beans at a price of \$4.25 net per 100 pounds delivered free on board steamer at San Francisco, Cal., to be shipped thence to New York and to be paid for by drafts at 10 days' sight; that prior to the time of arrival of said beans at New York and prior to the time when said plaintiff could have had an opportunity to examine said beans the draft for their purchase price arrived and was paid by the plaintiff; that when said consignment of beans arrived at New York in the month of December, 1913, and were examined by plaintiff, it was found that said beans were not of the kind and quality called for in said contract, but were in fact Manchurian beans of inferior quality. Plaintiff therefore rejected the same, and notified defendants of such rejection, and demanded that the controversy thus arising between the parties be settled by arbitration as in said agreement provided, but the said defendants have refused to arbitrate said controversy or to respond to the demand of plaintiff for reimbursement of the damages sustained by the defendants' breach of their agreement.

The defendants in their answer expressly admitted the truth of the paragraph in the plaintiff's complaint wherein it was alleged that the defendants agreed to sell and deliver to said plaintiff a carload containing about 40,000 pounds of California cranberry beans; but they denied the breach of said agreement, and, on the other hand, alleged that in the month of December, 1913, they shipped to the plaintiff one carload of Manchurian beans, which were choice, re-cleaned cranberry beans grown in California, and were both of the quality and variety specified and called for in said contract and were in merchantable condition. The defendants further denied that they refused to arbitrate any controversy between themselves and the plaintiff as to the kind or quality of said beans, and denied that the plaintiff suffered any damages whatsoever.

The cause came to trial upon the issues thus presented, and upon its submission the trial court made and filed its findings of fact, wherein it was found that all of the allegations of the plaintiff's complaint as to the making, terms, and breach of the contract in question were true. Upon the question of damages the court found that the plaintiff was entitled to recover the sum of \$1,395.91, with interest thereon from January 31, 1914, to date, and accordingly rendered judgment for the aggregate sum of \$2,037.80. The defendants prosecute this appeal from said judgment.

The sum of the contentions of the appellants herein is that the evidence does not sustain the findings of the trial court as to any breach on their part of the contract in question.

This contention is based upon the proposition that by the terms of their said contract they were not required to deliver to the plaintiff beans of any other kind or quality than cranberry beans grown in California, and that the so-called Manchurian beans so delivered by them in fulfillment of their said contract were cranberry beans grown in California of the merchantable quality required by their said contract.

Much evidence was adduced upon the trial upon the question as to what was meant by the term "California cranberry beans," which, according to the averments of the complaint and admissions of the answer, the defendants had agreed to sell and deliver. A fair résumé of this evidence shows the following to be the facts upon which the findings of the trial court were based: For some years prior to the year 1913 there had been grown in California a species of cranberry beans the seed of which had originally come from Italy, where the bean was known as Italian or Roman bean. This type of bean had improved under cultivation in California and had acquired an established reputation in the New York market under the name of "California cranberry bean." During the seeding season of 1912-1913 in California growers had found it difficult to procure the seed of this particular species of bean, and accordingly one George Shima, a California bean grower upon a large scale, had imported from Manchuria seed of a cranberry bean known as the Manchurian bean, and had grown therefrom extensively and during the growing season of 1913 cranberry beans, which he in turn had transferred to the defendants herein for sale in the Eastern market. These Manchurian cranberry beans are a smaller, rounder bean than the California cranberry bean developed from the Italian stock. It is unquestioned that, if the contract between the parties hereto contemplated by its terms the sale and delivery of the particular kind and quality of bean known as "California cranberry beans," it was breached by the defendants in their attempt to supply the plaintiff with Manchurian cranberry beans, even though the particular lot transmitted to the plaintiff had been grown in California.

Upon the trial of the cause, the plaintiff in the first instance relied upon the express averments of his complaint to the effect that the defendants had contracted to sell and deliver to him California cranberry beans and upon the defendants' express admission of the truth of said averment. He therefore objected to the admission in evidence of the contract itself upon the ground that it responded to no issue in the case. The contract, however, was admitted in evidence. When its terms are examined, it is disclosed that in the main body of the contract it is recited that the buyer has bought and the seller sold "the qualities and varieties of

California beans * * * named on reverse side." On the reverse side of the contract, under the heading "Description," are these words: "One carload new crop re-cleaned cranberry beans." It thus appears that the specific phrase "California Cranberry beans" is not used in the contract; and the defendants therefore upon the trial urged that they were only bound under said contract to furnish the plaintiff with any species of cranberry bean grown in California, and that the Manchurian beans grown by said Shima in California during the year 1913 sufficiently responded to the requirements of said contract. The plaintiff thereupon offered certain evidence in explanation of the terms of said contract tending to show that the only California-grown cranberry bean known to the New York market prior to or during the year 1913 was the "California cranberry bean" of Italian origin, and that hence the plaintiff must be held to have contracted with reference to this particular kind and quality of bean. The defendants objected to this evidence upon the ground that it was inadmissible to explain the meaning of the contract, which was already sufficiently clear. The trial court admitted this evidence, and in accordance therewith gave to the contract the interpretation of which the appellants complain.

[1] We are of the opinion that in so doing the trial court committed no error; for, while it is true that the contract between the parties does not contain the precise phrase "California cranberry bean," it does refer when read as a whole to a California cranberry bean; and since it had appeared in evidence that there were two varieties of beans being grown in California during 1913, one of which was definitely known to the eastern market as the "California cranberry bean," the contract was thereby rendered uncertain as to which particular variety of cranberry bean was within the intentment of the parties to this contract at the time and place when it was made. This being so, the court was entitled to have recourse to oral evidence to clear up this uncertainty.

[2] The appellants, however, contend that the evidence which the plaintiff offered under this ruling of the court was inadmissible for the further reason that it only purported to show what kind of bean was known to the New York market and to the plaintiff herein as a California cranberry bean, and that this evidence was immaterial and inadmissible, since the contract must be interpreted by the knowledge and usage of the place where it was to be performed, which they contend was California.

We cannot agree with this latter contention. The contract was made in New York and was to be performed there on the plaintiff's part when, upon his receipt thereof of the shipping documents, he was to honor the draft drawn upon him for the purchase price.

The mere fact that the carload of beans was to be placed upon the steamer at San Francisco does not of itself show that the contract was to be there performed, since the defendants retained full control of the shipping documents until such time as they were presented with the draft on the buyer in New York and were to be delivered upon the payment of said draft. The latter place was therefore the place where this contract was to be performed; and, this being so, the trial court was entitled to take the offered evidence for the purpose of relieving said contract of its uncertainty and of carrying into effect the intentment of the parties as explained by the knowledge and usages of the place where said contract was both made and to be performed.

No other material questions being presented upon this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 744

JONES v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3962.)

(District Court of Appeal, First District, Division 2, California. Oct. 31, 1921. Hearing Denied by Supreme Court Dec. 29, 1921.)

1. Damages ⇨130(3)—Verdict for \$405, in excess of lost earnings and expenditures, for injuries to back, head, and elbow, not excessive.

Where a woman 73 years old, whose back, head, and right elbow were injured as she was alighting from a street car, was under a physician's care for several weeks, and confined to her bed for two months, suffered intensely from pain in her back and head, and was unable to walk without staggering, or to do any work, unable to sleep, had lost her appetite, and had given up hope of permanent recovery, a verdict for \$2,500, of which \$2,095 represented actual loss of earnings and nurse's and physician's bills, was not excessive.

2. Carriers ⇨303(5)—Passenger in act of alighting entitled to assume she would be given reasonable time.

Where a street car conductor signaled the car to stop, and it was at a complete standstill, and plaintiff's daughter had alighted and was waiting to assist her, and plaintiff was in the act of stepping from the car, she had a right to assume that a reasonable time would be given her to alight, and that the conductor before starting the car would see that no passenger was alighting, though she had not notified the conductor of her intention to alight.

3. Trial ⇨191(9)—Instruction, assuming passenger started to alight after signal to start, properly refused.

Where plaintiff and several other witnesses, including a number of disinterested witnesses, testified that plaintiff had started to get off

a street car before the conductor gave the signal to start, and the conductor testified merely that everything was clear, and that he did not see plaintiff in the act of alighting, an instruction, assuming that plaintiff started to get off the car after the signal to go ahead was given, was properly refused.

4. Appeal and error ⇨1064(2)—Instruction, erroneously assuming plaintiff was one of the passengers for whom the conductor stopped car, held not prejudicial.

Though an instruction, that it was the duty of a common carrier, after stopping its car to enable passengers to alight, to know before starting the car whether "such passengers" were in a position to be injured by the starting of the car, and that it would be negligence to start the car suddenly and injure a passenger, was open to some criticism, where the passenger injured was not one of those for whom the conductor stopped the car, the error was not prejudicial.

5. Carriers ⇨303(5) — Conductor bound to see that passenger is not in act of alighting, though car stopped for another passenger.

It is the duty of a street car conductor, after stopping the car to enable a passenger to alight, to know before starting the car again, not only that the passenger upon whose signal the car was stopped is not in the act of alighting, but also to know that no other passenger who may rely upon the signal to stop is in the act of alighting.

6. Carriers ⇨280(1)—Bound to exercise highest degree of care.

A carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by ordinary care.

7. Carriers ⇨316(1)—Presumption of negligence from injury caused in operation of instrumentalities.

When it is shown that an injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in its business, there is a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without any negligence on its part.

8. Damages ⇨216(10)—Instruction construed as authorizing recovery for past mental suffering due to apprehension of future disability.

An instruction that, if the jury should find that by reason of plaintiff's injuries she had, since receiving them, and still did in good faith, suffer from the reasonable apprehension that she would in the future be permanently disabled as the natural and proximate result of such injuries, then such apprehended disability was an element of damages, though ambiguous, fairly meant that there might be a recovery for the mental suffering endured by plaintiff up to the time of the trial due to her reasonable apprehension of permanent disability proximately resulting from the accident.

9. Damages ⚖️53—**Mental suffering due to reasonable apprehension of future disability is proper element.**

In an action for personal injuries, plaintiff's mental suffering up to the time of the trial, caused by her reasonable apprehension of permanent disability, is a proper element of damage, where the apprehension and the consequent mental suffering is a direct and proximate result of the injury, notwithstanding Civ. Code, § 2283, relative to future damages.

10. Appeal and error ⚖️1068(4)—**Instruction as to damages, if erroneous, held harmless in view of the verdict.**

An instruction, allowing a recovery for plaintiff's mental suffering due to her reasonable apprehension of permanent disability from the injuries sued for, if erroneous, was harmless under Const. art. 6, § 4½, where the jury allowed only about \$400 for plaintiff's mental and physical suffering, nervous and helpless condition, loss of sleep and appetite, loss of capacity to attend to her household duties, or walk about unaided during a period of a year and a half between the accident and the trial, and for her loss or impairment of earning power in the future.

Sturtevant, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Eliza Jones against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott and K. W. Cannon, both of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

William P. Hubbard, of San Francisco, for respondent.

LANGDON, P. J. This is an action for damages for personal injuries alleged to have been caused by defendant in negligently starting one of its cars after the car had stopped to allow passengers to alight therefrom. By the verdict of a jury, plaintiff was awarded \$2,500 damages, and from the judgment rendered thereon, the defendant appeals.

Appellant excepts to certain instructions given and to the refusal of the court to give others offered, and also contends that the damages are excessive.

Plaintiff is 73 years of age and at the time of the accident was a seamstress, earning \$25 to \$30 a week. She lived with her married daughter, Mrs. Holman, on Hyde street near Clay, in San Francisco. On the afternoon of May 26, 1919, in company with her daughter, she boarded an east-bound Clay street cable car at Sacramento and Fillmore streets. The car had an inclosed section in the middle, with open portions at each end. A long seat on each side of the open section is reached directly from the street by running boards. The open sections of the car have

wooden uprights, to which are attached iron hand bars. Plaintiff took a seat on the left rear portion of the open section, and her daughter sat beside her. Mrs. Holman, immediately before reaching Hyde street, tried to attract the attention of the conductor to inform him that she wished to get off the car at Hyde street, but failed to catch his eye because he was in the front portion of the car. However, the conductor did give the signal to stop and the car came to a complete stop at Hyde street to allow some passengers to get on and others to get off the car. After the car stopped, Mrs. Holman stepped off the car onto the ground, and reached up and took hold of plaintiff's right hand to assist her to alight. With her left hand, plaintiff took hold of the rear stanchion, and raised herself to her feet. She was in the act of stepping down when the car started. The starting of the car caused plaintiff's body to be swung around from this unstable position so that she faced the rear of the car. Her hand or arm caught between the iron hand bar and the wooden stanchion, and thus held, she was dragged across Hyde street, until a jolt of the car loosened her from this position and she fell backward upon the pavement. She was assisted to her residence, which was a short distance from the place where the accident occurred, and was put to bed by her daughter. A physician was called to treat her. For several days she was in a stupor. Her back, head, and right elbow were injured, and she was under a physician's care for several weeks, and was confined to her bed for over two months.

[1] Since the accident, according to plaintiff's testimony, she has suffered intensely from pain in her back and head, from a sensation of wrenching and pulling on the nerves, has been unable to walk even about a room without staggering or to do any work. She has been unable to sleep well, has lost her appetite, and has given up hope of any permanent recovery. Her physicians attributed her condition at the time of the trial to shock and nervous symptoms due to the accident, and expressed the opinion that she would never be much better. Plaintiff testified that prior to the accident, she was in perfect health, and had not required the services of a doctor for 30 years.

Under these facts, we think it cannot be said that the damages are excessive. It is not challenged in the record that plaintiff was earning from \$25 to \$30 a week, immediately prior to the accident, and had been unable to do any work since. The actual loss of money from her business, at the time of the trial, estimated at \$25 a week, amounted to \$1,950, to which must be added the nurse's fee of \$30 and a physician's bill of \$115. Something is allowable for physical and mental suffering out of the \$2,500 judgment.

[2] Three instructions offered by defendant were refused. The gist of two of the instructions so offered is that the carrier is not liable if the passenger does not notify the conductor of her desire to leave the car, nor is it liable if, when the car stops for a reasonable time, the passenger has not previously nor does not then signify to the conductor her intention of alighting, and the conductor does not actually see her in the act of alighting. In the instant case it appears without contradiction that the conductor did give the signal to stop, and that the car was at a complete standstill before plaintiff made any attempt to get off the car. The car being at a standstill, Mrs. Holman having alighted safely and remained standing with her hand outstretched to assist the plaintiff, and plaintiff being in the act of stepping down from the car, she had a right to assume that a reasonable time would be given her to alight, and that the conductor, before starting the car, would see that no passenger was in the act of alighting.

In the case of *Hoffman v. Pacific Electric Co. et al.*, 188 Pac. 597, it is said:

"It is the law in this state that carriers of passengers upon railways owe to such passengers the highest degree of care, and this degree of care would require of such carriers, especially upon street cars operated in cities, that whenever such cars come to a stop, whether at regular stopping places or not, if such points of stoppage are such that passengers might properly and conveniently alight, it would become the duty of those in charge of the car to advise themselves that such passengers were not attempting to alight from their said car at such point of stoppage before again starting the car, and a neglect of this duty would render their principal liable. The following authorities fully support this view: *Carr v. Eel River, etc.*, R. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; *Raub v. Los Angeles, etc., Ry. Co.*, 103 Cal. 473, 37 Pac. 374; *West Chicago St. R. R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958.

It is clear, in the light of the above authorities, that the instructions offered by defendant on this question were improper and were rightly refused. The case of *Dougherty v. Union Traction Co.*, 23 Cal. App. 17, 136 Pac. 722, relied upon by appellant in this connection, is not in point here. It is there stated to be the duty of a passenger "before attempting to leave a moving car or when preparing to do so, to notify the conductor in some proper manner of their desire to alight." In that case, the plaintiff supposed the car was going to stop at the next crossing because it had slackened its speed, and, acting upon this supposition without any warning to the conductor, she moved to a position of peril, and was thrown to the ground by a sudden lurch of the car. It is apparent that the facts in the present case clearly differentiate it from the *Dougherty* Case, supra, and bring it within the rule of the case of *Hoffman v. Pac. Electric Co.*, supra.

[3] The other instruction offered by the defendant assumed a fact not in evidence, viz.: That the plaintiff started to get off the car after the signal was given by the conductor to go ahead. Plaintiff, her daughter, and four apparently disinterested witnesses testified that plaintiff had started to get off the car before the conductor gave the signal to start the car. Nor did the conductor, nor any one else testifying for the defendant, say that the plaintiff started to alight from the car after the signal had been given to start. All the conductor said was that "everything was clear," and that he saw no sign whatever of any other woman than Mrs. Holman rise to get off. There is nothing in the record to warrant the assertion that plaintiff started to leave the car after the conductor had given the signal for the gripman to go ahead.

Appellant contends that because the conductor stated that he did not see the plaintiff in the act of alighting at the time he gave the signal to start the car the jury had a right to infer that plaintiff started to leave the car after the signal was given. In the first place the negation of the conductor is not coextensive with the statements sought to be negated. The clear, positive testimony of several persons was to the effect that the plaintiff started to leave the car while it was at a standstill, and that the car started while she was in the act of alighting. The conductor then testified that he did not see the plaintiff in the act of alighting when he gave the signal to go ahead, non constat that she was not actually in the act of alighting. We are therefore of the opinion that the record does not show a substantial conflict in the evidence upon this question.

[4, 5] Appellant objects to the giving of the following instruction:

"It is the duty of a common carrier, after having stopped its car to enable passengers to alight, to know before starting up the car again whether such passengers in the act of attempting to get off are in a position to be injured by the starting up of the car before such passenger can alight, and it would be negligence to start the car under such circumstances suddenly, and thereby injure the passenger."

An instruction substantially the same as this one was given in the case of *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 82 Pac. 666, and it was approved by our Supreme Court. The difference between the instruction there given and the one above quoted is that in the instruction in the instant case there was added the word "such" before "passengers." Appellant objects to the addition of this word, asserting that in this form the instruction assumes a fact not in evidence; that it does not appear from the record that the conductor stopped the car for the plain-

tiff (such passenger) to alight, but that he stopped the car for another passenger to alight, and that the insertion of the word "such" gives to the instruction the former implication. We think the instruction is open to the criticism made of it—that it does not precisely cover the facts in evidence, but we are nevertheless of the opinion that under the circumstances the error is not prejudicial to the defendant. This is because it is our view that it is the duty of the conductor, after having stopped the car to enable a passenger to alight, to know, before starting the car again, not only that the passenger upon whose signal the car was stopped was not in the act of alighting, but also to know that no other passengers who may also have relied upon this signal to stop are in the act of alighting. *Cody v. Market St. Ry. Co.*, supra; *Hoffman v. Pac. Elec. Co.*, supra. Under either set of facts, the instruction was proper, and the latter set of facts unquestionably existed in the present case. Therefore no prejudice could have resulted to the defendant from the instruction given. Errors not affecting the result are harmless, and are not cause for reversal. *San Jose Elec. R. R. Co. v. Mayne*, 83 Cal. 566, 569, 23 Pac. 522; *Pac. Rolling Mill Co. v. English*, 118 Cal. 123, 130, 50 Pac. 383.

Objection is made to an instruction declaring it to be the duty of a carrier of passengers at its stopping places to stop the car a sufficient length of time to enable passengers desiring to do so to alight therefrom in safety, and to hold the car still during that time; that should the carrier start the car while a passenger is on the steps of the car and in the act of alighting, without giving him sufficient time to alight, and without giving notice or warning to the passenger, whereby the passenger is thrown from the car and injured, then the carrier is guilty of negligence. Appellant contends that the instruction is erroneous in this case because it does not appear that plaintiff notified the conductor that she desired to alight from the car. The objection is not good; it is disposed of by the discussion of this question herein in relation to other instructions. The evidence showed that the car had stopped to allow passengers to alight, and that plaintiff's daughter had alighted and was assisting plaintiff, who was in the act of alighting when the car started. Under such circumstances, defendant was as much obligated to see that plaintiff was not in the act of alighting as it would have been if plaintiff had been the passenger who had actually given the signal to stop. We are unable to see any difference in the obligation upon the carrier between a case where the passenger who has actually given the signal to stop is in the act of alighting and a case where any one of a number of passengers is in the act of alighting at a stopping place,

after the car has stopped upon a signal given by one of their number.

[6, 7] Appellant also objects to the giving of the following instruction:

"The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by ordinary care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in its business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part."

A practically identical instruction was given in the *Cody* Case, supra, and was declared by the Supreme Court to be a proper one. The same rule had been announced previously, in this state, in the case of *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, at page 561 thereof, 55 Pac. 324. Under these circumstances, citations of authority from other jurisdictions are not in point here.

[8, 9] The last assignment of error made by the appellant is with reference to an instruction upon the question of damages. The instruction complained of is:

"If you should find from the evidence that plaintiff has sustained any injuries because of the negligence of defendant and its employees, and should also find from the evidence that by reason of such injuries plaintiff has, since receiving the same, and does now, in good faith, suffer from the reasonable apprehension that she will in the future be permanently disabled as the natural and proximate result of such injuries, then I instruct you that such apprehended disability is an element of damages you may take into consideration in arriving at the amount of your verdict."

While this instruction is not entirely unambiguous, we are of the opinion that its fair meaning, and the meaning which it conveyed to the jury, is, that the mental suffering endured by the plaintiff up to the time of the trial, due to her reasonable apprehension of permanent disability (which reasonable apprehension was the proximate result of the accident), was an element to be considered by the jury in arriving at its verdict. As so construed, the instruction was proper under the principle of law announced in the case of *Boa v. San Francisco-Oakland Terminal Railways*, 182 Cal. 93, 187 Pac. 2, where it is said:

"Unquestionably the physical and mental condition of plaintiff resulting from the accident was material, and mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from her injury was a proper element to be considered by the jury in assessing the damages."

It was further said that the plaintiff had a right to testify as to her belief at the time of

the trial that she would be a permanent invalid.

To the same effect are the cases of *Freiburg v. Israel*, 187 Pac. 130; *Ryan v. Oakland Gas. Co.*, 21 Cal. App. 14, at page 24 et seq., 130 Pac. 693. It is true that in the *Boa Case*, supra, certain requirements are laid down as to the necessity of a causal connection between the reasonable apprehension causing the mental suffering and the injury. We think the facts shown in the present case fully meet that requirement and, furthermore, the instruction complained of declared to the jury that it could only take into consideration these matters if they were the "natural and proximate result of such injuries."

Appellant contends that this instruction is violative of section 3283, Civil Code, and of the well-settled rule that future damages, to be recoverable, must be certain. The contention is without merit. The rule embodied in this instruction, as we construe it, is in harmony with the rule of the *Boa Case*, supra, and with the other cases cited herein upon this question, and as such does not impinge upon the well-settled doctrines invoked by the appellant. Under the instruction, the jury was not permitted to allow damages for any future disability which the plaintiff apprehended; that, of course, could not be done. The jury was merely instructed that it might take into consideration plaintiff's mental suffering up to the time of the trial, which was caused by her reasonable apprehension of being permanently disabled, which apprehension and consequent mental suffering was a direct and proximate result of her injury. This element of damages is no more uncertain and indefinite than in any other case of mental suffering. Mental suffering, like physical suffering, is incapable of exact measurement in dollars and cents, but the jury, nevertheless, may place its estimate upon it. With regard to pain and suffering, the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by the jury as their discretion dictates and as under all the circumstances may be just and proper. *Wiley v. Young*, 178 Cal. 686, 174 Pac. 316; *Rystinki v. Central Cal. T. Co.*, 175 Cal. 336, 165 Pac. 952.

We shall consider briefly the authorities cited by the appellant on this question: In the case of *Poucham v. Godeau*, 167 Cal. 692, 140 Pac. 952, the instruction given was objectionable because by it the jury was permitted to allow damages for both present and future injury to the character of the plaintiff caused by the slanderous utterances of the defendant. This is quite different from an allowance for present and past apprehension of future disability, which apprehension caused plaintiff mental suffering.

In the case of *Rouse v. Pac. Elec. Ry. Co.*, 27 Cal. App. 772, 151 Pac. 164, it was held that a jury may not estimate the pecuniary

loss sustained by plaintiff through loss of earning power without any evidence upon that subject whatsoever; that such an estimate would be mere conjecture. This case, clearly, is not in point here.

In the case of *Saylor v. Taylor*, 183 Pac. 843, the instruction considered was one which allowed the jury to consider future mental anguish and pain in reaching its verdict. This also presents a different question from the one presented by the instruction in the instant case.

The case of *Melone v. Sierra Railway Co.*, 151 Cal. 113, 91 Pac. 522, lays down the rule that where suffering or mental anguish is endured by the victim, it is recognized as an element of damages in this state. However, it was there held that the jury might not take into consideration the pain and anguish which plaintiff may suffer in the future.

The other cases cited by the appellant upon this question are also not in point. They do not involve the element of damages covered by the instruction, as we view it, in the present case. In all of these cases the question involved was either the propriety of a recovery for pain and anguish to be suffered in the future, or for possible future disability apprehended by the person injured. Under our view of the instruction in the present case no such questions are involved.

[10] However, if our interpretation of this instruction be an improper one, and the instruction be open to the objections urged against it by the appellant, nevertheless we are of the opinion that the giving of the instruction would not be reversible error under the facts of this case. As stated before, the actual damages pleaded and proved, without the slightest effort at contradiction, amounted to \$1,950 loss of earnings from the date of the injury to the date of the trial, \$115 for doctor's services, and \$30 paid to a nurse—in all \$2,095. It appears, then, and there was, approximately, \$400 allowed for mental and physical suffering, for plaintiff's nervous and helpless condition, for her loss of sleep and appetite and her loss of capacity to attend to her household duties or to walk about unaided, and for her loss or impairment of earning power in the future. The trial was had a year and a half after the accident, and the testimony was to the effect that all the conditions above mentioned still existed at that time, and plaintiff's physicians stated that there was little hope of any improvement in her condition. Assuredly, \$400 is not an excessive amount of damages for the mental and physical suffering of plaintiff up to the date of the trial. Under these circumstances, in support of the judgment, we must assume that the \$400 covered the above enumerated physical injuries and mental and physical suffering, all of which were proper elements of damages which were allowable. It is

therefore unnecessary to charge any portion of this sum of \$400 either to mental suffering due to apprehension of permanent disability, under our view of the instruction, or to apprehended future disability, under appellant's view of the same. We are therefore of the opinion that even though this instruction be erroneous, it was not prejudicial, and would not warrant a reversal of this judgment.

Furthermore, the verdict of the jury in this case is a manifestly just one, and no judgment may be set aside on the ground of misdirection of the jury, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Section 4½, art. 6, Const. of Cal.

The judgment is affirmed.

I concur: NOURSE, J.

STURTEVANT, J. I dissent. In my opinion the trial court committed at least two prejudicial errors. It was claimed by the plaintiff that the defendant's car had come to a stop, and while the car was so stopped, and while she was in the act of alighting, that the car was started with a jerk which caused her injury. These allegations the defendant denied, and also pleaded the contributory negligence of the plaintiff. On the trial of the case the plaintiff called the conductor as a witness. He stated that at the time in question he was standing at the back end of the car (which would be immediately behind the plaintiff). He also stated that—

While the car was at a standstill some passengers got off and then "I see my platform clear, and with my left arm I proceeded to go ahead, and, seeing everything was clear, I walked inside to get the rest of the fares that had boarded the car. * * * She [the plaintiff's daughter] was clear off the car when I saw her. Everything was clear, and I proceeded down to collect one or two fares. * * * At that time I saw no sign whatever of any other lady rise to get off or show any signs of getting off. * * * When I gave the two bells to go ahead I was standing to the rear."

When the case stood thus, the trial court instructed the jury as follows:

"The carrier of passengers is required to exercise the highest degree of care in their trans-

portation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by ordinary care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier, in operating the instrumentalities employed in its business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part."

That instruction was highly prejudicial. It violated the rule in *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375, 143 Pac. 718. Furthermore, the instruction states, "There is a presumption of negligence." If there is, it must somewhere be printed in the statutes. Code Civ. Proc. § 1959. But one will search the statutes in vain to find any such provision printed therein.

It is patent from the record that, conceding that an accident had occurred, and conceding that the plaintiff had been injured, and conceding that the injury occurred through the fault of the defendant, still it was the theory of the defense that the plaintiff's injury was slight, that she had wholly recovered, and that her claim for damages was excessive. When the parties stood before the court making these conflicting contentions, the court instructed the jury as follows:

"If you should find from the evidence that plaintiff has sustained any injuries because of the negligence of defendant and its employees, and should also find from the evidence that by reason of such injuries plaintiff has, since receiving the same, and does now, in good faith, suffer from the reasonable apprehension that she will in the future be permanently disabled as the natural and proximate result of such injuries, then I instruct you that such apprehended disability is an element of damages you may take into consideration in arriving at the amount of your verdict."

The instruction was clearly erroneous and in direct conflict with the rule as stated in *Pouchan v. Godeau*, 167 Cal. 692, 695, 140 Pac. 952. It cannot be ascertained from the record whether the jury made and based its award on the claimed "apprehension" as to the future, or based its award on what had occurred down to the date of the trial.

I think the case should be reversed and remanded for a new trial.

54 Cal. App. 757

NEFF v. REDMOND et al. (Civ. 2236.)

(District Court of Appeal, Third District, California. Oct. 31, 1921. Hearing Denied by Supreme Court Dec. 29, 1921.)

1. Sheriffs and constables ⇐100—Sheriff not bound by deputy's act in receiving money under agreement.

A deputy sheriff acted within the scope of his authority in releasing an attachment, but was not so acting in agreeing to become custodian of certain moneys to be paid to him under the agreement whereby the attachment was released, and the sheriff was not liable where the deputy disappeared without accounting for the money received by him.

2. Officers ⇐103—Persons charged with knowledge as to extent of powers.

Parties dealing with public officials are charged with knowledge as to the extent and limits of the powers and duties of such officials.

3. Principal and agent ⇐178(1) — When knowledge of agent is imputed to principal.

Knowledge of the agent is imputed to the principal only so far as it relates to the duties of his office and is acquired while acting within the scope of his authority.

4. Sheriffs and constables ⇐100—Deputy held not ostensible agent of sheriff in receiving moneys.

Where deputy sheriff released attachment under an agreement whereby the sheriff was made custodian of moneys to be paid, and such moneys were paid to the deputy, the sheriff was not estopped to deny that the deputy had authority from him to become custodian of the fund in question merely by reason of payment of the money to the deputy in the sheriff's office, under Civ. Code § 2300, relating to ostensible agency.

5. Sheriffs and constables ⇐138(2) — Prior acts of agency of deputy not admissible against sheriff without showing knowledge.

Where moneys were paid to deputy sheriff as custodian, to hold which was outside the duties of the sheriff or deputy, and action was brought against the sheriff to recover the fund, on the theory of an ostensible agency, under Civ. Code, § 2300, prior acts of deputies were not evidence of agency, in the absence of a showing that the sheriff had knowledge thereof.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by H. H. Neff against Marian Redmond, as administratrix of the estate of Robert Redmond, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Puter & Quinn, of Eureka, for appellant.

A. W. Hill and H. C. Nelson, both of Eureka, for respondents.

BURNETT, J. On April 28, 1916, plaintiff commenced an action in the superior court of Humboldt county against Eugene

Woodin and others, as trustees of the California Redwood Shingle Company, a dissolved corporation, for the recovery of \$1,928. An attachment was issued in said action and levied upon certain property held as such trustees by said defendants. Thereafter, the parties to the action, together with one H. A. Poland, entered into a written agreement whereby it was provided that said attachment should be released, and "the mill owned by the defendants and held under attachment herein may be operated by H. A. Poland." Then follows certain directions in reference to the disposition of the proceeds of said operation, from which we quote this:

"That said H. A. Poland shall deposit with the sheriff the sum of \$100 per month during the period of operation of said mill, said sum to be payable in advance, commencing on the 15th day of May, 1917; * * * that when the payments mentioned in subdivision second made to said H. H. Neff and to said sheriff shall amount in the aggregate to \$1,928, no further payments shall be made to said H. H. Neff or to said sheriff under this stipulation."

A duplicate of this agreement was delivered to John F. Helms, the chief deputy or under sheriff, who thereupon released said attachment. Thereafter a sum of money aggregating \$897.91 was paid in his office to said Helms, under said stipulation, in various installments at different times. Helms afterward disappeared without accounting for any of the money, and the sheriff, Robert Redmond, refused to pay over or to admit his responsibility for any part of said fund. Thereupon the action was brought against said sheriff for said amount; the complaint alleging that—

"Said defendant, Robert Redmond, agreed to keep the custody of said money, to wit, the sum of \$897.91, until said attachment suit was fully adjusted and settled."

While the action was pending Mr. Redmond died, and his administratrix was substituted as party defendant. At the close of plaintiff's case the court granted a nonsuit, and from the judgment entered thereupon the appeal has been taken.

[1, 2] It is not claimed that the transaction was had directly with the sheriff, or that he ever authorized his deputy, Helms, to enter into such an agreement or to become the custodian of such a fund. The liability of the sheriff, if any, must rest, therefore upon the doctrine of agency or of knowledge and ratification of the agreement executed by Helms. It is plain that there was no actual agency in the transaction. Helms acted within the scope of his authority in releasing the attachment, but it was no part of the duty of the sheriff to become the custodian of this fund. It is entirely plain that in receiving said money

Helms was not acting as deputy sheriff, since that is not a duty imposed upon him by law. In other words, he was acting without the scope of his authority, and the sheriff was not bound by Helms' act in receiving the money or in making any agreement concerning the same. It is equally true that the parties by their agreement could not impose upon the sheriff any additional duty than those provided by law. It is the law, also, that parties dealing with public officials are charged with knowledge as to the extent and limits of the powers and duties of such officials. These propositions are not disputed, and it is sufficient in this connection to refer to *Fresno National Bank v. Hawkins*, 93 Cal. 551, 29 Pac. 233, 27 Am. St. Rep. 221, among the many cases cited by respondent.

It cannot be and is not claimed, therefore, that Redmond was liable for the money by virtue of the fact that Helms received it and promised to account for it as deputy sheriff.

[3] It also follows that the knowledge of Helms in reference to the transaction would not be imputed to Redmond from the mere fact that the former was the latter's deputy. The rule is familiar that the knowledge of the agent is imputed to the principal only so far as it relates to the duties of his office and acquired while acting within the scope of his authority. Indeed, there is no possible ground for holding Redmond liable for the money by virtue of his office as sheriff.

[4] In fact, we understand from the brief and oral argument of appellant that his claim is based solely upon the theory of ostensible agency. Section 2300 of the Civil Code provides:

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him."

This definition has been amplified and explained in many of the decisions of the courts, among which we may refer to *Post v. City and County Bank*, 181 Cal. 238, 183 Pac. 802, wherein is quoted with approval from 2 *Corpus Juris*, p. 464, the following:

"The person sought to be bound must, by his words or conduct have represented that the person assuming to act for him had authority to do so. Accordingly, an estoppel does not arise from the mere fact that the agent has acted for the principal on one or more previous occasions, but not under appearance of a general authority so to act, nor does the rule in question apply to acts of the agent outside of the scope of authority which the principal has caused him to seem to possess."

Nothing of the kind was shown in the case at bar. It is not claimed, indeed, that Redmond intentionally caused plaintiff to believe that Helms was Redmond's agent in the transaction. Nor was there any evidence tending to show the want of ordinary care

in the premises. No fact was brought to the attention of Redmond that would put him upon inquiry as to said agreement. He had no reason to believe that Helms would attempt to charge him with liability for said money. Under the circumstances he could not be expected to make inquiry as to whether such transaction had occurred any more than to ask Helms about any other private business arrangements that the latter might have made. The only possible circumstance that might indicate acquiescence, and therefore, by implication, lend support to the theory of agency, is the fact, as we have seen, that the money was paid to Helms at the sheriff's office. The sheriff, however, was not present, and there is no evidence that any record of said payments was made in the books of the office, or that any one communicated with the sheriff in reference to the matter until after the transaction was closed, and then the sheriff disavowed any knowledge of it. The mere payment in the sheriff's office would be no evidence that it was with the knowledge or consent of the sheriff.

[5] It is true that some attempt was made to show other transactions of a similar nature to add to the probability that the sheriff authorized or at least acquiesced in the arrangement herein, but said incidents were of an entirely different character. One of these occurred in 1912, when a certain business was under attachment and so remained while one of the deputies from the sheriff's office took in the money while the business was being operated for a few days pending a settlement. In that case the attachment remained, while here it was released. Nor is there any evidence that plaintiff had any knowledge of that proceeding, and, of course, he could not have been induced to act as he did by reason of it.

The same thing may be said of the manner in which receipts for fees for the sheriff's services in civil cases were signed by Helms. This would be no evidence of the authority of Helms to represent the sheriff in receiving the moneys paid to said Helms for plaintiff, or to give such receipts as "J. F. Helms, undersheriff." It may be added that there is nothing to show that plaintiff had any knowledge of how Helms was accustomed to sign said receipts for fees, and hence the circumstance could not have any tendency to create a belief in the mind of plaintiff that an agency existed.

"The party maintaining that an ostensible authority existed must prove that he knew of the facts giving color of authority to the supposed agent. A mere surmise that he knew them is not sufficient." *Harris v. San Diego Flume Co.*, 87 Cal. 526, 25 Pac. 758; *Gosliner v. Grangers' Bank*, 124 Cal. 225, 56 Pac. 1029; *Armstrong v. Barceloux*, 34 Cal. App. 433, 167 Pac. 895.

We think that respondent has aptly summarized the case as follows:

"Every payment made was to Helms personally; every conversation on the subject between the parties interested and their attorneys was with Helms individually. Redmond was not present on a single instance, and in the nature of things could not be charged with knowledge as to every act and conversation of an unofficial character held between his various deputies and third persons, even though such conversations and acts took place within the confines of the county jail, or the sheriff's outside office. Any finding by the jury that Redmond had knowledge of this transaction or consented to it or acquiesced in it would be based on merest guess and conjecture, with no evidence whatever to support it. * * *

"Ordinary diligence on the part of appellant would have caused him to ascertain the extent of Helms' authority in the premises and to have spoken to Redmond about the matter. He simply took for granted and assumed, without reason therefor, that the deputy was authorized to bind and represent the sheriff in a matter not connected in any way with the sheriff's duties."

We may add that the record shows that appellant's attorneys had the utmost confidence in the honesty of Helms, and that is probably the reason why they were not more careful to consider the scope of his authority or to consult Mr. Redmond in reference to the matter. It is another case of misplaced confidence, and the one who failed to exercise due circumspection must suffer the loss rather than the entirely innocent party.

We are not unmindful of the rule that prevails in case of nonsuit, but we are satisfied that if the jury had found for plaintiff the court would and should have set aside the verdict as entirely unsupported.

The judgment is affirmed.

We concur: FINCH, P. J.; PREWETT, Justice pro tem.

55 Cal. App. 175

MAMLOCK v. WILLIAMS et al. (Civ. 3928.)

(District Court of Appeal, First District, Division 1, California. Nov. 14, 1921.)

1. Principal and agent $\S$ 64(1) — Agent authorized to compromise debt bound to act with highest good faith.

An agent for the collection of a note with authority in a certain contingency to enter into a compromise with the maker was bound to act in the highest good faith toward his principal.

2. Principal and agent $\S$ 69(3)—Agent's compromise of note without notifying principal that he had assumed payment held a nullity.

Under Civ. Code, $\S$ 2322, placing agents under some of the disabilities of a trustee, sections 2228, 2230, and 2233 relative to the du-

ties of trustees, and section 2234 declaring a violation of such duties a fraud on the beneficiary, where an agent, authorized to compromise a note if a business proved unsuccessful, purchased the business and assumed payment of the note, it was his duty to negotiate directly with the principal for a compromise, and his attempted compromise of his own indebtedness without notice to the principal that he had become liable did not discharge the debt.

3. Principal and agent $\S$ 75—Principal's retaining agent's check, purporting to be for money collected, did not render applicable rules as to payment by check.

Where an agent, authorized to compromise a note if a business proved unsuccessful, purchased the business and assumed payment of the note, and thereafter sent his check for \$10 to the principal with the statement that he had compromised the debt at that amount, the rules of law relating to payment by check did not apply to the principal's retention of the check, as it did not purport to constitute payment of anything due the principal from the agent, but only a forwarding by the agent of money belonging to the principal.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Max Mamlock against Edwin H. Williams and another. From a judgment for defendants, plaintiff appeals. Reversed.

William A. Kelly, of San Francisco (Harold C. Faulkner, of San Francisco, of counsel), for appellant.

W. F. Postel, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of defendants in an action brought to recover the sum of \$3,000, due upon a promissory note executed by defendant Edwin H. Williams in favor of the plaintiff, and which by an agreement, subsequently entered into between Williams and his codefendant, Robert L. Coleman, the latter undertook to pay. Coleman having died after the commencement of the action, his executrix, Frances E. Coleman, was substituted as defendant in his stead.

The plaintiff and Robert L. Coleman were copartners doing business under the name of Alco Taxicab Company when, on January 1, 1916, the former sold all his interest in the concern to Edwin H. Williams, and the note in suit was given by Williams as a portion of the purchase price thereof. The note was payable in monthly installments. On the day that the note was executed, and as a part of the same transaction, the plaintiff executed the following writing:

"I, Max Mamlock, payee in the note executed by Edwin H. Williams in my favor, do hereby irrevocably authorize and appoint Robert L. Coleman as my agent for me and in my behalf to collect all moneys due and payable to him under the terms of the foregoing note, and I

further authorize said Robert L. Coleman to receipt for said moneys collected by him, and in the event of the failure of the business of the Alco Taxicab Company to compromise said note for less than the face value thereof and in his judgment as he may see fit to give further and complete receipts and acquittances thereunder for me and in my name, place and stead. Dated, January 1, 1916."

On January 25, 1916, and shortly after the above transaction, Coleman purchased from Williams his newly acquired interest in the Alco Taxicab Company, and in connection with said purchase executed and delivered to Williams a writing in terms as follows:

"San Francisco, January 25, 1916. For and in consideration of the execution to me of a bill of sale of even date herewith, I hereby undertake and agree that I will pay to Max Mamlock that certain promissory note dated January 1, 1916, in the principal sum of eleven thousand dollars and signed by Edwin H. Williams, and that I will hold Edwin H. Williams harmless from any and all loss, damage or expense by reason of his having executed said promissory note in favor of Max Mamlock. A copy of said note is hereto annexed, marked 'Exhibit A' and made a part hereof."

The note referred to in this writing is the same as that above referred to. In May, 1917, Coleman sold and disposed of the business, and in August of that year, the monthly payments upon the aforesaid note having been made up to that time, notified the plaintiff in writing that the business of said concern had proved a failure, and that he had, under the authority given him by the document of date January 1, 1916, hereinabove set out, accepted a compromise in the sum of \$10 of the Williams note, accompanying said notification with a check drawn by himself for that amount.

There is nothing in the record to show that Mamlock was informed of Coleman's agreement with Williams to pay said note, or that the purported compromise was not in fact had with Williams. Mamlock neither cashed nor returned said check, but on September 13, 1917, about five weeks after its receipt, brought this action to recover the amount then due upon the note. By a supplemental complaint the amount due was fixed at \$3,000.

Answers were filed by both Williams and Coleman's executrix, in both of which the aforesaid alleged compromise is pleaded as a discharge and satisfaction of the note sued upon. The trial court found in accordance with this defense, and judgment was entered in favor of the defendants.

In support of his appeal it is urged by the plaintiff that the trial court was in error in holding that the purported compromise by Coleman of the note in suit and his tender of a check for \$10 to the plaintiff operated as payment and discharge of the note; and we think that this contention of the appellant must be sustained.

[1, 2] Coleman as the agent of Mamlock for the collection of the note, with authority in a certain contingency to enter into a compromise with its maker, was bound to act in the highest good faith toward his principal. In respect of this agency he was under some of the disabilities of a trustee. Civ. Code, § 2322. He was inhibited from obtaining any advantage over him by the slightest concealment (Civ. Code, § 2228); he could not enter into any transaction connected with his trust in which his interest would be adverse to that of his principal (Civ. Code, § 2230; Watkins' Estate, 121 Cal. 327, 53 Pac. 702); and it was his duty immediately to disclose to his principal his adverse interest (Civ. Code, § 2233); and any violation of these duties constitutes a fraud against the principal (Civ. Code, § 2234). As already remarked, there is no evidence in the record of a disclosure by Coleman to Mamlock of the fact that he had by agreement with Williams become responsible for the payment of the note; and in his letter to Mamlock, advising him of the purported compromise, he states, "I have compromised the said note for the sum of \$10, and have given full and complete receipts and acquittances therefor," clearly intending to convey the impression to Mamlock that the compromise had been made with another person than himself. We think it obvious that if the contingency foreseen in the written appointment of Coleman as Mamlock's agent arose, authorizing the making of a compromise, it was Coleman's duty, having himself become liable on the note, to negotiate directly with Mamlock with a view to effecting such compromise, and not to place himself in the impossible situation of negotiating with himself for a compromise of his own indebtedness.

[3] The respondents attach some weight to the failure of Mamlock to return to Coleman the \$10 check, claiming that its retention for some five weeks before the commencement of this action amounted to its acceptance as payment of the note, notwithstanding that it had not been presented for payment. No question arises here as to any prejudice suffered by the drawer of the check by reason of delay in its presentation for payment; sole reliance being placed upon the mere retention of the check. On this point it is sufficient to say that the check did not purport to be payment of anything due from Coleman to Mamlock, but at most the forwarding by means of a check by an agent of money belonging to his principal. Under these circumstances the question of payment by check and the rules of law relating thereto do not arise.

For the reasons given the judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

54 Cal. App. 691

WENDLING LUMBER CO. v. GLENWOOD LUMBER CO. (Civ. 3968.)

(District Court of Appeal, First District, Division 2, California. Oct. 28, 1921. Rehearing Denied Nov. 26, 1921. Hearing Denied by Supreme Court Dec. 27, 1921.)

1. Sales ⚡225(4)—Burden of proof in action against purchaser from fraudulent vendee stated.

In conversion against purchaser from vendee, it was incumbent on the plaintiff to show ownership and wrongful conversion as alleged, and then on the defendant to prove that plaintiff sold to vendee before action commenced, and then upon the plaintiff to show fraudulent intent of the vendee in selling the property to the defendant, and then upon defendant to show a valuable consideration, and then again upon the plaintiff to show vendee's knowledge of the fraudulent intent of the vendee.

2. Sales ⚡225(4), 244(3)—Evidence insufficient to show property acquired by fraud or that purchaser knew thereof.

In conversion against vendee of purchaser of lumber, evidence held insufficient to show that the lumber was obtained by the purchaser through fraud or that the vendee of such purchaser had knowledge of plaintiff's rights or claims.

3. Estoppel ⚡75 — Seller of goods held estopped to assert title against subsequent purchaser.

Where plaintiff sold lumber outright to a known dealer in lumber, and defendant purchased from such dealer under a conditional sale contract, paid by credits, dollar for dollar, without any knowledge of the facts of the sale to the dealer, the plaintiff is estopped from asserting title under a claim of fraud on the part of the dealer.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Wendling Lumber Company against the Glenwood Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Louis H. Brownstone, of San Francisco, and Nicholas Bowden, of San Jose, for appellant.

Walter H. Linforth, of San Francisco, and James P. Sex, of San Jose, for respondent.

STURTEVANT, J. The plaintiff sold to J. H. Routt a quantity of lumber for which he failed to pay the plaintiff. Routt sold the lumber to the defendant. Contending that it had been wronged, the plaintiff sued the defendant under a charge of conversion. At the end of the plaintiff's case the defendant moved for a nonsuit. The motion was granted, and the plaintiff has appealed.

[1,2] The case was appealed twice before this appeal. *Wendling, etc., Co. v. Glenwood,*

etc., Co., 153 Cal. 411, 95 Pac. 1029; *Id.*, 19 Cal. App. 1, 124 Pac. 734. The first of those cases states that the rule of procedure declared in *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630, governs this case. Following the rule declared in that case, it was incumbent on the plaintiff to produce evidence to prove the issues tendered by its complaint, including the issue of ownership and wrongful conversion. The burden then shifted to the defendant to prove that the plaintiff sold to Routt before the action was commenced. Both of these things were done, in the trial of this case, during the presentation of the plaintiff's case. The steps next in order are stated in *Hart v. Church*, 126 Cal. 471, at page 481, 58 Pac. 910, 913 (77 Am. St. Rep. 195), as follows:

"It is the well-settled rule that where a plaintiff attacks a conveyance as in fraud of his rights it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the vendor. *Ross v. Wellman*, 102 Cal. 4."

We do not understand that the plaintiff questions these rules of procedure, but it presents the question as to whether its proof fell short of the requirements of the rules above stated at the time the plaintiff rested. In applying and following said rules the plaintiff adopted an unusual course. It did not make any distinction as to what matters should be presented in its case in chief, and what in rebuttal, etc.; but it chose the course of taking up all of said matters in the presentation of its case in chief. And, at this time, it states that its rights turn on a correct answer to the question, "Does the plaintiff's case, as made, show that fraud was committed?" If the plaintiff had directly pleaded fraud, the burden would have been on it. It cannot escape that burden by adopting a different kind of pleading. By adopting a pleading sounding in conversion, it simplified the pleadings in the case and it postponed the hour in which it had to take up the issue of fraud; but the burden still rested on the plaintiff when the time arrived to take up that issue. We reach the same conclusion on this branch of the case if we view this record from a different angle. On its face the judgment purports to be based on an order of nonsuit granted at the end of the plaintiff's case. In truth, and in legal effect, it was an order of nonsuit granted after the presentation of the whole case, because all of the actors had been called and examined on all of the facts except as is herein stated. Picking up the bill of exceptions and running through it from end to end, there is not a scintilla of proof that Routt acted with a

fraudulent intent when he sold to the Glenwood Lumber Company. Moreover, the evidence does show that the Glenwood Lumber Company purchased for a valuable consideration, and, finally, there is not the slightest proof on the part of the plaintiff that the defendant ever had the slightest information or knowledge of the fraudulent intent, if any, on the part of Routt. On these elements of the case the story is as follows: In the early part of 1903 Routt interviewed the president of the plaintiff corporation for the purpose of negotiating the purchase of materials. In that interview he stated to G. X. Wendling, president of the plaintiff corporation, that he was contemplating the purchase of the plant of the defendant corporation; that he estimated the purchase price would be \$20,000, which was the estimated value of the merchandise on hand; that for the purpose of making the purchase he had \$3,000; that he expected Mr. Johnson of Santa Cruz to join him and put up \$5,000; that he expected to incorporate and pledge the corporate stock for \$7,000; and that he expected to sell off lumber on hand, reducing the stock to \$20,000, if the stock exceeded that sum. Contemporaneously with these interviews, Mr. Routt held interviews with the defendant corporation looking toward the purchase of the defendant's plant. Again, these parties estimated that the stock on hand was about \$20,000. The negotiations between Routt and the defendant advanced to the point where a contract of purchase was entered into by the terms of which Routt agreed to purchase under a conditional sales contract, by the terms of which the title of the property remained in the vendor until paid for. The amount to be paid remained to be ascertained by the taking of an inventory. At that time it was known that the taking of the inventory would require several weeks. While the inventory was being taken and before the amount thereof was ascertained, the contract between Routt and the plaintiff was entered into and the lumber in question was shipped and was received by Routt into the yard of the defendant. While on the stand as a witness Wendling stated that by the terms of the interview between him and Routt, Routt was to pay the defendant \$20,000 as a purchase price, out of the \$3,000 which he held, \$5,000 to be invested by Mr. Johnson of Santa Cruz, \$7,000 to be borrowed from the bank, and that the plaintiff corporation was to advance \$5,000 or \$6,000 worth of lumber. However, when the inventory was completed, the purchase price payable to the defendant was \$39,000. There was no proof to the effect that Routt misrepresented any existing fact to the plaintiff corporation. The proof is all one way, that Routt stated in the beginning that he possessed \$3,000, and

that statement squares with the fact. He stated that he expected to borrow \$5,000 from his friend in Santa Cruz. The fact is that he had such a promise but that the friend changed his mind. He stated that he intended to incorporate under the name of the San Jose Lumber Company and borrow from the bank in San Jose \$7,000 more. He did not incorporate. But the fact whether he did or did not incorporate, it is patent, would not add one dollar to his purse, and therefore, would not operate as a material misrepresentation to the defendant. The proof does not show why he did not incorporate under the name of the San Jose Lumber Company, nor why the \$7,000 was not borrowed from a bank in San Jose. The proof all tends to show that Routt was attempting to operate on too little capital and that the material error was that all of the parties underestimated the value of the defendant's stock. It does not in any respect show that Routt committed any act with a fraudulent intent to deceive the plaintiff or the defendant. There was no proof whatever that the defendant corporation was at any time informed as to the statements made by Routt to the plaintiff, whether those statements be true representations or false representations. The plaintiff called Routt as a witness. It also called the secretary and bookkeeper of the defendant corporation. Those two men were the very persons who knew what facts, if any, had been communicated to the defendant regarding the matters that had transpired between Routt and the plaintiff. But no question was asked of, and no statement was made by, either of those witnesses relative to the knowledge or information of the defendant concerning the trade that had been made between Routt and the plaintiff.

[3] The case then stands thus: The plaintiff sold its lumber outright to Routt, a known dealer in lumber; without any knowledge of the facts of that sale, the defendant received the same lumber from Routt under a conditional sales contract and paid by credits, dollar for dollar, to Routt therefor. These facts bring this case within the rule that when the owner of property clothes another with the apparent title to, or power of disposition over it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterwards asserting his title. *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Barstow v. Savage M. Co.*, 64 Cal. 388, 393, 1 Pac. 349, 49 Am. Rep. 705; *Chase v. Whitmore*, 68 Cal. 545, 547, 9 Pac. 942; *Kohn v. Sacramento Electric, Gas & Ry. Co.*, 168 Cal. 1, 11, 141 Pac. 626.

The motion for a nonsuit was based on six different grounds, including among others:

" * * (2) There is no evidence in this case connecting the defendant or any one authorized to represent the defendant with any representations made by Mr. Routt to the plaintiff or any one connected with the plaintiff with reference to this particular lumber, whether those representations were false or otherwise. (3) There is no evidence in this case that the Glenwood Company did not obtain this property from Mr. Routt in the usual course of business and for a valuable and sufficient consideration; on the contrary, the evidence shows that they were bona fide purchasers of it for value and without notice. * * * (5) There is no evidence in this case that the plaintiff was the owner of the property involved in this action or any part of it at any time subsequent to the sale of the same by the plaintiff to Routt."

The motion for a nonsuit was granted generally. On the elements of the motion above stated the motion was properly granted.

It follows that the judgment should be and the same is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 147

TRIFIRO et al. v. BEVILACQUA.
(Civ. 3995.)

(District Court of Appeal, First District, Division 1, California. Nov. 10, 1921.)

1. Sales ☞ 179(4)—No recovery of purchase price from seller after inspection at place of delivery.

Where wine was inspected and found satisfactory at the place provided for delivery, and was then paid for, evidence that the wine was subsequently found to be spoiled and worthless when sought to be distributed was properly excluded in action by purchasers to recover the purchase money.

2. Sales ☞ 71(3) — Agreement to deliver two carloads of wine held complied with.

It was fair to construe a contract requiring the delivery of "two carloads of wine, about 7,200 gallons," as meaning that the number of gallons mentioned was merely an estimate or approximation, and was complied with by delivering two carloads containing 6,100 gallons, especially as no exception was taken to the deficiency at the time it was delivered, accepted, and paid for.

3. Appeal and error ☞ 172(1)—Claim for damages not to be urged first on appeal.

In action to recover purchase money paid by purchaser of wine alleged to have spoiled and become worthless, plaintiffs cannot complain for the first time on appeal that defendant seller breached his contract in that he delivered a deficiency; no claim for damages therefor being pleaded, nor any such breach being mentioned below.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Guiseppe Trifiro and another against Giacomo Bevilacqua. Judgment for defendant, and plaintiffs appeal. Affirmed.

Walter E. Dorn and L. W. Lovey, both of San Francisco, for appellants.

Victor A. Scheller, of San Jose, and Albert Picard, of San Francisco, for respondent.

RICHARDS, J. This is an action in which the plaintiffs seek to recover from the defendant the purchase price of 6,100 gallons of wine alleged to have been purchased by them from the defendant at Madrone, Santa Clara county, Cal., and which wine proved upon its arrival in New York to be spoiled and worthless; and also to recover certain additional sums expended by the plaintiffs in connection with this shipment of said wine, together with a further recovery of \$3,000 damages alleged to have been sustained by the plaintiffs in their business of supplying their customers with wine by reason of the fact that the wine that they thus received and supplied to them was spoiled and worthless.

The defendant answered, denying the averments of the plaintiffs' third amended complaint, and the cause proceeded to trial.

Upon the trial the written agreement of the parties as to the purchase and sale of this wine was presented in evidence from which it appeared that the defendant sold and the plaintiffs purchased "two carloads of wine, about 7,200 gallons, at the price of 23 cents a gallon, delivery at the car." The contract also called for the payment of the purchase price in cash upon delivery at the station at Madrone. The evidence showed without conflict that the actual amount of wine so delivered and paid for was 6,100 gallons. The evidence is otherwise quite conflicting as to the actions and conduct of the parties or their representatives at or about the time of the delivery of the wine in barrels upon the cars at Madrone.

Upon the submission of the cause the trial court made its findings of fact, in which the court found the existence of the written contract between the parties for the purchase and sale of the wine in question, and that in pursuance thereof 6,100 gallons of said wine was to be delivered to the plaintiffs at Madrone, Cal., and was in fact so delivered, and was then and there examined and inspected by the duly authorized agent and representative of said plaintiffs, who then and there, and after such inspection and acceptance, paid the purchase price thereof and received said wine; that said wine was sound and merchantable, and that the plaintiffs' averments as to the unsound, unmerchantable, and inferior grade of said wine at the time and place of its delivery and acceptance are untrue. Upon these findings the trial court rendered its judgment in favor of

the defendant and against the plaintiffs upon their several demands for reimbursement and damages. From such judgment this appeal has been taken.

The first and main contention of the appellants is that the findings of the trial court are unsustained by the evidence in the case. The reporter's transcript on appeal embraces 160 pages of typewritten testimony and exhibits. The appellants have supplied us with no appendix to their opening brief, with no closing brief, and with not a single excerpt from this mass of evidence in their brief on file. We are merely referred to certain pages of the transcript, as sustaining the appellants' quite brief and very general statement as to what the record in the case contains. Notwithstanding this entire absence of an effort at compliance with the sections of the Code defining the duty of the appellants in this regard, we have undertaken to examine the reporter's transcript in the case with the result of satisfying ourselves that the findings of the trial court are fully sustained by the evidence in the case; that the defendant complied with his written agreement as to the sale and delivery of the wine in question to the extent of delivering 6,100 gallons thereof on the cars at Madrone, which amount of wine, after being then and there examined, sampled, and inspected by the agent and representative of the plaintiffs, was fully paid for without any objection or exception as to its quality or amount; that said wine when so sampled, accepted, delivered, and paid for, was sound and merchantable, and that whatever happened to said wine thereafter to render the same unfit and unmerchantable when sought to be distributed by the plaintiffs to their customers in New York was something for which the defendant was not to be held responsible.

[1] The second point urged by the appellants is that the trial court erred in ruling against the admission of certain depositions offered by the plaintiffs upon the trial, tending to show that said wine was spoiled and worthless when sought to be so distributed in New York; but in so ruling the trial court was not in error, since, the plaintiffs having examined, tasted, accepted, and received said wine at its specified place of delivery, the defendant's responsibility was then at an end; and hence the offered evidence was immaterial.

[2] The appellants' final contention is that, the defendant having agreed to deliver to the plaintiffs 7,200 gallons of wine, and having only delivered 6,100 gallons thereof, they were entitled to damages for the nondelivery of the remaining 1,100 gallons of said wine. A fair construction of the language of the contract between the parties, which requires the delivery of "two carloads of wine, about 7,200 gallons," would seem to be that the

specified number of gallons was merely an estimate or approximation of the content in gallons of two carloads of wine; and this seems to have been the intent of the parties, since the evidence showed that two carloads of wine were actually shipped, and also since no exception was taken to the deficiency in gallons of the wine at the time it was delivered, accepted, and paid for at Madrone.

[3] But an even better reason exists for holding the appellants' contention in this regard to be without merit, since in their complaint no mention was made of any such breach of the contract, nor was any claim for damages therefor averred. It is too late to urge such a claim upon appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

55 Cal. App. 103

PEOPLE v. NORRINGTON. (Cr. 792.)

(District Court of Appeal, Second District, Division 2, California. Nov. 7, 1921.)

1. Criminal law $\S$ 1134(3), 1144(13)—Appellate jurisdiction extends only to questions of law; facts detailed by state's witnesses presumed proven.

On appeal from a conviction, the jurisdiction of the appellate court extends only to questions of law, and it must accept as proven facts as detailed by the witnesses for the state.

2. Rape $\S$ 53(2) — Evidence of prosecutrix held not so incredible as to warrant interference with verdict of guilt of assault with intent to rape.

In a prosecution for assault with intent to rape, testimony of the prosecutrix held not so intrinsically incredible as to warrant interference with jury's verdict of guilty.

3. Rape $\S$ 54(1), 57(1)—Conviction of assault with intent may rest upon testimony of prosecutrix, and weight of testimony is for jury.

A conviction for assault with intent to rape may rest upon the uncorroborated testimony of the prosecutrix, if she be believed by the jury, and the degree of credibility which should be given her statements and the weight to be accorded her testimony are matters to be addressed solely to the consideration and discretion of the jury.

4. Criminal law $\S$ 1144(15)—Assumed that jury reached verdict free from passion and prejudice.

In the absence of something in the record upon which to base a contrary opinion, an appellate court must assume that the jury reached a verdict of guilty with a full realization of their full duty, free from passion and prejudice.

5. Criminal law ⚖️1159(2)—Verdict of guilt disturbed only where record shows passion and prejudice.

A verdict of guilty of assault with intent to rape, based solely on the uncorroborated testimony of prosecutrix, will not be disturbed on appeal, unless the court finds in the record full justification for believing that the verdict was the expression of passion and prejudice, rather than of deliberate judgment.

6. Rape ⚖️53(3)—Absence of outcry not conclusive of lack of intent.

Though the absence of violent outcry by prosecutrix in prosecution for assault with intent to rape has a tendency to refute the hypothesis of guilt and a felonious intent to commit rape, it is by no means conclusive.

7. Rape ⚖️53(2)—Evidence held sufficient to sustain conviction of assault with intent to rape.

In prosecution for assault with intent to rape, evidence held to sustain a conviction.

8. Rape ⚖️16(1)—Intent for a moment to overcome resistance constitutes assault with intent to rape.

If prosecutrix resisted, and if, for an instant during the assault and the prosecutrix's resistance, defendant intended to overcome her resistance by force or violence, he was guilty of assault with intent to commit rape under Pen. Code, §§ 220, 261, subd. 3.

9. Rape ⚖️16(1)—In prosecution for assault with intent to rape, every element of rape except penetration must be proved.

It is essential, in a prosecution for assault with intent to commit rape, that the state, beyond proving the assault, should prove every fact necessary to constitute rape except penetration.

10. Rape ⚖️16(6)—Importance of resistance simply to show intent and nonconsent.

In a prosecution for assault with intent to commit rape, the importance of resistance by the woman is simply to show two elements of the crime; the assailant's attempt to use force in order to have carnal intercourse, and the woman's nonconsent.

11. Criminal law ⚖️1159(2)—Determination supported by substantial evidence not disturbed.

The appellate court cannot disturb a conviction if there is any substantial evidence upon which the verdict may find meritorious support.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

James M. Norrington was convicted of assault with intent to commit rape, and appeals. Affirmed.

Guy Eddie, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and R. L. Chamberlain, of San Francisco, for the People.

FINLAYSON, P. J. Defendant, who was convicted of an assault with intent to com-

mit rape, appeals from the judgment and from an order denying his motion for a new trial. The appeal presents the single question as to whether the evidence is sufficient to justify the verdict, defendant claiming that the testimony of the prosecutrix is inherently improbable, and that she did not resist to the utmost of her ability.

[1] There is an irreconcilable conflict between the testimony of the prosecutrix and that given by the defendant. But, since our appellate jurisdiction extends only to questions of law, we must accept as proven the facts as detailed by the witnesses for the state. As was said by our Supreme Court in *People v. Emerson*, 130 Cal. 562, 62 Pac. 1069:

"If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive."

About midnight of August 18, 1920, the prosecutrix, a married woman, 40 years of age, and who resided with her husband in Los Angeles, left Long Beach for her home. She arrived in Los Angeles, alone, shortly before 10 o'clock in the morning. After standing for a considerable length of time on a street corner waiting for a street car to take her home, she finally accosted the defendant, a police officer in uniform, wearing his star or badge, and sought from him information regarding the street car that would take her nearest to her home, which was not far from the intersection of Vermont avenue with Ninth street. Defendant, who was just off duty, volunteered to take her home in his automobile, which, at that time, was in a garage on Grand avenue, between Eighth and Ninth streets. The offer was accepted, the prosecutrix and defendant went to the garage, and presently the two drove away in defendant's car. After proceeding south on Grand avenue to Ninth street, they turned into the latter street and traveled westerly for a distance about halfway between Grand avenue and Vermont, when defendant, against the remonstrance of the prosecutrix, turned his car northerly and drove to Wilshire boulevard, where he again turned and proceeded along that thoroughfare in a westerly direction, across Vermont avenue, until he finally brought his car to a stop on Wilshire boulevard at a point between one-quarter and one-half mile west of Western avenue, and which, the prosecutrix testified, was "beyond any signs of habitation, * * * beyond the residential district." The nearest dwelling, she thought, was distant about 600 yards. After stopping his car at the edge of the road, defendant switched off the

lights. As the car came to a stop, another automobile passed by, traveling in a westerly direction. Just before this other vehicle passed, defendant, addressing the prosecutrix, said:

"Don't you dare to speak or make any outcry when this machine passes. Don't you dare to."

What took place after this is described by the prosecutrix substantially as follows:

"After the car came to a stop [i. e., defendant's car] the defendant took me by the elbows, lifted me bodily, and slid under me, endeavoring to place me on his lap; and it was necessary to think very quickly, and to the best of my ability; I realized I was in quite a predicament, and that I must not lose my head, so I opened the door and stepped out onto the ground. I moved toward the front of the car—about two or three feet beyond the front of the car. Defendant followed me immediately and came up to me. I again begged him to take me home. I talked very loud, as loud as possible—probably louder than I have ever talked in my life or have been able to—and when I started to do that he took me by the back of the neck, in the crook of his elbow, and put his right hand over my mouth and pushed my head back just as far as he could. He seemed very nervous, and kept saying, 'Sh-sh-sh.' It was quite a shock to my nerves. However, I did not lose consciousness. His right hand was over my mouth, forcing my head back. I then went toward the middle of the car, in front of the rear side door. The defendant followed me to that position. I kept begging him to take me home; I spoke of my husband several times. Defendant kept repeating, 'I will take you home; I will take you home, but not until I am completely satisfied.' He stated that he would have intercourse with me in some way or other. He raised my skirts nearly up to my hips. Meanwhile he held my left arm up in the air with his right hand. He was facing me, and I was leaning or standing against the back of the car, that is, not touching it, but standing right in front of it, with my back to the door. I had on a union suit. It was worn. I had been wearing it since morning, and had had no opportunity to change it. It had been worn with circular holes through rubbing and wear. In reaching under my skirts the first time he grabbed through one of these holes that had been worn in this old union suit and tore it. Then he reached again. I had on an undernapkin. He reached with such violence that he pulled the pin out of this napkin so that the pin was bent. He threw the pin over into the front of the car. The napkin was torn loose. It was left hanging after he had reached under with his left hand and jerked the pin out. Defendant's trousers were open and his private parts exposed. He informed me that he was going to be satisfied before he took me home. I told him that I felt sure he would have to wait some time if he waited for that to be accomplished, because I certainly would defend myself, if possible. Then he made another attempt to enforce his intentions, and I simply talked to him and spoke again that I must get home. I was

trying to use suggestion, thinking that would perhaps influence him to take me home. He said, 'I think I will just take you over under the bushes here on the grass.' I replied that he could not budge me from the spot where I stood. Then he proceeded to attempt to make the insertion there where I stood. He pushed me violently against the car 60 or 75 times, striking his penis against the tab of my sanitary belt from which he had removed the cloth by jerking the pin loose. While he was doing that I saw my opportunity to get his badge and I unpinned it and took it from his coat. I was endeavoring to fight him off as best I could. He did not make any penetration, but after about 60 violent strokes against my body something happened—he had an emission. Then it was that he relaxed his hold on me, and I stepped to one side. Then I again asked him to take me home, and finally he consented, and drove east toward Western avenue. He took me to Ninth and New Hampshire, and then I recognized that we were about a short block from where I lived. From there I walked home. It was about 25 minutes to 5 in the morning when I arrived home. I told my husband what had happened."

[2-5] We are unable to say that the testimony of the prosecutrix is so intrinsically incredible that this court should interpose to disturb the jury's determination. Her manner and deportment on the witness stand, as well as her apparent appreciation, or lack of appreciation, of the consequences of her testimony, are tests of her truthfulness of which we, as a reviewing court, are deprived. It is well settled by the decisions of the Supreme Court and appellate courts of this state that in cases of this character a conviction may rest upon the uncorroborated testimony of the prosecutrix, if she be believed by the jury. The degree of credibility which should be given to her statements while on the witness stand, and the weight to be accorded her testimony, are matters to be addressed solely to the discretion and consideration of the jury. *People v. Mazurco*, 193 Pac. 164. In the absence of something in the record upon which to base a contrary opinion, we must assume that the jury reached their verdict with a full realization of their sworn duty, free from passion and prejudice. Moreover, the learned trial judge, by denying the motion for a new trial, manifested his satisfaction with the sufficiency of the evidence. His opportunity to form a correct opinion as to the credibility of the witnesses, as well as the weight and effect of their evidence, is far better than ours; and his conclusions ought not lightly to be disturbed. Before we can interfere, we must find in the record full justification for believing that the verdict was the expression of passion and prejudice rather than of deliberate judgment. *People v. Lewis*, 18 Cal. App. 359, 365, 123 Pac. 232. We cannot say that such a condition is shown here.

[6] Appellant strenuously insists that there is not sufficient evidence to warrant the inference that he was actuated by the felonious intent to commit rape. That is, it is insisted that the evidence does not warrant the inference that he intended to gratify his lust upon the person of the prosecutrix at all events and regardless of what she might or could do to prevent it. The basis for this contention is the claim that the evidence shows that the prosecutrix did not put forth all the resistance within her power for the reason that she failed to make any violent outcry. Though the absence of such outcries may have a tendency to refute the hypothesis of guilt, it is by no means conclusive. While, from the nature of the crime, it may be expected in such cases that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of the case will allow, still, to hold, as a matter of law, that such manifestation and resistance are essential to the existence of the crime, so that it could not be committed if they are wanting, would be going farther than any well-considered case in criminal law has hitherto gone. *State v. Pilegge*, 61 Wash. 264, 112 Pac. 263.

[7, 8] That the defendant desired to have sexual intercourse with the prosecutrix, and that, in attempting to attain his purpose, he assaulted her, are facts shown by the testimony of the state's witness beyond all question. If the prosecutrix resisted, and if for an instant during the assault and the prosecutrix's resistance the defendant intended to overcome her resistance by force or violence, he is guilty of assault with intent to commit rape. Pen. Code, § 220, and subdivision 3 of section 261. In cases such as this, the intent with which the assault is committed is a fact which can only be inferred from the outward act and surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except where the proven facts afford no reasonable ground for the inference. *People v. Moore*, 155 Cal. 237, 240, 100 Pac. 688. Here there was evidence to warrant the inference that defendant intended to accomplish his purpose by force, and that he desisted only upon the subsidence of his bestial desire following the highly excited condition to which he had wrought himself during his frantic endeavors to satisfy his lustful passion.

We are cited to a number of cases, beginning with *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506 and ending with *People v. Fleming*, 94 Cal. 308, 29 Pac. 647, in which verdicts were set aside upon the ground that the evidence was insufficient to sustain the charge of rape or of assault with intent to commit rape. Those cases are reviewed in *People v. Moore*, *supra*. They have no ap-

plication where, as here, all the outward facts are clearly established, and the only question is as to what the defendant intended, and there is reasonable ground to infer that he intended to use his superior strength to overcome the resistance of the prosecutrix and to accomplish his purpose by main force.

[9, 10] The weakness of appellant's argument lies in the fact that his counsel over-emphasize the necessity for extreme resistance by the woman, and overlook the effect of defendant's intent as manifested by his conduct. Unquestionably, it is essential that in a prosecution for assault with intent to commit rape the state, beyond proving the assault, should prove every fact necessary to constitute rape, except penetration. What the assailant meant to do, however, and the manner in which he intended to accomplish his purpose—whether by persuasion, force, or fear—is, as we have said, a question of fact to be determined by the jury; and an appellate court should not disturb their finding simply because conflicting inferences may reasonably be deduced from the evidence. The importance of resistance by the woman is simply to show two elements of the crime—the assailant's intent to use force in order to have carnal knowledge, and the woman's nonconsent. And though, unquestionably, the jury must be fully satisfied of the existence of these two elements, it would be a reproach to the law to make the crime hinge on the utmost exertion by the woman. Our views upon this phase of the case are so admirably expressed by the Idaho Supreme Court in *State v. Neil*, 13 Idaho, 539, 90 Pac. 860, 91 Pac. 318, that we quote as follows:

"A * * * number of authorities are cited by counsel for appellant to the effect that the state must show in such cases that the female 'showed the utmost reluctance and used the utmost resistance.' *De Voy v. State*, 122 Wis. 148, 99 N. W. 455. To our minds the trouble with a number of these authorities is that they reverse the order of the inquiry. They go about inquiring into the kind, character, and nature of the fight put up by the woman, rather than the nature of the assault and evident and manifest purpose and intent of the assailant. For the purpose of reaching the conclusions announced in some of these cases it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she 'kicks, bites, scratches and screams' (*People v. Morrison*, 1 Parker Cr. R. [N. Y.] 625) to the 'utmost of her power and ability,' she will be deemed to have consented, and indeed to have invited the familiarity. Such is neither justice, law nor sound reason. On the contrary, under the statute a case might arise where a conviction could properly be had for assault with intent to commit rape, and still no personal encounter or

contact have ever taken place. In fact, many such cases are reported. 23 Am. & Eng. Ency. of Law, 866, and notes; 1 McClains Cr. Law, sec. 463; 10 Ency. of Ev. 607, and cases cited. * * * It is true that she [the prosecutrix] must not have consented, because if she did there would be no offense; but, on the other hand, men should not be allowed, under the protection of law, to construe every indiscreet act or word of a woman into a consent to carnal knowledge, nor should they be allowed to indulge in presumptions against the virtue and chastity of women. Rather let the evil-minded man incur the risk and hazard of misjudging the opposite sex, and [sic] endeavoring to degrade them and destroy their peace and happiness. A little of this kind of law would go a long way with some of the brutes who unfortunately bear the names of men. There would be far less illicit intercourse if there were no assaults by the seducer in the first place, and the oftener he is brought to justice the less annoyance the community will suffer from the graver offenses toward which his conduct leads."

[11] From all the facts in the record before us the jury may not unreasonably have believed that, throughout the experiences through which she passed while defendant was seeking to gratify his lascivious desires, the prosecutrix acted upon the honest belief that she best could extricate herself from her predicament by remaining calm and collected, relying upon her wits rather than by making an outcry and thus, peradventure, run the risk of being choked into insensibility. At any rate, this is a reasonable hypothesis, and therefore one which may have been deduced by the jury as a reasonable inference of fact from all the evidence in the case. It is quite possible that had we, and not the jurors, been the triers of the facts, we would have reached the conclusion that the prosecutrix, acting the part of a shameless wanton, was but playing upon the defendant's passions in order to gratify some inscrutable desire to tantalize him by exciting without gratifying, his lustful concupiscence. But as we sit in criminal cases solely for the correction of errors of law, we cannot disturb the jury's determination if there be any substantial evidence upon which the verdict may find meritorious support. Whether the apparent resistance of the prosecutrix was genuine and bona fide was a question addressed solely to the consideration of the jurors as the triers of the facts; and we cannot say that there was no evidence to warrant the inference that the prosecutrix offered a sincere resistance in an honest endeavor to protect her honor and virtue.

Judgment and order affirmed.

We concur: WORKS, J.; CRAIG, J.

(54 Cal. App. 771)
LINEKER v. MCCOLGAN et al. (Civ. 2340.)

(District Court of Appeal, Third District, California. Oct. 31, 1921.)

1. Appeal and error ⇐ 1010(1)—Findings supported by evidence conclusive on appeal.

Findings of trial court, with evidence to support them, are conclusive on appeal.

2. Subrogation ⇐ 22—Mortgagee held not required to pay junior lien.

Trust deed, authorizing trustee and mortgagee to pay any "incumbrance now subsisting or that may hereafter subsist hereon which may, in their judgment, affect certain premises, or these trusts," etc., and that in the event of a sale all sums due the mortgagee under its terms should first be paid out of the proceeds, held not to authorize the mortgagee to purchase a certificate of sale of the land under execution, on a junior lien, and add the amount expended therefor to the indebtedness secured by the trust deed; subrogation only being allowed as a matter of right in such cases when a party is forced, for the protection of his own interests, to discharge an incumbrance which might otherwise jeopardize them.

3. Mortgages ⇐ 144 — Mortgagee could purchase certificate of sale under execution under a junior lien for his own use and benefit.

A mortgagee could purchase for his own use and benefit a certificate of sale under execution, which was a junior lien and included mortgagor's equity of redemption, relation between mortgagee and mortgagor, and between the beneficiary under a trust deed and the maker thereof, not being fiduciary.

4. Mortgages ⇐ 376 — Mortgagee purchasing equity of redemption entitled to surplus on sale under mortgage.

Where mortgagee, or beneficiary under trust deed, acquired mortgagor's equity of redemption by a sheriff's deed in an execution sale, and, for protection of his title so acquired against intermediate liens, caused the land to be sold under the trust deed, he was entitled to receive and retain for his own use and benefit all the proceeds of a sale under the trust deed above the indebtedness secured thereby, to which mortgagor, or maker of the trust deed, would otherwise have been entitled.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Fred V. Lineker against Adelaide McColgan, administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and others. From a judgment denying injunction and accounting, plaintiff appeals. Affirmed.

Milton S. Hamilton, of San Francisco, for appellant.

Cullinan & Hickey and Alfred J. Harwood, all of Los Angeles, for respondents.

FINCH, P. J. The plaintiff appeals from the judgment herein denying his prayer for

an injunction and an accounting. While the pleadings are complicated and lengthy, covering 48 pages of the printed transcript, the facts essential to a correct understanding of the issues raised on appeal may be briefly stated.

The plaintiff was the owner of the land described in the complaint, subject to certain incumbrances in the following order of priority: (1) Trust deed to defendant R. McColgan, as security for payment to defendant Daniel A. McColgan of a promissory note for \$2,850 and future advances, executed by plaintiff's wife, Norvena E. S. Lineker, prior to her marriage and while she was owner of the land. (2) Attachment liens aggregating \$1,241.09. (3) Judgment lien for \$1,264.91. (4) Sheriff's certificate of sale of the land under execution for \$1,361.20.

Under the foregoing circumstances, Daniel A. McColgan purchased the sheriff's certificate of sale and, at the expiration of the year allowed for redemption, received and recorded the sheriff's deed to the land. On the day that and after the sheriff's deed was received and recorded, the land was sold under the trust deed to R. S. Marshall for the sum of \$14,000. Marshall made the purchase for the use and benefit of the plaintiff pursuant to an agreement between them. In order to make up the purchase price of the land and provide additional money for the plaintiff, Marshall, under agreement with the plaintiff, gave his promissory note to Daniel A. McColgan for the sum of \$2,455 and, as security for the payment thereof, conveyed the land to R. McColgan and Eustace Cullinan by trust deed.

The complaint alleges that prior to the sale under the trust deed the plaintiff demanded of Daniel A. McColgan an account of the moneys due thereunder, but that the latter refused to give it; that the certificate of sale was purchased and the sale under the trust deed was had pursuant to an agreement between plaintiff and said McColgan to the effect that out of the proceeds of the sale McColgan was to retain whatever was due him under the trust deed and for the purchase of the certificate of sale and also the amount necessary to satisfy the attachment and judgment liens, if such liens were finally adjudged to be valid, and to account to the plaintiff for the remainder thereof; that the plaintiff has repeatedly demanded an accounting but that his demands have been refused; that the whole of the \$14,000 was paid to Daniel A. McColgan; that it has not all been consumed "in paying the amount due under the deed of trust * * * or any liens alleged to be subsisting against said real property, but that a large amount of said sum of \$14,000 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid"; and that there is justly due

plaintiff from said McColgan more than \$2,455, the sum for which the second deed of trust was given. The plaintiff further alleges that the trustees named in the second deed of trust threaten to sell the land thereunder and prays for an injunction to prevent the sale and for an accounting.

[1] The answer denied the alleged agreement between plaintiff and Daniel A. McColgan relative to the purchase of the certificate of sale and the disposition of the proceeds of the sale under the trust deed. At the trial the latter testified that no such agreement was made, and that he acquired the land under the sheriff's certificate of purchase and deed for his own use and benefit and that he never agreed to account to plaintiff for the proceeds of the sale. The court found in accordance with such answer and testimony. The court further found that, at the time the note for \$2,455 and the second trust deed were executed, such note "was intended by said Fred. V. Lineker and by said Daniel A. McColgan to be and was in fact an account stated between" them, and "was intended to be and was in fact a final accounting * * * of all debts and financial transactions between them up to the time of said execution of said promissory note." Since there is evidence to support the findings, they are conclusive on appeal.

[2] The trust deed authorized the trustee and Daniel A. McColgan to pay "all or any incumbrance now subsisting, or that may hereafter subsist thereon, which may, in their judgment, affect said premises, or these trusts, * * * and these trusts shall be and continue as security to the party of the third part * * * for the repayment * * * of all amounts so paid out, * * * which disbursement and interest the party of the first part hereby agrees to pay." The trust deed further provided that, in the event of a sale of the land thereunder, all sums due the third party under its terms should first be paid out of the proceeds and the surplus, if any, should be paid to the first party, or assigns.

Appellant contends that under the foregoing provisions of the trust deed "Daniel A. McColgan could not go out and purchase for his own use and benefit the * * * certificate of sale for the reason that this certificate of sale evidenced a lien subsisting upon the real property affected by said deed of trust * * * being one of the class of liens mentioned in said deed of trust." No authority is cited in support of the contention. Since the lien created by the levy of the execution under which the certificate of sale was issued was junior to that of the trust deed, the provisions of the latter instrument did not authorize the beneficiary thereunder to discharge the former incumbrance and add the amount paid therefor to the indebtedness accrued by the trust deed.

"A voluntary payment by a mortgagee of claims against the mortgaged property, which it was not necessary for his own protection that he should pay, does not entitle him to be subrogated to the rights of the creditors whose liens he has discharged." *Jones on Mortgages* (7th Ed.) § 878.

"Subrogation is only allowed as a matter of right in such cases, when a party is forced, for the protection of his own interests, to discharge an incumbrance which might otherwise jeopardize them." *Carpentier v. Brenham*, 40 Cal. 239.

The trustee and the beneficiary were authorized to pay only such liens "as affect said premises, or these trusts." This language must be interpreted to mean such liens as might affect the rights of the holder of the superior lien. While they were made the judges as to what incumbrances would affect such rights, they were not authorized to decide arbitrarily, in disregard of the plain fact that the junior lien could in no manner affect their security.

[3] The relation between a mortgagee and mortgagor is not fiduciary. *De Martin v. Phelan*, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115. Neither is that between the beneficiary under a trust deed and the maker thereof. *Copsey v. Sacramento Bank*, 133 Cal. 659, 66 Pac. 7, 204, 85 Am. St. Rep. 238.

"The acquisition of the equity of redemption by the mortgagee is looked upon with suspicion by the courts, * * * because he has, by reason of his position as creditor, a certain advantage over the mortgagor which may be abused. * * * This objection, however, does not apply with equal force when he purchases the equity of redemption from one who has purchased it of the mortgagor, or when he purchases it at an execution sale had at the instance of a stranger." *Jones on Mortgages* (7th Ed.) § 870.

"A mortgagee in possession does not stand in such a relation of trust or confidence to the mortgagor as that he is prohibited from purchasing, for his own benefit, the title of the latter on an execution sale against him made upon a judgment in favor of a third person, and he may set up a title so acquired as a defense to an action by the mortgagor or his grantee to redeem." *Ten Eyck v. Craig*, 62 N. Y. 406; *Clark v. Jackson*, 64 N. H. 388, 11 Atl. 59.

"The mortgagee in possession may even purchase the equity of redemption at a sale upon an execution in his own favor issued upon a judgment for a debt other than the mortgage debt, and may hold the title adversely to the mortgagor if he does not redeem, as upon a sale upon execution." *Jones on Mortgages* (7th Ed.) § 712; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623.

[4] On acquiring plaintiff's equity of redemption by the sheriff's deed, *Daniel A. McColgan*, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff's title by the sheriff's deed, *McColgan* was entitled

to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lienholders' rights to share in such surplus is not involved in this action. The judgment is affirmed.

We concur: BURNETT, J.; PREWETT, Judge pro tem.

55 Cal. App. 134

BILLINGS et al. v. FINN, Sheriff.
(Civ. 3989.)

(District Court of Appeal, First District, Division 1, California. Nov. 9, 1921.)

I. Parties ¶71—Action against persons described as copartners is against the individuals named and not the partnership.

Where the caption and body of the complaint both described the defendants as J. F. and J. D., copartners doing business under the firm name and style of J. F. & Co., the action was against the persons or individuals named, and not against the business conducted under such firm name.

2. Judgment ¶700—Person carrying on business in trade name held not party and not bound by judgment against persons described as doing business under such name as partners.

Where A. F. was doing business as J. F. & Co., under a certificate filed under Civ. Code, §§ 2466-2472, but an action on an obligation signed in such trade-name was brought against J. F. and J. D., described as copartners doing business under such name, neither A. F. nor J. F. & Co. was a party to the action, and an appearance by attorneys for the defendants did not bind them, nor were they bound by the judgment rendered.

Original application by George E. Billings and another for a writ of error directed to Thomas Finn, Sheriff of the City and County of San Francisco, etc. Writ denied.

H. L. Sacks, of San Francisco, for petitioners.

Harry I. Stafford, of San Francisco, for respondent.

KERRIGAN, J. This is an application for a writ of mandate directing the respondent, Thomas Finn, as sheriff, to sell certain property in accordance with the instructions of petitioners.

The facts upon which the petition is based may be briefly summarized as follows: The petitioners herein in 1916 commenced an action against John Fauser and John Doe, alleging such persons to be "copartners doing business under the firm name of John Fauser & Co." The action was brought upon a bond executed in the name of John Fauser & Co.

Judgment was rendered against "John Fauser and John Doe, copartners doing business under the firm name and style of John Fauser & Co.," for the sum of \$1,056.77. Subsequently the plaintiffs caused execution to issue thereon, and the sheriff accordingly levied upon certain personal property, consisting of machinery and stock fixtures located in a building upon Guerrero street, which it is claimed belonged to John Fauser & Co. Thereafter, and before a sale could be had, one Annie Fauser filed with the sheriff a third party claim to the property. Plaintiffs bonded against such claim and demanded that the sheriff proceed with the sale. Thereupon Annie Fauser delivered to the sheriff an undertaking pursuant to the provisions of section 710a of the Code of Civil Procedure, and the sheriff then refused to act further in carrying out a sale.

It appears from the record that one John Fauser owned the business conducted under the name of John Fauser & Co., He died, and Annie Fauser acquired the business, and filed in the office of the county clerk the certificate provided for by sections 2466-2472 of the Civil Code, to the effect that she was conducting said business under the name of John Fauser & Co. Notwithstanding this notice, plaintiffs in the action above referred to, in attempting to proceed against John Fauser & Co., alleged the same to be a copartnership, and sued John Fauser and John Doe as copartners doing business under such copartnership name, and service of summons was had upon John Fauser, a brother of Annie Fauser, who, it appears from the record, had no interest whatever in the business, but was a mere employee therein. Appearance was made in the action for the defendants by a firm of attorneys, and judgment was rendered in favor of plaintiffs as above recited.

[1] It is here claimed by respondent that, as the business was owned by Annie Fauser, she should have been made the party defendant, and that, not having been made such party and never having been served with summons, the judgment here sought to be enforced can in no manner affect the property of "John Fauser & Co.," of which she is the sole owner. It is admitted that the business attempted to be sued and the one against which the levy is sought to be made is one and the same. There is no question that in the action above referred to an attempt was made to sue a copartnership known as John Fauser & Co., for the obligation sued upon was executed under such name. The pleader, however, failed to do so. Both in the caption of the complaint and in the averment as to the relations of the parties the defendants are described as John Fauser and John Doe, copartners doing business under the firm name and style of John Fauser & Co. In such a case the action is against the

persons or individuals named and not against the business, although such names are followed by the description "partners doing business under" a designated firm name; and, conversely, where the declaration or complaint is in terms against the firm, the addition of the averment that such firm consists of certain named persons does not render such persons parties individually, but the action is against the firm, such additional averments being considered mere descriptive personæ. 15 Ency. of Pl. & Pr. p. 850; Davidson v. Knox, 67 Cal. 143, 7 Pac. 413.

[2] This being so, neither John Fauser & Co. nor Annie Fauser, the owner of the business, was either sued or served in the action referred to, nor did the judgment run against either of them; it being against John Fauser and John Doe, copartners doing business under the firm name of John Fauser & Co. The defendants were not copartners, so far as the record shows, and did not do business under the firm name mentioned, for Annie Fauser was the sole owner of the business conducted under such name, as her certificate filed in the office of the county clerk showed. Plaintiffs could have ascertained this fact by proper inquiry. They failed to do so and sued the wrong parties. Neither John Fauser & Co. nor Annie Fauser can properly be considered parties to the action, and it follows that appearance by attorneys for all the defendants in no manner bound Annie Fauser nor her pseudonym "John Fauser & Co.," nor were they affected by the judgment.

For the reasons given, the writ is denied.

We concur: WASTE, P. J.; STURTEVANT, Justice pro tem.

55 Cal. App. 112

PEOPLE v. HULBART. (Cr. 815.)

(District Court of Appeal, Second District, Division 2, California. Nov. 8, 1921.)

Criminal law §507(7)—**Testimony of prosecuting witness incapable of complicity in offense need not be corroborated; "accomplice."**

In view of Pen. Code, § 1111, as amended by St. 1915, § 760, defining an accomplice as one liable to prosecution for the identical offense, the testimony of a boy under 14, on whom the lewd and lascivious act defined in section 288 was committed, need not be corroborated, since he could not be guilty with defendant of the offense charged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

Appeal from Superior Court, Los Angeles County; W. P. Cary, Judge.

Paul E. Hulbart was convicted of a lewd and lascivious act on the body of a child, and he appeals. Affirmed.

LeRoy D. Barnett and W. W. Judd, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was convicted of the offense defined in section 288 of the Penal Code, namely, the commission of a lewd and lascivious act upon or with the body "of a child under the age of fourteen years, with the intent of arousing * * * lust," etc., appeals from the judgment, and from an order denying his motion for a new trial.

At the time of the commission of the offense of which he was convicted, defendant was a man of about 23 years of age, and his victim, the complaining witness, was a boy of about 12 years. A discussion of the malodorous facts is not necessary, and in view of the nature of the testimony no detailed consideration of the evidence will be made. At the request of defendant the court gave certain instructions respecting the necessity for corroboration of the testimony of an accomplice. These instructions were given upon the theory that, in every case of this character, the complaining witness is, of necessity, an accomplice. Subsequently the court withdrew all of the instructions that it had given relative to the law of accomplices, and specifically instructed the jury that the complaining witness was not an accomplice. It is of this action on the part of the court that complaint is now made.

Appellant contends that, regardless of the boy's age, the evidence shows him to be an accomplice, because of his intelligence, education, and understanding of moral questions, and that therefore the court's withdrawal of its instructions upon the law of accomplices and its refusal to instruct the jurors that if they found the child to be an accomplice his testimony would require corroboration to sustain a conviction, constituted prejudicial error. Without doubt the testimony of an accomplice is required to be corroborated in order to sustain a conviction. Section 1111 of the Penal Code expressly so provides. But, by an amendment of that section in 1915 (Stats. 1915, p. 760), we now have a legislative definition of an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." The gist of the offense defined by section 288 is that the acts shall be committed upon or with the body "of a child under the age of fourteen years." In the present case the prosecuting witness, a boy of but 12 years, could

not be guilty, with this defendant—who was over 14 years of age—of the offense defined in section 288, for, as we have seen, the gist of the offense is that the acts shall be committed upon or with the body of one under the age of 14 years.

It is not necessary to pursue the question further; for it has been expressly decided that there is no statute or rule of law in this state calling for the corroboration of the testimony of the complaining witness in cases of this character, where, as here, the defendant is over the age of fourteen years. *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907; *People v. Troutman*, 201 Pac. 928. See, also, *People v. Thourwald*, 189 Pac. 124.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

55 Cal. App. 22

PITNEY v. PITNEY et al. (Civ. 3961.)

(District Court of Appeal, First District, Division 2, California. Nov. 1, 1921.)

1. Appeal and error §1011(1) — Appellate court cannot disturb trial court's finding of intention to deliver deed.

On the issue of intention as to delivery of deeds, the court on appeal cannot disturb the findings of the trial court, where based on conflicting evidence.

2. Deeds §61—Delivery irrevocably to take effect on grantor's death held valid.

A deed delivered to a third party, to be delivered to grantee on grantor's death, is effective to pass present title, if grantor's intention is to make such delivery absolute, and place it beyond his power to revoke or control the deed.

3. Evidence §461(2)—Indorsement on envelope containing escrow held admissible to show grantor's intent.

On issue as to whether grantor, placing deeds in escrow to be delivered on her death, intended to make absolute irrevocable delivery thereof, an indorsement on the envelope containing the deeds, made according to grantor's instructions at the time they were delivered by her in escrow, and in the presence of the parties, were admissible on the question of her intent, irrespective of proper signature thereto.

4. Deeds §45 — Signature held sufficient, whether considered as grantor's own, or "signature by the hand of another."

Testimony that at the time of delivery of deeds in escrow, and in the presence of all the parties, the grantor's attorney at her request signed her name thereto, followed by mark and the words "her mark," and that grantor at the same time had hold on the pen, showed a signature "by the hand of a party," within the first class of signatures permitted by Civ. Code, §§ 14, 1091, and testimony that such attorney, at grantor's direction, signed her

name in her presence and the presence of witnesses thereto, showed a valid signature "by the hand of another," within the second class authorized by the statute, and if the grantor placed her mark at the end of the deed, and her name was written thereon by the attorney, and thereafter plaintiff turned to a notary public present and acknowledged to him that she executed the deed, it was an adoption of the signature, valid as between the parties to the instrument.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Suit by Amanda E. Pitney against George R. Pitney and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Benj. C. Jones, of Lakeport, and Mannon & Mannon, of Ukiah, for appellant.

M. H. Iverson, of Ukiah, for respondents.

STURTEVANT, J. The plaintiff brought an action against the defendants to quiet her title to certain lands in Lake county. In her complaint she named as defendants her four children and a grandchild, the daughter of a deceased child of the plaintiff, and she also named H. E. Witherspoon, the former attorney of the plaintiff, and the holder of the deeds sought to be canceled and annulled. The summons was served on all of the defendants; three of the defendants appeared and answered, but the other defendants neither appeared nor answered, nor was a default entered. The defendants that answered were George R. Pitney, a son, May Foutch, a daughter, and H. E. Witherspoon. On the issues so made the court tried the case sitting with a jury.

The jury returned a verdict in favor of the defendants, and brought in five special verdicts: (1) The plaintiff did intend, on October 10, 1916, at the time H. E. Witherspoon took the written instruments, that the said instruments should become immediately operative as deeds; (2) that plaintiff did intend, at the time H. E. Witherspoon took the written instruments, that such instruments should presently pass title to the land described in them; (3) the plaintiff did intend, at the time H. E. Witherspoon took the written instruments, to put it beyond her power to make any other disposition of her land; (4) the plaintiff did intend, at the time H. E. Witherspoon took the written instruments, that said Witherspoon should have actual custody of those papers; and (5) the plaintiff did intend, when H. E. Witherspoon took the written instruments, to part with all future control over said instruments.

Thereafter the trial court received and adopted said verdicts as part of its findings, and among other findings the trial court made a finding that the plaintiff did, on the 10th day of October, 1916, deliver the deeds to H. E. Witherspoon and instruct him to hold the said deeds in escrow until her death, and

in that event to deliver the said deeds to the several grantees therein named, and the trial court further found that the said deeds were signed, acknowledged, and delivered by the plaintiff to H. E. Witherspoon in escrow, with full knowledge of their nature and effect, and with the intent thereby to surrender up all dominion or control over the said deeds forever, and to place them irrevocably beyond her power to recall them, and with the further intent that title to the said lands should immediately vest in the several grantees named in the said deeds, subject only to a life estate therein reserved to herself, and thereupon the court entered a judgment in accordance with the said findings. Later the plaintiff moved for a new trial; her motion was denied, and she appealed from the judgment under section 953a of the Code of Civil Procedure. On this appeal the appellant contends that the deeds were never subscribed by her, and consequently, even though delivered in escrow, were never operative to transfer any title, and secondly, that the deeds were never delivered and were inoperative because appellant never intended to vest an estate in the grantees or to put it beyond her power to make a subsequent disposition of the property.

On the 10th day of October, 1916, the plaintiff was about 71 years of age; she was unable to read or write; her general health was fairly good; at the time the survey was made, about a week before, she was well enough that she was out on the farm and directed the surveyors as to the lines that should be run. On the day the deeds were made, she was indisposed and was in bed, but there is no contention that she was suffering from any severe illness at that time. The testimony produced by the plaintiff and that produced by the defendants is to the effect that the plaintiff was in possession of her mental faculties and freely discussed with her attorney the business in hand.

Mr. Witherspoon was called as a witness for the defendants. Among other things, he testified that prior to the 10th day of October, 1916, the plaintiff had asked him if she could make deeds to the grantees named, and yet retain the possession of the property during her lifetime. He said he explained what was meant by escrow deeds, that she could make deeds in escrow, and deliver them to a third party, with the intention of passing present title; that such an act would give her a life estate in the property, and at her death the holder of the deeds would deliver the deeds to the parties she had named, and they could record the deeds. That seemed to satisfy her. He also explained to her that the property in her lifetime was hers to use, that she could rent it, and farm it, and was entitled to the entire income from the property and that the property would only come to the possession of the grantees named in the deeds after

her death. After that explanation the plaintiff said that was the way she wanted her property fixed. He explained to her that she could not get the deeds back after placing them in escrow. She said that this was to be her final disposition, she didn't want to be bothered any more about dividing her property, she wanted this to be final. He also told her that it would be necessary to obtain descriptions to be inserted in the deeds. Thereupon the services of a local surveyor were obtained, and later the descriptions were delivered by the surveyor to Mr. Witherspoon.

On October 10, 1916, Mr. Witherspoon took with him Dr. R. G. Reynolds, a notary public, and Mr. D. W. Dillard, and the three went to the residence of the plaintiff. While there the deeds were finally completed, and then one at a time the same were read to the grantor, and thereupon each one was executed in such a manner that the closing part was as follows:

"In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

her
"Amanda E. X Pitney. [Seal.]
mark

"Signed, sealed, and delivered in the presence of witnesses to mark: R. G. Reynolds. D. W. Dillard."

Thereupon each deed was acknowledged before Dr. Reynolds as a notary public, and each certificate of acknowledgment is in the ordinary and regular form. Mr. Witherspoon wrote the words "Amanda E. Pitney her mark." Each deed was placed in a separate envelope, and there was written on each envelope an indorsement; the one on the envelope in which the deed to May Fouch was inserted being as follows:

"Escrow Instructions. I instruct H. E. Witherspoon, in whose hands I have deposited a deed to May Fouch, to hold the same during my life, and at my death to deliver the same to the said May Fouch, and I hereby declare it is now my intention to have the said deed delivered in escrow to the said Witherspoon for purpose of delivering said deed at my death to the said May Fouch.

her
"Amanda E. X Pitney.
mark

"Witnesses to mark: R. G. Reynolds, D. W. Dillard. Oct. 10/16."

The signing of the instructions was done in the presence of Dr. Reynolds, Mr. Dillard, and Mr. Witherspoon, and was done in the same manner as the signing of the deeds. Mr. Witherspoon explained the contents of each deed to the grantor before she signed the same, and explained to her the instructions in writing and read the same to her. He testified:

"She was again asked if she understood an escrow deed meant the delivery of a deed to

a third party, that she surrendered all future control of the deeds and retained only a life estate in the property, and that that was the effect of the instructions upon the envelope."

After the deeds had been so executed and delivered to the witness, and inclosed in the envelopes and sealed, the witness and Dr. Reynolds and Mr. Dillard left the house, the witness taking the envelopes and their contents with him, and he has retained the same ever since. On cross-examination he stated that in April, 1918, the plaintiff demanded the possession of the deeds, but that he refused to deliver the same. That was the first dissatisfaction he heard expressed. About October 17, 1916, the plaintiff called on the witness and made a will disposing of her personal property. By that will she divided her personal property, giving different things to her children or to her grandchildren. She inserted a clause that the rest and residue of her property was to be divided among her children.

Mrs. Fouch testified that, on the day the survey was being made, her mother had stated that she wanted her property disposed of by deed, and that was her final decision. She also testified that she heard the instructions read to her mother, and heard her mother assent thereto; that she never heard any dissatisfaction expressed until the spring of 1918, although after the deeds had been executed, and before the spring of 1918, she said that her mother had made the remark that the execution of the deeds was a final disposition of the property; she was entirely satisfied and happy, and she was glad to be rid of it and have it off her mind. The defendant George R. Pitney testified that on the morning the survey was made his mother pointed to the land that she was going to deed to him and said—

"I am going to make a final disposition, so I can't change it, if I want to."

There is a stream that crosses or borders the lands conveyed to George Pitney and May Fouch. After the deeds had been made, the plaintiff directed the attention of Mr. Fouch and of George Pitney to the fact that the stream was cutting the banks, and that it would be necessary for them to protect their respective properties. Thereupon those men entered upon the lands and performed the work in question.

Before the trial of the case Dr. Reynolds had died. The witness above referred to, Mr. Dillard, was called by the plaintiff. He testified, among other things, that in every instance Mr. Witherspoon read over the deed to Mrs. Pitney, after which he asked her if that was her wish, if that was the way she wanted the deed, and afterwards she signed it. "As I understand, Mr. Witherspoon signed with her touching the pen." After the deeds had been prepared, Mr. Witherspoon

asked the plaintiff, "Now do you want me to take these deeds in escrow, and deliver them to the proper parties?" She said, "Yes." He also testified that the instructions were read over to her and that she signed the instructions.

The plaintiff testified that she did not intend to transfer her property; that at the time of the transaction she did not understand the effect would be that she would lose control over the papers; that she supposed she could get the papers back; that, if she had supposed that she was parting with all control over them, she would not have executed the papers; that she did not understand, at the time of the transaction, that, if she made the papers and left them with Mr. Witherspoon, immediately Mrs. Foutch and George would become the owners of interests in the ranch.

[1-3] From what has been stated, it appears clearly that the intention of the grantor at the time the deeds were made was the real question put in issue by the pleadings and the proof, as introduced by the respective parties, and that it may be conceded that the evidence is conflicting. However, it must also be conceded that there was an abundance of evidence going to support the verdicts and findings. On the issue of intention, this court is not at liberty, therefore, to disturb the findings of the trial court. The appellant cites and relies on the rule stated in *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703. That case, however, does not control in this case, because in that case the finding of the trial court was that Williams never intended that his deed should presently pass the title. On the other hand, this case is controlled by the rule stated in *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186. Referring to that case and similar cases, the Supreme Court said:

"It is well settled that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor, and that such a delivery will be effectual to pass a present title to the property to the grantee, *if the intention of the grantor is to make such delivery absolute and place it beyond the power thereafter to revoke or control the deed*. Where delivery is made under these circumstances and with this intention, it is fully operative and effective to vest a present title in the grantee, the grantor retaining only a life estate in the property and the third party or depositary holds the deed as a trustee for the grantee named in it." *Williams v. Kidd*, 170 Cal. 631, 637, 151 Pac. 1, Ann. Cas. 1916E, 703. (Italics ours.)

As bearing on the intention of the grantor, the memorandum indorsed on the envelope pursuant to the grantor's request was admissible in evidence. No law required the same to be signed. Whether it was so signed as to comply with the requirements of section 14

of the Civil Code is immaterial; but, whether signed or unsigned, the words of the memorandum, the fact it was read to the grantor, and her declarations concerning the same, were all material facts going to prove or disprove intention and all of them were admissible in evidence. Code Civ. Proc. § 1850; Id. § 1870, subd. 7.

[4] It is earnestly contended by the appellant that the signature by mark, as the same was executed, under the foregoing facts does not constitute a legal signature when measured by the calls of the statute. Civ. Code, §§ 14 and 1091. A signature may be attached (1) by the hand of a party; (2) by the hand of another; and (3) by use of a mark, 36 Cyc. 451. Mr. Dillard testified that, when Mr. Witherspoon had prepared the papers, Mr. Witherspoon wrote "Amanda E. Pitney her mark," on the request of the plaintiff, and that the plaintiff at the same time had a hold on the pen. Such procedure, standing alone, had, in legal effect, the force of being a signing by the plaintiff. Such a signature falls within the first class.

Again, the testimony of the several witnesses called by the defendants was to the effect that when the time to sign arrived, the plaintiff directed Mr. Witherspoon to sign her name, which act was done by him in her presence, and in the presence of Mr. Dillard and of Mrs. Foutch. Such act, without regard to any mark, constituted and was in law the signature of the plaintiff. Such a signature falls within the second class. Our first statement is supported by the ruling in *Harris v. Harris*, 59 Cal. 620. The second is supported by the doctrine stated in *Videau v. Griffin*, 21 Cal. 389, 392, where the court says:

"The only exception to the rule that an authority to execute a deed must be conferred by writing is where the execution by the attorney is in the presence of the principal. The exception arises from the doctrine that what one does in the presence of and by the direction of another is the act of the latter—as much so as if it were done by himself in person. The attorney in such case, so far as the signature to the instrument is concerned, is a mere amanuensis of the grantor, and in the affixing of the seal is only the instrument, the hand, as it were, of the grantor. It is not sufficient that the attorney was directed to sign the name of the principal and affix his seal; the execution must be in the immediate presence of the principal, and this fact must be affirmatively established by the party who relies upon it as an excuse for the absence of a power in writing."

And in *Jansen v. McCahill*, 22 Cal. 563, 565 (83 Am. Dec. 84) where the court says:

"The name of the wife being written by her daughter in her presence, and at her request, made it as much her signature as though it had been written by herself." *Ball v. Dunsterville*,

4 Term, 313; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *King v. Longnor*, 4 Barn. & Ad. 647; *Frost v. Deering*, 21 Me. 156.

In *Blaisdell v. Leach*, 101 Cal. 405, 408, 35 Pac. 1019, 1020 (40 Am. St. Rep. 65) the court said:

"The Civil Code (section 1091) requires that a grant of real property shall be subscribed by the grantor in order that the title may be transferred thereby, but it is not necessary that the signature of the grantor be affixed by himself. It may be so affixed by another, if done in his presence, and by his own direction (*Gardner v. Gardner*, 5 Cush. 483); and he may also adopt and ratify a signature made by another without any previous authority (*Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92); and the adoption of a forgery has been held to be binding upon the maker of a promissory note. (*Forsyth v. Day*, 46 Me. 176; *Greenfield Bank v. Crafts*, 4 Allen, 447)."

In the case of *Pierce v. Dekle*, 61 Fla. 390, 54 South. 389, Ann. Cas. 1912D, 1355, the Supreme Court of Florida was considering the validity of a signature attached to a paper by the direction of the defendant who stood by and saw the signature attached. On page 391 of 61 Fla., page 389 of 54 South., and page 1356 of Ann. Cas. 1912D, the court said:

"One of the defendant's pleas was non est factum. The contention being that before Liddon could have bound the defendant under seal he should have had authority under seal to so bind him. The rule is well settled, both in England and in the United States, that an act done by a person in the presence of another, and by his direction or with his consent, as the signing or execution of a sealed or written instrument, for example, is not regarded as the act of an agent, but is the direct act of the person by whose direction it is done." (Italics ours.)

And again, when the plaintiff had placed her mark at the end of the deed and her name was written thereon by Mr. Witherspoon, and thereafter the plaintiff turned to Dr. Reynolds as a notary public and acknowledged to him that she executed that paper, such act was on her part an adoption of the signature in its entirety and it became her signature. 36 Cyc. 448; 1 C. J. 786; *Eadie v. Chambers*, 172 Fed. 73, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879, 18 Ann. Cas. 1096; *First National Bank v. Glenn*, 10 Idaho, 224, 77 Pac. 623, 109 Am. St. Rep. 204, 209; *Blaisdell v. Leach*, 101 Cal. 405, 408, 35 Pac. 1019, 40 Am. St. Rep. 65. Such an adopted signature may fall within class 2 or class 3. As the rights of third persons are not involved, the signature was valid as between the parties. Such was the common-law rule. 8 R. C. L. 940. There is no statute in California to the contrary. Certainly section 14 of the Civil Code does

not so state. What that section does state is this, and nothing more: That when a signature is by mark, then, and in that event, the signature may not be acknowledged, unless the signature is witnessed by two persons, who must subscribe their own names as witnesses thereto.

Note, however, that under the facts of this case such clause was fully complied with. Furthermore, the same section provides that when a person cannot write he may make his mark, and his name should be written near, by a person who writes his own name as a witness. This is a further call of the statute. A failure to comply with the call is not defined by statute. When the statute was enacted, the Legislature must have realized that instruments signed by mark, witnessed by two witnesses, and acknowledged before a notary public, would be entitled to be received in evidence without further proof. Code Civ. Proc. § 1951. That such papers would be entitled to recordation and that certified copies of the record would carry the same rights. Code Civ. Proc. § 1951. Yet how could it be ascertained from a certified copy who had written the name of the grantor? These considerations impel us to the conclusion that the mode of making the signature by mark is addressed primarily to unacknowledged instruments.

The appellant cites and relies on *Sivils v. Taylor*, 12 Okl. 47, 69 Pac. 867; *Sims v. Hedges*, 32 Okl. 683, 123 Pac. 155; *Walker Bond & Co. v. Purifier*, 32 Okl. 844, 124 Pac. 322; *Scivally v. Doyle*, 50 Okl. 275, 151 Pac. 618; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Fakes v. Wilder*, 70 Ark. 449, 69 S. W. 260. The first four of those cases are from Oklahoma, and the last two are from Arkansas. We think they do not support the appellant. If a promissory note or other paper is not acknowledged, and the purported signature is by mark, which is not attached in the manner prescribed by statute, the attempted signature is not valid. Such is the rule in Oklahoma and in Arkansas. See above cases. But if a signature attached to the paper was made in a manner not in compliance with the statute on the subject, but the individual nevertheless appears before a notary public and states to that officer that he executed the instrument, the person does, by such act, adopt the purported signature and makes it his own. Such is the rule in other jurisdictions, and is also the rule in Oklahoma and in Arkansas. *Campbell v. Harsh*, 31 Okl. 436, 439, 122 Pac. 127; *Sims v. Hedges*, 32 Okl. 683, 687, 123 Pac. 155; *Ward v. Stark*, 91 Ark. 268, 121 S. W. 382, 384.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 92

LEDBETTER et al. v. BAYSIDE LAND CO.
(Civ. 4049.)

(District Court of Appeal, First District, Division 2, California. Nov. 5, 1921. Hearing Denied by Supreme Court Jan. 3, 1922.)

1. Contracts ⚙️322(4)—Evidence held to support finding that a bulkhead was constructed in workmanlike manner, and in accordance with specifications.

Evidence held sufficient to support finding that a bulkhead was constructed in a good and workmanlike manner, and in accordance with specifications agreed upon at the time of entering into a contract.

2. Trial ⚙️53—Evidence admitted on contract count may support finding on count for work and labor.

Where in one count plaintiff sued for work and labor and materials furnished in repair work, and in another count relied on a specific contract for the work, and the court found against the count relying on the specific contract, a finding for plaintiff for work and labor and materials is supported by evidence that plaintiff had done the repair work introduced in support of the allegations concerning the specific contract.

3. Costs ⚙️238(3)—Where respondent offered to modify judgment by eliminating interest to which he was not entitled, he will be allowed costs.

Where the respondent made an offer to reduce his judgment for an item of interest to which he was not entitled, and before the bill of exceptions was prepared, he will be allowed his costs.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by W. M. Ledbetter, John Hess, and W. H. Spear, copartners doing business under the firm name and style of the W. M. Ledbetter Company, against the Bayside Land Company. From a judgment for plaintiffs, defendant appeals. Modified and affirmed.

Bordwell & Mathews, of Los Angeles, for appellant.

E. T. Sherer and Emmet H. Wilson, both of Los Angeles, for respondents.

NOURSE, J. Plaintiff sued upon a complaint setting forth four causes of action—to recover a balance due on an express contract for the construction of a bulkhead at Seal Beach, Orange county; a common count for the balance of the reasonable value for the same work; a common count based upon the reasonable value of labor and materials furnished in repairing a portion of the bulkhead which had been washed out; and a cause of action alleging that this repair work had been performed under an express contract termed a "force account" contract or one

calling for payment of all costs plus 10 per cent. Plaintiffs had judgment on the first cause of action in the sum of \$326.10, and upon the third cause of action in the sum of \$2,081.07. To the amount found due under the third cause of action, the trial court added interest from the date of performance in the amount of \$365.06. Plaintiffs stipulate that this interest should not have been allowed, and consent to a modification of the judgment in that respect.

No error is assigned as to the portion of the judgment relating to the first cause of action, but appellant insists that the contract was not fully performed, and that it should have been permitted to set off its damages therefor against the amount found due. As to the portion of the judgment based upon the third cause of action, it is argued that the services were gratuitous, because, the original contract not having been fully complied with, respondents were obligated to make the repairs without cost to appellant, and also that the evidence does not support the finding that the appellant agreed to pay respondents the reasonable value of the labor employed and materials furnished in making such repairs.

[1] As to the first point urged by appellant, it is sufficient to say that the trial court found that respondents constructed the bulkhead in a good and workmanlike manner, and in accordance with the specifications agreed upon at the time of entering into the contract; also that respondents did not agree to construct the bulkhead to prevent the ocean from eroding the land adjacent thereto, and that they did not construct such bulkhead in noncompliance with any of the terms and conditions of the contract, and in an unworkmanlike or negligent manner. While it may be said that inferences might have been drawn from the facts proved which would have supported a contrary finding, nevertheless sufficient evidence was offered to support these findings as made. It is in evidence that the break in the bulkhead was caused by a heavy tide, which in turn was caused by an unusually heavy flow of water, and also that it had been constructed in a dangerous place against the warning and protest of respondents, but upon the insistence of appellant. The danger was increased by the location of a "seal pen" in the channel immediately in front of the place where the break occurred, it being said that this caused a whirlpool in the tide which eroded the bank supporting the toe of the piling of the bulkhead. This seal pen the appellant refused to permit respondents to remove, but ordered them to complete the bulkhead in accordance with the specifications of the contract.

When the break occurred in the bulkhead appellant approached respondents and urged them to make the necessary repairs. The

testimony as to what occurred in this conversation is in direct conflict. One of the respondents, who alone participated in the conversation with the representative of appellant, testified that it was agreed that they should make the repairs on the basis of cost plus 10 per cent. This was specifically denied by the representative of the appellant. The court found that the contract had not been made as alleged in the fourth cause of action, but found that the parties did agree that the respondents should furnish all labor and materials for the purpose of repairing the bulkhead, for which appellant agreed to pay the reasonable value thereof. Such reasonable value was found to be \$2,081.07.

[2] On this phase of the case it is argued that the evidence was offered in support of the fourth cause of action, and not the third; that the trial court having found that the contract set out in the fourth cause of action was not made, there is no evidence to support its finding upon the third cause of action. The trial court having found that the express contract for the original construction had been duly performed, the question of the expense for the repair work must be treated as though the parties then met for the first time. Respondents then having proved that the labor had been performed and the materials furnished as alleged in their third cause of action, the burden was upon appellant to prove either that it was done gratuitously or under a special contract. In this it failed. The law thereupon implied the promise of appellant to pay the reasonable value of the labor and materials. Evidence was offered showing the exact amount expended by respondents for labor, material, and rental of machinery, etc., to which was added 10 per cent for their time in purchasing materials and overseeing the work. These charges were shown to be reasonable. The evidence fairly met the issues raised in the third cause of action, and appellant could not have been taken by surprise when it was offered. It is of little moment that the same evidence would have supported the allegations of the fourth cause of action if respondents had been successful in proving that a cost plus 10 per cent. contract had actually been made. The work was performed in the latter part of the year 1916, when this form of contract was in common use in both public and private work. The trial court found that the actual cost paid out by respondents for labor and materials going into the work plus 10 per cent. to cover their time was the reasonable value of the entire account, and the evidence fully supports that finding.

[3] Respondents have consented to a modification of the judgment to the extent of eliminating the sum of \$365.06 allowed as interest on the amount found due under the third cause of action. It is stipulated that a

similar offer was filed with the clerk of the trial court on the 7th day of November, 1919. Though the latter offer was made subsequent to the filing of the notice of appeal, it was nevertheless made before the bill of exceptions was prepared, and nearly a year before the bill was settled and the transcript prepared. If this were the only point involved, it could have been readily adjusted before appellant had incurred any great expense in prosecuting this appeal. For that reason respondents should have their costs.

The judgment is modified by striking therefrom the sum of \$365.06 allowed as interest on the third cause of action, and as so modified will stand affirmed. Respondents to have costs.

We concur: LANGDON, P. J.; STURTEVANT, J.

54 Cal. App. 719

SHAFFER et ux. v. ARNAELSTEEN.
(Civ. 3551.)

(District Court of Appeal, Second District, Division 2, California. Oct. 28, 1921. Hearing Denied by Supreme Court, Dec. 27, 1921.)

1. Malicious prosecution §64(2)—Finding of want of probable cause warranted.

In an action by an apartment house manager for malicious prosecution on a charge of embezzling \$2.50, which she retained as cleaning money, evidence held to warrant the jury in finding that there was no probable cause for the prosecution.

2. Malicious prosecution §64(2)—Finding of want of good faith warranted.

In an action by an apartment house manager for malicious prosecution on a charge of embezzling \$2.50, which she had retained as cleaning money, evidence held sufficient to warrant the inference that the amount was appropriated openly, under a claim of title preferred in good faith, so that if she did so claim within Pen. Code, § 511, she was not guilty, even if her claim was untenable, and that defendant believed that she had so appropriated the money.

3. Malicious prosecution §32—Malice may be inferred from want of probable cause.

Though there is no legal presumption of malice from want of probable cause, malice may be found as an inference of fact arising from the circumstances of the want of probable cause.

4. Malicious prosecution §72(3)—Instruction on advice of counsel held not misleading.

In an action for malicious prosecution on a criminal charge, an instruction on the defense of advice of counsel, stating that, if defendant honestly believed the crime had been committed, and sought the advice of counsel, by whom, after a full and fair statement of the facts within his knowledge, he was advised that the facts constituted a crime, his good faith was warranted, was not erroneous, as leading the jury

to infer that want of probable cause was proved, if defendant failed to seek the advice of counsel or to make a full and fair statement of the facts, where the court also charged that one is not liable for causing the arrest of another unless he acts through malice and without probable cause, that it was incumbent on plaintiff to prove both malice and want of probable cause, and that defendant had the right to prove that he acted in good faith, without malice and upon probable cause.

5. Malicious prosecution ⚡22—**Instruction on advice of counsel held proper.**

In an action for malicious prosecution on a criminal charge, an instruction that, to support the defense of advice of counsel, defendant must show that he made to the prosecuting attorney a full, fair, and true statement of all the material facts known to him "of which he had and knew the means of ascertaining," held not erroneous.

6. Trial ⚡260(6)—**Requested instruction on probable cause held properly refused in view of instruction given.**

In an action for malicious prosecution of a charge of embezzlement, where the court charged that, to justify a finding of want of probable cause, jury must find that amount claimed to have been embezzled was collected in accordance with a contract plaintiff claimed to have entered into with defendant, the court did not err in refusing an instruction that, if the jury believed in the existence of certain alleged facts, they should find there was probable cause for the charge.

7. Malicious prosecution ⚡69—**\$6,000 damages held excessive.**

In an action for malicious prosecution, where plaintiff, who was confined but a few hours secured her release on deposit of \$10 bail, and her attorney charged only \$10, and, aside from the publicity and other natural concomitants of arrest and detention, there were no special circumstances of aggravation, held that a verdict for \$6,000 was excessive by \$4,000.

8. Appeal and error ⚡1140(2)—**Court may order new trial of action for malicious prosecution where damages excessive, unless plaintiff files remittitur.**

In actions for malicious prosecution, the courts have the power, and it is their duty, to order a new trial where the damages are excessive, unless plaintiff files a remittitur.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by J. Shaffer and wife against Ed. Arnaelsteen. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, unless plaintiff files remittitur, and in such case affirmed.

Harry Lyons, of Los Angeles, for appellant.

George L. Sanders, of Los Angeles, for respondents.

FINLAYSON, P. J. This action for malicious prosecution is founded upon the allegation in the complaint that defendant maliciously and without probable cause had the plaintiff Mrs. Shaffer arrested and prosecuted for the embezzlement of \$250. Following her acquittal of the embezzlement charge, Mrs. Shaffer and her husband brought this action against defendant to recover damages for the alleged malicious prosecution. The jury gave plaintiffs a verdict for \$10,000. Defendant moved for a new trial on the ground, among others, of excessive damages, appearing to have been given under the influence of passion and prejudice. The trial court ordered that, unless plaintiffs remitted the sum of \$4,000 within 10 days, the motion would be granted. Plaintiffs filed the required remission, and thereupon the motion for a new trial was denied. Defendant appeals from the judgment, and urges, as one of his grounds for a reversal, that the sum of \$6,000, remaining after the remission of said \$4,000, is excessive, and so disproportionate to any damage sustained by plaintiffs as to make it manifest that a verdict for even that amount could have been induced only by prejudice and passion.

The charge of embezzlement upon which Mrs. Shaffer was prosecuted grew out of the following facts: Defendant, at the times herein mentioned, was the owner of the Louvre Apartments in the city of Los Angeles. On June 7, 1919, he employed Mrs. Shaffer as manager. During the oral negotiations prior to the consummation of the contract of employment, and after defendant had offered Mrs. Shaffer a monthly salary of \$100 and the further sum of \$60 per month with which to pay the janitor service, and after she had told him that \$60 a month would not suffice to pay a janitor, defendant, according to the testimony of Mrs. Shaffer and her husband, told Mrs. Shaffer, in substance, that she could collect and keep the moneys paid by the tenants for cleaning their apartments. Mrs. Shaffer's testimony upon the terms of this arrangement was substantially as follows:

"I told Mr. Arnaelsteen that \$60 would not be enough to pay a janitor, and that I didn't feel that I could work for less than \$100 a month; and Mr. Arnaelsteen says, 'Well, I will tell you, I will make it a little bit better for you; you can collect for cleaning the apartments.' He said that if a tenant should come to rent an apartment for less than a month, that is, for one week or two weeks, we were to charge the tenant in advance for cleaning his apartment, and that that was to be added on to the rent."

Defendant denied that he ever made any agreement whatever with Mrs. Shaffer authorizing her to collect and keep the "clean-

ing money." In view of the fact that the jury returned a verdict for the plaintiffs, we must consider the case upon the assumption that an agreement was made substantially as testified to by the plaintiffs.

About June 8, 1919, Mrs. Shaffer entered upon the performance of her duties as manager of the apartment house, and remained until the 2d or 3d of July following, when she and her husband, owing to some misunderstanding or disagreement with the defendant, left the Louvre Apartments. On leaving defendant's employ, Mrs. Shaffer and her husband moved into the Hirsch Apartments, about three blocks from defendant's apartment house. Before leaving the Louvre Apartments, Mrs. Shaffer left with defendant her new address and telephone number.

On or about June 20, 1919, and while Mrs. Shaffer was managing the Louvre Apartments for defendant, a Mr. Davis and his wife rented apartment No. 315 for two weeks. Davis paid Mrs. Shaffer \$14. She kept \$2.50 as a cleaning charge, gave Davis a receipt for \$14, and entered upon a book that she kept for defendant the item \$11.50, rent for the apartment. This particular apartment had previously been cleaned by Mrs. Shaffer with the aid of the janitor. With respect to this collection Mrs. Shaffer testified substantially as follows:

"Mrs. Davis made the business arrangements with me. She and her husband came in and asked for an apartment. I told them I had one. She says, 'Well, it is only wanted for two weeks.' I told her then that the price of the apartment with a garage would be \$11.50, and I says, 'By staying only two weeks you pay in advance for the cleaning of your apartment;' and she said, 'That is perfectly satisfactory with me.' I receipted them for \$14, which they paid me."

On July 4, 1919, which was at least one day after Mrs. Shaffer had left defendant's employ and had severed her connection with his apartment house, Davis' tenancy expired. As Davis was leaving defendant told him that he still owed \$2.50 for cleaning the apartment; Davis replied that he did not, and told defendant that he had a receipt to show for it. Shortly thereafter Davis produced the receipt for \$14 which Mrs. Shaffer had given him, and turned it over to defendant. On July 8, 1919, defendant swore to a complaint in the police court, charging Mrs. Shaffer with the embezzlement of \$2.50. Before preferring the charge defendant laid the case before a deputy city prosecutor for the city of Los Angeles, but failed to tell that officer of his agreement with Mrs. Shaffer that she might collect and keep the "cleaning money." Indeed, as we already have stated, defendant at all times stoutly denied that he ever made any such agreement with Mrs. Shaffer. Upon the facts

thus given to him, the deputy prosecutor advised defendant that the crime of embezzlement had been committed by Mrs. Shaffer, and thereupon defendant swore to the criminal complaint, and set on foot the prosecution of Mrs. Shaffer for the alleged embezzlement. A warrant was issued, Mrs. Shaffer was arrested, and, on depositing bail money in the sum of \$10 was later released, after having been in actual custody not more than four or five hours. A day or so after the arrest, a trial in the police court was had, and Mrs. Shaffer was adjudged to be not guilty of the alleged embezzlement. Shortly thereafter she and her husband brought this action, and obtained the judgment from which this appeal is prosecuted.

[1] It is claimed by appellant that the evidence is insufficient to sustain the verdict; the claim being that the evidence is insufficient to show either a want of probable cause or malice in the criminal prosecution of Mrs. Shaffer. There was sufficient evidence to warrant the jury in finding that there was not probable cause for the prosecution. From the evidence adduced by plaintiffs, the jury was justified in finding that defendant told Mrs. Shaffer that she might collect and keep all moneys paid to her by tenants for cleaning apartments while she was defendant's manager; and also that defendant knew that Mrs. Shaffer was claiming the \$2.50 under this agreement. Because Mrs. Shaffer testified that the understanding was that she was to collect the cleaning money in advance, it is argued that the money was to be collected, not only in advance of the commencement of the tenancy, but also in advance of the cleaning for which the charge was made; and, further, that because this particular apartment that Mr. Davis rented had been cleaned by Mrs. Shaffer before Davis' tenancy commenced, she, therefore, was not entitled to retain the \$2.50 which she had collected from Davis as "cleaning money." But Mr. Shaffer testified that defendant told himself and wife that the latter could collect the cleaning money from an incoming tenant for cleaning an apartment that had previously been vacated by its former tenant. His testimony on this phase of the case is as follows:

"Q. Did Mr. Arnaelsteen tell you in that conversation that you should collect the cleaning money from the tenants coming in for the cleaning of apartments that had just been vacated? A. Yes, sir. * * * Q. What was your understanding? Did you understand that you were authorized to collect from a tenant coming in moneys for cleaning the apartment after the tenant that had just moved out? A. Tenants moving in we were to collect in advance. Q. For what? A. For two weeks; if they rented for two weeks we were to collect in advance. Q. What were you to collect in advance? A. The cleaning of the apartment. Q. When was the cleaning to be done? A. Before the tenants moved in."

[2] Moreover, conceding that there was room for an honest difference of opinion between the parties as to the proper interpretation to be placed upon their agreement respecting the "cleaning money," still there is sufficient evidence to warrant the inference that the \$2.50 which Mrs. Shaffer received from Mr. Davis was appropriated by her openly and avowedly, under a claim of title preferred in good faith. If she did so appropriate and claim the \$2.50, she was not guilty of embezzlement, even if her claim was untenable. Pen. Code, § 511. If, therefore, defendant believed, or had reasonable grounds to believe that Mrs. Shaffer had appropriated the money openly and avowedly, under a claim of title preferred in good faith, then he had no probable cause for the criminal prosecution which he caused to be launched against her. That he did believe that she had so appropriated the \$2.50 under an honest claim of title thereto is an inference that the jurors were warranted in drawing from all the evidence in the case. As we have stated, the evidence shows that defendant told Davis, as the latter was quitting the Louvre Apartments, that he (Davis) owed \$2.50 for cleaning the apartment which he previously had rented; and that to this Davis replied that he did not owe the cleaning money; that he had a receipt to show for it, referring to the receipt for \$14 which Mrs. Shaffer had given him when, as defendant's manager, she rented the apartment to him. Knowing that, under their agreement, Mrs. Shaffer was entitled to collect and keep moneys paid to her by tenants for cleaning their apartments, and learning from Mr. Davis that the latter had paid this particular sum of \$2.50 to Mrs. Shaffer as such "cleaning money," and knowing, further, that, when Mrs. Shaffer and her husband left defendant's apartment house to move to another near by, they had left with him their address and telephone number, defendant, as an ordinarily cautious man, had reasonable ground to believe that Mrs. Shaffer was claiming the money in good faith under her contract with him, and that, when it was received by her, she had appropriated it as her own openly and avowedly. In short, the circumstances of this case are such that, notwithstanding defendant's positive and sworn assertion to the contrary, the jury may well have inferred that when he preferred the charge against Mrs. Shaffer he did not in good faith believe her guilty of embezzling the \$2.50 which she had collected pursuant to her contract.

[3] There is sufficient evidence on the issue of malice. Undoubtedly it devolved upon plaintiffs to establish the fact that the prosecution was malicious as well as without probable cause. But from the want of probable cause the requisite malice could be inferred by the jury. The malice could not be found as a presumption of law from the fact

that there was not probable cause for the prosecution, for there is no legal presumption of malice arising from the want of probable cause; but malice may be found as an inference of fact arising from the circumstances of the want of probable cause.

[4] It next is contended that the court committed error by giving an instruction whereby the jurors were told that if the person causing the prosecution of another honestly believes that the crime has been committed, and if, in addition to such honest belief in the guilt of the accused he seeks the advice of counsel learned in the law, and, after a full and fair statement of the facts within his knowledge, is advised by such counsel that the facts constitute a crime, "his good faith in prosecuting the alleged offender is warranted." Appellant's criticism of this instruction is grounded upon the assumption that the jury might have inferred from the language of the court's charge that a want of probable cause is proved if the person causing the prosecution fails to seek the advice of counsel, or if he does not make to counsel a full and fair statement of the facts. It is, of course, true that a complete defense of probable cause may exist without the accuser having sought or taken the advice of counsel. If he has reasonable grounds to believe, and does in fact honestly believe, that the criminal charge is well founded, then he has probable cause for prosecuting the accused regardless of whether he has or has not consulted counsel. In the instant case the defendant pleaded in his answer, as one of his affirmative defenses, that before swearing to the criminal complaint against Mrs. Shaffer he consulted the deputy city prosecutor; that he made to the latter a full and fair statement of all the facts within his knowledge; and that he was advised by the deputy that the crime of embezzlement had been committed. It was to this particular defense that the instruction in question was directed. In this instruction, as well as in others given by the learned trial judge in the course of his charge to the jury, the court was careful to say that a person who causes the arrest of another is not liable therefor unless he acts through malice and without probable cause. In one of its instructions the court specifically charged the jury that it is incumbent upon plaintiffs to prove both malice and want of probable cause, and that—

"On the other hand, the defendant has the right to prove that he acted in good faith, without malice and upon probable cause; that is, upon such facts and information as would induce a reasonably prudent man to believe that the plaintiff Mrs. Shaffer had embezzled the amount mentioned in the complaint, to wit, \$2.50."

In a further instruction the court expressly charged the jury that if they found from

the evidence that certain matters were true—that certain things specifically enumerated by the court were facts—then they should find that defendant did have probable cause. In the instruction last referred to, nothing whatever is said by the court about seeking the advice of counsel. The entire charge to the jury must be read and considered as a whole. When so considered, it is not possible that, from what was said by the court when specifically charging the jury with respect to one particular affirmative defense set up in defendant's answer—the defense arising out of the advice alleged to have been given to him by counsel—the jurors could have inferred that if a person does not seek the advice of counsel, or make a fair and full statement to a person learned in the law, there necessarily is a want of probable cause.

[5] Criticism is made of an instruction whereby the jury was instructed that—

To support the defense that he acted upon the advice of counsel, defendant is required to show by a preponderance of the evidence that he made to the deputy prosecuting attorney "a full, fair, and true statement of all the material facts known to him, of which he had and knew the means of ascertaining," and that if defendant "had reasonable grounds for believing that other facts existed which would tend to exonerate Mrs. Shaffer from the charge of embezzlement, good faith requires that he should have either made further inquiry with reference to those facts and circumstances, and communicated the information obtained to counsel, or that he should inform counsel of his belief in their existence, in order that the counsel might investigate with reference to them and take into account, in forming his opinion, the information obtained with reference to them."

A substantially identical instruction was considered in *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463, and held to be free from error. The briefs filed in that case show that there, as here, the appellant attacked the instruction upon the ground that it is error to charge the jury that, to justify the defense that the accuser sought and received the advice of counsel, he is required to prove that he stated all the material facts "known to him, of which he had and knew the means of ascertaining." The instruction, nevertheless, was upheld by the Supreme Court, a hearing in bank was denied, and we, therefore, are constrained by that decision.

[6] The trial court refused to give an instruction requested by defendant charging the jury that if they believed in the existence of certain alleged facts, then they should find that there was probable cause for the criminal charge. In refusing this instruction the court committed no error. Upon this particular matter the jurors were fully and fairly charged in a carefully prepared instruction given by the court, where-
by they were told, in effect, that to justify

a finding that there was not probable cause they must find that the \$2.50 was collected "in accordance with the contract" between Mrs. Shaffer and defendant. This language of the court's instruction is a complete answer to the point specifically presented by appellant as his reason why the refusal to give his requested instruction was prejudicial error.

[7, 8] Some other questions are presented by the record, but none, in our judgment, that requires consideration, except that of whether the verdict is excessive notwithstanding plaintiff's remission of \$4,000 in compliance with the trial court's conditional denial of defendant's motion for a new trial. Mrs. Shaffer was in actual confinement but a few hours. She secured her release on the deposit of \$10 as bail. The fee charged by the attorney who appeared for her in the police court was but \$10. She does, it is true, complain of the publicity that attended her arrest, and also of certain distressing but natural and not unusual circumstances which are said to have occurred while she was in the lieutenant's office at the University Police Station awaiting her release on bail that her husband meanwhile was endeavoring to procure. But beyond these natural and not unusual concomitants of arrest and temporary detention, there were no special circumstances of aggravation. The case was one where but \$10 could be assessed for actual expenses, together with general compensatory damages and damages by way of punishment. Under these circumstances, it appears to us quite clear that the verdict, even as reduced under the order made by the trial court, is still outrageously excessive and grossly disproportionate to any injury that plaintiffs may have received and to any punishment that properly could be inflicted upon defendant. There is, it is true, no inflexible or definite rule by which courts can be governed in reviewing verdicts in such cases as this. But that, in actions such as this, we have the power, and that it is our duty, to order a new trial where we are satisfied that the amount assessed against the defendant is excessive, unless the plaintiff shall file a remittitur of damages is thoroughly established in this state. *Phelps v. Cogswell*, 70 Cal. 201, 11 Pac. 628; *Russell v. Dennison*, 50 Cal. 243; *Daves v. Southern Pacific Co.*, 98 Cal. 13, 32 Pac. 708, 35 Am. St. Rep. 133. Whilst we do not desire to restrict juries within very narrow limits in assessing damages in this class of cases, we are impelled to the conclusion, after a careful consideration of all the circumstances of the case, that a verdict for more than \$2,000 would so far exceed all reasonable bounds as to raise a just presumption that it proceeded from passion and prejudice.

The judgment is reversed, and the cause

remanded for a new trial, unless, within 30 days from the filing of the remittitur in the court below, plaintiffs shall remit from the judgment all except the sum of \$2,000 and the costs as at present adjudged therein, neither side to recover from the other costs on this appeal. If such remission be so made, then and in that event the judgment shall stand affirmed; otherwise it shall stand reversed, and the cause shall be retried.

We concur: WORKS, J.; CRAIG, J.

55 Cal. App. 169

REAK et al. v. BORSI et al. (Civ. 4041.)

(District Court of Appeal, First District, Division 2, California. Nov. 14, 1921. Hearing Denied by Supreme Court Jan. 11, 1922.)

1. Judgment $\S$ 256(2)—Cannot stand against defendant in favor of whom material finding is made.

Where a material finding is made in favor of a defendant, a judgment against him is not supported by the findings and cannot stand.

2. Judgment $\S$ 256(2) — Not supported by conflicting findings.

In an action to recover for death caused by automobile owned by one defendant and driven by another, findings that the automobile was owned by one defendant, and that the other defendant was driving it in the performance of services in and about the carrying on of the owner's garage business, for the purpose of procuring and delivering to the garage parts or appliances to be used by workmen therein, although the driver was not at the time of the accident in the actual employment of the owner, were hopelessly conflicting, and judgment against the owner could not stand; it being alleged in the complaint that the driver was the employee of the owner.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Althea Reak and others, copartners transacting business under the firm name of the Citizens' Laundry, against Emma Borsi and another. Judgment for plaintiffs, and defendants appeal. Affirmed as to one defendant, and reversed and remanded as to the other.

E. J. Emmons and J. W. Wiley, both of Bakersfield, for appellants.

Foster & Barnhart and Kaye, Siemon & Abel, all of Bakersfield, for respondents.

STURTEVANT, J. Walter Reak while in the employment of George S. Kaar and Eliza M. Howell, as copartners, was so injured in an automobile accident that he died. Having become liable to his heirs under the Workmen's Compensation Act, the copartners commenced this action, under the provisions of that act, to obtain a judgment in damages against the person causing the accident. The case was tried before the judge of the trial court sitting without a jury, and the plaintiffs were awarded a judgment against Emma Borsi and George Elliott. The defendants have appealed, and have brought up the judgment roll only. Several attacks are made on the findings. Owing to the conclusion which we have reached as to one of the attacks, we will not discuss the others.

[1] By the very nature of the action it became altogether material to ascertain who operated the car that caused the injury, and in what capacity was the operator acting at the time. The plaintiff alleged:

"That the defendant Borsi who was driving the said automobile at said time, was in the employment of the said George Elliott, and was driving said automobile for, and on account of the business or household of the said George Elliott, and was engaged in the performance of duties in the due course of such employment."

These allegations were denied by the answers of the defendants. The court found that—

"The said defendant Borsi was not at the time of the accident in the actual employment of the said defendant Elliott."

The court did not make a finding on the rest of the allegations quoted from the complaint. The court did, however, make several findings which are wholly without the issues and which will be noticed later. Addressing ourselves to the issues made by the pleadings and the findings thereon, the case is one where a material finding is made in favor of a defendant, and nevertheless the judgment is awarded against him. Such a judgment is not supported by the findings and cannot stand.

[2] Let us now return to the findings which were made, but which did not respond to any issue made by the pleadings, and consider them together with those findings which were responsive. Paragraph VIII is as follows:

"That the said Cadillac automobile at said time was owned by the defendant George Elliott, and the defendant Emma Borsi was driving the same with the knowledge and consent of said defendant Elliott and also for and on account of the business of the said Elliott in connection with a garage which was then being operated in the said city of Bakersfield by him. Although the said defendant Borsi was not at the time of the said accident in the actual employment of the said defendant Elliott, yet she had shortly prior thereto been engaged in his employment, and during said time and also at times immediately prior to the said accident she frequently drove and operated upon the public streets of the city of Bakersfield the said automobile of the defendant Elliott

with his consent, and at the time of the said accident she was operating the same with the express consent of the said defendant Elliott, and also in the performance of services in and about the carrying on of the said garage business, namely, for the purpose of procuring and delivering to the said garage certain parts or appliances to be used by the workmen in the repair shop of said garage."

It will be noted that the foregoing paragraph finds: (1) That the defendant Borsi was not at the time of the accident in the employment of the defendant Elliott; and (2) that the defendant Borsi was in the employment of Elliott at the time of the accident and acting within the scope of her employment. The two propositions are hopelessly conflicting, and the case must for that reason be reversed. *Zechiel v. Los Angeles Gas & Electric Co.*, 192 Pac. 720, 722.

It is found that "the defendant Emma Borsi was driving the same with the knowledge and consent of said defendant Elliott." Such fact, standing alone, is immaterial, because it may have been that Elliott had loaned her his car. It is found that "she was driving the machine for and on account of the business of the said Elliott in connection with the garage which was then being operated in the said city of Bakersfield by him." It will be noted that it is not found that Elliott, or any one acting under his authority, directed Emma Borsi to so operate the car. It is found that Emma Borsi "had shortly prior thereto been engaged in his employment." This finding is immaterial under any consideration. The question of importance is not what relation had existed between the defendants at some past date, but what relation existed at the moment the accident occurred. It is also found that "she frequently drove and operated upon the public streets of Bakersfield the said automobile of the defendant Elliott with his consent." The criticism last made applies equally to that finding. It is found that "at the time of the said accident she was operating the same with the express consent of the said defendant Elliott." The most that can be said is that this finding vaguely intimates a direction on the part of Elliott, but it does not directly so state. Again it is found that at said time she was operating the machine "in the performance of services in and about the carrying on of the said garage business, namely, for the purpose of procuring and delivering to said garage certain parts or appliances to be used by the workmen in the repair shop of said garage," but it is not found in this connection whether she was so acting for and on the request of a workman who had no authority from Elliott, or whether she was so acting upon a request made by Elliott, or made by one having authority from Elliott to make such a request.

No attack is made which even tends to show that the judgment was erroneous as to the defendant Emma Borsi. As to her, the judgment is affirmed. As to the defendant George Elliott, the only attack that has any merit concerns paragraph VIII of the findings. As pointed out above, there is much matter inserted in that paragraph that is immaterial. The findings in that paragraph are material in so far as they respond to the allegations contained in paragraph 4 of plaintiffs' second amended complaint, and no further. As to the defendant George Elliott the action is reversed and remanded for the purpose of trying anew the issues made by paragraph 4 of plaintiffs' second amended complaint, and thereafter to render such a judgment as may be proper under the facts and the law applicable thereto.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 59

JAN WAI et al. v. SMITH-RIDDELL CO.
(Civ. 2243.)

(District Court of Appeal, Third District, California. Nov. 4, 1921. Rehearing Denied Dec. 3, 1921. Hearing Denied by Supreme Court Jan. 3, 1922.)

1. Appeal and error $\hookrightarrow$ 931 (1)—Plaintiffs' testimony assumed to be true, where court found for them.

In an action for the price of meat claimed to have been furnished a third person at defendant's request, where the court found in favor of plaintiffs, it must be assumed on appeal that defendant's president promised to pay for the meat as testified by plaintiffs.

2. Corporations $\hookrightarrow$ 428 (6) — Knowledge of president as to his agreement knowledge of corporation.

Knowledge of the president in active management of corporate affairs as to an agreement made by him was the knowledge of the corporation.

3. Corporations $\hookrightarrow$ 432 (12)—Prima facie case of authority of president to make agreement held established.

Where a corporation had leased land at a cash rental to one who was unable to pay for meat for his camp, and could not have continued his farming operations without the corporations' assistance, and its president was in the active management of its affairs, and there was no evidence that he had no authority to promise dealers in meat that he would pay therefor if they would continue to supply the tenant, the evidence made a prima facie case of authority.

4. Evidence $\hookrightarrow$ 158 (28), 318 (1), 354 (13)—Tags showing weight of meat sold and account books made up therefrom held admissible.

Where one member of a firm of meat dealers testified that when he got orders for meat

he made out tags showing the weight of the meat, and gave them to other men, who cut and wrapped up the meat, and put one of the tags inside, the other being kept in the dealers' office, and the person receiving the meat testified that he got a copy of the tags with every shipment, and recognized those produced as comparing with the ones received, the tags were admissible over the objection that they were hearsay and not the best evidence, and an account book made up from the tags was also admissible.

5. Frauds, statute of §23(3)—Promise to pay for meat furnished defendant's tenant held original.

Where at the time defendant's president paid plaintiffs for meat furnished defendant's tenant, plaintiffs refused to give the tenant any further credit, and the president told them to go ahead and send meat to the tenant, and defendant would pay therefor, the promise was an original promise not within the statute.

6. Sales §353(4)—Complaint held to support recovery for reasonable value of goods sold.

A complaint, alleging that defendant was indebted to plaintiffs in a specified sum on account of meats sold by plaintiffs to defendant at defendant's special instance and request, and delivered to a third person at defendant's instance and request, was sufficient to uphold a judgment for the reasonable value of the meat as against the objection that it was based on an express contract.

On Petition for Rehearing.

7. Corporations §432(2)—That person is president is to be considered on question of authority to make contract.

While no presumption arises that a person had authority to make an agreement for a corporation from the mere fact that he was its president, such fact may be considered with other circumstances, and it may more readily be inferred from circumstances proved that the president had authority to make a particular contract than in the case of one having no official relation to the corporation.

8. Corporations §432(7)—Silence when furnished with bills for goods delivered on president's order held evidence of authority.

Where a corporation had knowledge of its president's agreement to pay plaintiffs for meat furnished a third person, and received quarterly statements showing the meat furnished, but with such knowledge remained silent for over nine months before denying its liability, its silence was evidence of actual authority in the president to make such agreement.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Jan Wai and others, copartners doing business as Wing Lee & Co., against the Smith-Riddell Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Driver & Driver, of Sacramento, and G. W. Bedeau, of Marysville, for appellant.

Otis & French, of Sacramento, for respondents.

FINCH, P. J. Plaintiffs were given judgment for the value of meats alleged to have been "delivered to T. Tominaga at the special instance and request of said defendant."

The evidence shows without conflict that the defendant leased certain lands in Yolo county to Tominaga for a term of one year beginning December 1, 1917, at the annual rental of \$12,134, payable as follows: \$6,067 on or before July 15, 1918, and \$6,067 on or before September 1, 1918. Tominaga gave the defendant a mortgage on the crops to be grown on the land, as security for the payment of the rent, authorizing the defendant to take possession of and sell the crops grown in case of default in payment. Plaintiffs were furnishing Tominaga with meat to supply his camp, and early in 1918 they informed him that they could not deliver any more meat until he paid his bill for that already furnished. Not having the money with which to pay the bill, Tominaga informed the defendant of the situation, and requested the latter to make payment in his behalf. Thereupon the defendant wrote the plaintiff as follows:

"Telephone Market 1022. F. H. Smith, President. A. McD. Riddell, Secretary. Smith-Riddell Co. Cable Address Alfalfahay. Codes used A. B. C. 4th and 5th editions. Alfalfa Producers and Dealers. Ranch and Warehouses, Lisbon District, Yolo County. Office and Warehouse, 381-389 Seventh Street. San Francisco, Cal., Feb. 2, 1918. Wing Lee & Co., 1122 Third St., Sacramento—Dear Sir: I will be in town on Wednesday, Feb. 6th and will call and see you about the bill that our tenant T. Tominaga owes you for meat \$460.75. Very truly yours, Smith-Riddell Co., 381 7th Street, San Francisco."

[1] Early in the following March, Mr. Smith, who was president of the defendant corporation, called on the plaintiffs at their place of business, and gave them the defendant's check for the amount of the bill. Smith testified that at that time there was due Tominaga from the defendant sufficient money to pay the bill. Jan Wai, one of the plaintiffs, testified that, after Smith paid the bill, he asked:

"'When you send meat?' Bookkeeper said: 'No.' He said: 'Why not?' 'Because I no give Tominaga credit.' He said: 'You send him order, then I come pay you every, we pay you every three months.'"

Chang Sing Ho, another plaintiff, testified that Smith said:

"Go ahead; send meat to Tominaga; we pay every three months his company. * * * Until we stop, just go stop—don't any more. * * * You ship meat all right; send me bill; never mind about him; we are going to pay for it."

shipping tags, showing the weight of each shipment, were produced and testimony was introduced as to the reasonable value thereof. This testimony was not contradicted, and was corroborated by Tominaga.

[4] The admission of the shipping tags in evidence is assigned as error. Plaintiff Chang Sing Ho, who was one of the partners and the bookkeeper for the firm, testified:

"Most of the time Jan Wai shipped the meat down to Tominaga, I made out the tag; the other man wrapped the meat. I cut most of the meat shipped to Tominaga; very seldom the other boys cut it. The other men wrapped the meat. I got the order for so much meat, so I cut it up and told the man to ship it. I gave the tag I made out to the boy. I gave the other boys the tags so they would know how much meat to cut. They would cut the meat, wrap it up in a paper, and put one of the tags inside; the other tag I kept in the office."

This testimony, corroborated as it is by that of Tominaga hereinbefore set forth, furnished sufficient foundation for the admission of the tags in evidence. They were not subject to the objection made "that they are hearsay, and not the best evidence." The account book, made up of entries from these tags, was properly admitted.

[5] The oral agreement to pay for the meat delivered to Tominaga is not within the statute of frauds. The complaint and the evidence show an original promise on the part of the defendant. "If goods are delivered by the seller to one person on the promise of another to pay for them and solely on the promisor's credit the promise is original and not within the statute." 25 R. C. L. 488.

[6] Appellant argues that the allegations of the complaint show an express contract, and are not sufficient to uphold the judgment for the reasonable value of the meat furnished. The complaint alleges that—

"Said defendant became and now is indebted to plaintiffs in the sum of \$1,532.40, for and on account of goods, wares, and merchandise, to wit: Meats sold by plaintiffs to defendant at the special instance and request of defendant and delivered to T. Tominaga at the special instance and request of said defendant."

It is sufficient to cite the case of Merchants C. Agency v. Gopcevic, 23 Cal. App. 216, 137 Pac. 609.

Appellant makes many other assignments of errors of minor importance. A discussion of them would unduly lengthen this opinion. It is sufficient to say that they are without substantial merit.

The judgment is affirmed.

We concur: BURNETT, J.; PREWETT, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [7, 8] In its petition for a rehearing the appellant states:

"It is admitted in this case that Smith had no actual authority to enter into the alleged contract."

No such admission appears in the record, and this court arrived at a contrary conclusion. The case was not decided on the theory of ostensible agency or authority, or on the doctrine of estoppel, but upon the conclusion announced that the evidence showed a prima facie case of actual agency and authority. Neither was the decision based upon any presumption that Smith had authority to make the agreement, arising from the mere fact that he was president of the defendant corporation. While such presumption does not arise, it may more readily be inferred from circumstances proved that the president of a corporation is clothed with authority to make a particular contract than one who stands in no official relation to the corporation. In other words, the fact that one is president may be considered with other circumstances shown in determining whether such person was authorized to act for the corporation. The statement in the opinion that, "Smith, being the principal officer of the corporation, must be presumed to have had the implied power to make all contracts which are essential to the successful prosecution of the business," must be understood in the light of the evidence showing his activities in the conduct of the defendant's affairs, and the latter's attitude toward the same. Smith arranged for the lease to Tominaga of the defendant's lands, and, pursuant to defendant's letter to plaintiffs, paid Tominaga's bill with a company check. When asked if he usually carried company checks with him, he testified:

"I generally carry some blank checks, because when I am buying hay around in the country, I have to pay the farmer a deposit; that is why I carry blank checks."

As stated in the opinion, the defendant must be presumed to have had knowledge of Smith's agreement in its behalf with the plaintiffs. Newell-Murdock Realty Co. v. Wickham, 190 Pac. 359. It received quarterly statements, showing that the meat furnished to Tominaga was being charged to the defendant. With all this knowledge, it remained silent for nine months. Under appropriate pleadings, the defendant would have been estopped by its conduct from disclaiming liability. Independent of any question of estoppel, the defendant's silence is evidence of actual authority in Smith to make the agreement. Even in a criminal case the silence of a defendant when he ought to speak is evidence that the fact is in accordance with the statement which he fails to deny. It cannot be less in a civil action. The defendant offered no evidence whatever to prove that Smith was not authorized to make the contract. While Smith

was a witness for defendant at the trial, he testified to nothing from which even an inference could be drawn that he acted without authority. While the burden of showing authority rested on the plaintiffs, yet, in view of the rule that "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict," the plaintiff must be held to have sustained the burden to the extent of proving a *prima facie* case.

The petition for a rehearing is denied.

55 Cal. App. 160

TASHJIAN v. KRIKORIAN. (Civ. 4018.)

(District Court of Appeal, First District, Division 2, California, Nov. 12, 1921.)

1. Appeal and error §1011(1)—Rule upholding court's findings applies particularly where testimony is confused.

The rule that the appellate court is bound by the findings of the trial court where the evidence is conflicting is more peculiarly efficacious where most of the witnesses, including the parties, were foreigners and expressed themselves with difficulty, so that the record was in apparent confusion.

2. Appeal and error §931(1)—All testimony supporting findings is assumed to be true.

In reviewing the trial court's findings, all statements appearing on the record, or matters reasonably inferable therefrom, which support the finding, are assumed to be true, and those in conflict therewith are assumed not to be true.

3. Evidence §568(1)—Purchaser's testimony he could borrow necessary money is insufficient to show ability.

The testimony of a prospective purchaser procured by a broker that he could have borrowed the money necessary to make the required cash payment does not establish his ability to buy, where such testimony was merely the conclusion of the purchaser, and he had no contract for the loan.

4. Appeal and error §1010(1)—Finding supported by evidence not disturbed.

Where the record contains evidence to support the finding of the trial court, the finding will not be disturbed on appeal.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by S. K. Tashjian against G. Krikorian to recover commissions on sale of real property. Judgment for defendant, and plaintiff appeals. Affirmed.

A. W. Carlson, of Fresno, and Walter Sorenson, for appellant.

Arsen Yeretizian, of Fresno, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action to recover commissions alleged to be due him upon a written contract with the defendant for the sale of defendant's real property in Fresno county. The trial court found that neither during the term of the agreement between the parties, nor thereafter, did the plaintiff find a purchaser for the property who was ready, willing, and able, or ready, or willing and able, to purchase said premises according to the terms of said agreement. There is only one question presented to us upon appeal and that is the sufficiency of the evidence to sustain this finding.

[1] While this court is, necessarily, always bound by the findings of a trial court in a case where the evidence is conflicting, there are, nevertheless, certain types of cases in which this rule is more peculiarly efficacious than in others. The record here presents such a case. Almost all the witnesses, including the parties to the action, struggled to express themselves in a language which was unfamiliar to them. This difficulty, added to their apparent confusion when called upon to remember and state accurately and precisely important matters, leaves the printed pages rather meaningless and contradictory in many instances. It is in such situations that the trial judge is able and empowered to use his broad experience with witnesses and his observation of their manner upon the stand, and the innumerable other intangible things which throw light upon the testimony of a witness, in order to clarify vague and uncertain statements, to reconcile contradictions and explain inconsistencies. Without such aids, it would be difficult indeed to arrive at the facts in records such as the one before us upon this appeal.

[2] We are bound to assume that all statements appearing on the record, or matters reasonably inferable therefrom, which support the finding of the trial court, are true, and that statements in conflict therewith are not true. In the light of such an assumption, we have this picture: Plaintiff is a real estate dealer, and through his agency the defendant has purchased a vineyard, the subject of this controversy. Before said purchase was completed, it was suggested that plaintiff resell the vineyard for the defendant at a price in excess of the amount he had paid for it. Such an agreement was entered into between the parties, and after the defendant had become the owner of the vineyard this agreement was delivered to the plaintiff. By this agreement plaintiff was to have the right to sell the vineyard and some personal property for \$60,000; \$16,000 cash, balance in annual

payments of \$10,500. Plaintiff was to receive \$2,400 commission upon such a sale. This agreement was dated January 7, 1920. On Saturday afternoon, which plaintiff stated was about February 5, but which the calendar discloses was February 7, 1920, the plaintiff called at defendant's ranch with Mr. Keoseyan. The plaintiff asked the defendant for a few days' additional time in which to find a purchaser, stating that his time to carry out his contract was about to expire. This the defendant refused, stating that the time was up that day. Keoseyan looked about the ranch and asked some questions regarding the crop, stating at the same time that he did not wish to buy the place. After several requests by the plaintiff that the defendant extend the time within which the plaintiff might sell the ranch, and defendant's repeated refusals to do so, plaintiff and Keoseyan left the ranch. On the way into Fresno, plaintiff offered to give Keoseyan \$2,000 of his \$2,400 commission if he would sign a contract to purchase the defendant's ranch; plaintiff stating at the time that he was going to lose the commission entirely if he did not make a sale at once. The parties then drove into Fresno and stopped their automobile on a street corner and Keoseyan signed a preliminary agreement and gave plaintiff his check for \$100. Plaintiff then went to a restaurant and met there another real estate dealer, and took him out to the defendant's ranch as "a witness" to the scene which he seemed to have anticipated, and in which, apparently, he wished to be fortified with legal testimony. Plaintiff and "his witness" reached defendant's ranch about 9 o'clock in the evening, and plaintiff called the defendant out of his house and told him he had sold the ranch and had taken a deposit of \$100, and demanded that defendant sign and approve the preliminary agreement. Defendant was unable to read English, and stated that he would consult his attorney in Fresno on the next day and would sign no agreement until it was explained by his attorney; that plaintiff should come to the attorney's office on Monday and "fix" it up. Plaintiff then handed to defendant a written notice signed by himself and by his "witness" Knapp, which read as follows:

"I herewith hand you notice notifying you that I have this day sold your place, and have a deposit on it, being the lot No. 9 and 10 in Indianola Colony in section No. 10, township 14 south, range 22."

On the following day, Sunday, Keoseyan took his family to the property and looked over the ranch to see if the place was "any good"; "if the place was not any good, I lose \$100 and give it up." On Monday morning the defendant came to Fresno to the office of his attorney, and later he found

the plaintiff on the street and together they went to the office of defendant's attorney. There the defendant asked the plaintiff to let him see the preliminary contract. Plaintiff refused to produce the contract, but said he would bring the purchaser. He failed to bring the purchaser to the defendant on Monday, and failed again on Tuesday, but finally found him and brought him to the office of the defendant's attorney on Wednesday. The plaintiff and purchaser were accompanied at this interview by an attorney, and discussions and negotiations were entered into with regard to numerous matters such as the amount of the deposit, interest upon the unpaid balance, etc., resulting in the parties separating without signing any contract for the purchase and sale of the property. The details of this interview are not material, according to the view we take of this record, because it does not appear from the evidence that the purchaser was able to buy the property according to the terms of the written contract between the plaintiff and defendant.

The facts herein recited as preliminary to this main interview are set out as throwing some light upon the character of this entire transaction. The crucial point is that the contract between the parties called for a cash payment of \$16,000. Keoseyan testified:

"Q. Now, just a while ago you said you had about \$10,000 in the bank. How do you know it was \$10,000? A. I don't know. I said, 'I think I have \$10,000;' I am not sure—"

"The Court: Just a minute, do you think you had \$10,000 in the Farmers' Bank? A. I think, I am very sure."

"Q. Did you have any other money more? A. Yes: I had a little at the Selma First National Bank."

"Q. How much? A. It is in still and I had some in Reedley First National Bank."

"Q. How much money did you have altogether? A. I think I had over \$10,000 anyway, altogether, and I can raise \$2,500."

"Q. Wait a minute. Had you made any arrangement to get the balance of it? A. No; I did not."

[3] It is true Keoseyan testified that he bought other property two months later, but there is no evidence of what he paid for the other property, or of how much cash he paid, or of any other definite matters from which one must conclude that he would have had \$16,000 available two months earlier. His statement that he was sure he could have borrowed the money from some one, without showing that there was any one legally bound to loan him this money, is insufficient to establish his financial ability to make this purchase. This question is considered in the case of *Mattingly v. Pennie*, 105 Cal. at page 522, 39 Pac. 203 (45 Am. St. Rep. 87), where it is said:

"That testimony amounted to nothing more than a statement of his belief that persons not bound by contract to do so would have advanced the money; and it is clearly not such evidence as, under section 1835 of the Code of Civil Procedure, would justify the jury in finding that he had the ability to pay."

[4] The record contains evidence to support the finding of the trial court regarding the financial inability of the purchaser secured by plaintiff to make the purchase. Under such circumstances, we will not disturb that finding, and upon such a finding the judgment was a proper one.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

55 Cal. App. 202

LAYTON v. NEW YORK LIFE INS. CO.
(Civ. 3936.)

(District Court of Appeal, First District, Division 1, California. Nov. 15, 1921.)

1. Insurance — 379(1) — Insured bound by statements made in application.

Where insured over his own signature declared that he had carefully read each and all of the answers given to the medical examiner, that each was written as made by him, and that each was full, complete, and true, such statements thereby became his solemn representations, and of the same binding force upon him as though he had himself written them in his own handwriting and signed them.

2. Insurance — 291(1) — Misrepresentation of facts relative to health fatal to contract.

Misrepresentation or concealment of the facts relative to the health of those whose lives are insured is peculiarly fatal to contracts of life insurance, because the companies necessarily rely upon the statements and acts of the insured in making the contract.

3. Insurance — 379(5) — Effect of fraud, mistake, or negligence of agent filling out application for life insurance.

When insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the insurer is estopped to assert their falsity as a defense to the policy; but there must be no complicity on the part of the insured, actual or implied, and the duty of insured upon receiving his policy is to read it, and it will be assumed that he did so, and discovered the false representations, and failure then to promptly notify the insurer thereof is bad faith which is fatal to the policy.

4. Insurance — 379(7) — Agent's representatives of insurer and not of insured.

Acts of insurance agent in filing out application, whether he is a general agent with power to issue policies, a soliciting agent, or merely

a medical examiner for the insurer, are the acts of the insurer, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application.

5. Insurance — 379(1) — Insured presumed to know contents of contract, including application.

Where one holds a life policy, referring in apt terms to the warranties and representations contained in the application annexed, for a reasonable time, he is conclusively presumed to know the contents of the contract, and any untruthful answer, plainly written in the application by the agent or medical examiner through mistake, negligence, or fraud, and is estopped to assert that he had no knowledge of the untruthful answer.

6. Pleading — 237(6) — Refusing to allow amendment to conform to proof held error.

In action on life policy, where defendant based its answer on statement in proof of death that death resulted from carcinoma of the mediastinum, and alleged that insured was not in good health at the receipt of the policy, and there was some conflict in the testimony as to the exact nature and name of the malady, the court erred in not allowing an amendment to the answer to conform to the proof in this regard.

7. Appeal and error — 1122(2) — Appellate court will not remand, with directions which would be in effect the making of new findings.

Where judgment against life insurance company was reversed by reason of fraud in answers contained in application, appellate court will not remand the case to the lower court, with directions to enter a judgment in favor of plaintiff for an amount tendered plaintiff as premiums paid, since to do so would be in effect the making of new findings for the lower court.

Appeal from Superior Court, Mendocino County; **J. Q. White, Judge.**

Action by **Hazel F. Layton** against the **New York Life Insurance Company**. Judgment for plaintiff, and defendant appeals. Reversed.

McCutchen, Olney, Willard, Mannon & Greene, of San Francisco (**James H. McIntosh**, of New York City, of counsel), for appellant.

Robert Duncan, of San Francisco, and **Thomas & Thomas**, of Ukiah, for respondent.

WASTE, P. J. The plaintiff, as beneficiary, brought this action upon a policy of insurance in the sum of \$2,000 issued by the defendant on the life of **Archie B. Layton**, her husband. Judgment was rendered in her favor, from which the defendant insurance company appeals, relying upon the two defenses interposed in the court below and reasserted here: First, that the insured was not in good health at the time the first premium was paid and the policy of insur-

ance delivered, and never again was in good health during his lifetime; and, second, that it is entitled to rescind, and has rescinded the contract of insurance because of written misrepresentations made by the insured in his application, which became a part of the policy.

In response to the issues tendered by these defenses, the lower court found that at the time of the delivery of the policy and payment of the first premium, the insured was in good health, and was not at any time prior or subsequent thereto suffering from, or afflicted with carcinoma of the mediastinum (a species of cancer), or any form of cancer whatever from which appellant contends the insured subsequently died, and that he was not at the time of the payment of the first premium afflicted with, nor suffering from the malady which subsequently caused his death. It also found that at the time of the examination by the medical examiner of the defendant company, the decedent made true and correct statements concerning matters relative to his health, and did not make any false representations of any kind for the purpose of deceiving or defrauding the defendant, but that the medical examiner of the defendant insurance company, with full knowledge of the facts, and in his own handwriting, wrote down the alleged erroneous answers to the questions.

There is no conflict in the record of the principal facts of the case. Layton made application to the appellant for insurance on his life September 25, 1917, and was examined by the medical examiner of the company at Ukiah the next day. He received the policy October 11, following, and paid the first premium within a day or two thereafter. He died about six months later. About a year before the issuance of the policy, Layton visited Dr. Rea at Ukiah, and asked him to remove a lump from his throat, which bothered him a great deal with pains radiating up the side of his neck. The doctor examined "the growth," as he described it, but not being able to exactly determine its size, refused to remove it unless the patient went to the hospital. That was not done, and the operation was not performed. During the month of January following, and some eight months before applying for insurance, Layton consulted Dr. Van Allen about the lump, or swelling, on his throat. The doctor inserted a local anæsthetic, and made a small incision, removing therefrom what appeared to be several pieces of the sac of the cyst. He then drew the incision together with stitches, and continued for some time to treat and dress the wound. It was slow in healing, and "broke out again a time or two," discharging a serum which necessitated the insertion of a small curet, or drain. The treatment lasted for one month, during which the doctor treat-

ed the patient some 14 times. Shortly after ceasing his visits to Dr. Van Allen, Layton was taken to Dr. Rea again by his wife. He was very weak suffering from a very serious hemorrhage from the incision on his neck, which Dr. Rea stopped. During the month of July following Dr. Cleland, who was the medical examiner of the defendant insurance company, removed a piece of emery steel from Layton's eye, and on three occasions treated a small ulcer on his neck at about the same spot previously treated by Dr. Van Allen and Dr. Rea. On August 10, 1917, about 1½ months before making application, Layton again visited Dr. Van Allen. He complained of a "choking sensation, like as though something closed up the throat." The doctor did not regard this as serious, and administered a simple remedy.

All of these consultations and treatments—all but one within 9 months of the date of the application—are undenied. The doctors themselves testified to the facts and to the dates. Yet in the application for insurance it is represented that no physician had been consulted by the insured for any ailment within five years. Just how that occurred is best shown by the certificate of the medical examination, and by the testimony of Dr. Cleland, the medical examiner at Ukiah for the insurance company. Layton was asked several questions as to whether or not he had suffered from certain specified ailments, or disease, or had ever had any accident or injury, to all of which he answered, "No". The examination proceeded to question 9-d in the application, which reads as follows: "Have you consulted any physician for any ailment or disease not included in your above answers?" Layton's reply to the doctor was, in substance:

"You remember that I was here in your office; you treated this sore on my neck, and you remember you knew that the trouble was referred to in my conversation I had with Dr. Rea in regard to it previously.' I [the doctor] said, 'Yes, I think I know about that; are you all right from it now?' He [Layton] said, 'Yes, I think it is all right; don't give me any trouble.'"

Dr. Cleland thereupon wrote down the answer "No." When the doctor asked Layton question 9-e,

"What physicians, if any, not named above, have you consulted or been treated by in the last five years, and for what illness or ailment?"

—Layton replied:

"Only in regard to this thing on my neck which you treated and Dr. Van Allen treated, and Dr. Rea treated."

Dr. Cleland thereupon wrote down the answer "None."

[1-5] By the terms of the policy of insurance delivered to plaintiff's husband, the policy itself and the application therefor, copy of which, including the questions and answers making up the medical examination, was attached to the policy, constituted the entire contract between the company and the insured. Layton over his own signature declared that he had carefully read each and all of the answers given to the medical examiner, that each was written as made by him, and that each was full, complete and true. The statements contained in the application thereby became his solemn representations, and of the same binding force upon him as though he had himself written them out in his own handwriting and signed them. *Westphall v. Metropolitan Life Insurance Co.*, 27 Cal. App. 734, 738, 151 Pac. 159. It needs no citation of authority to support the rule that misrepresentation or concealment of the facts relative to the health of those whose lives are insured are peculiarly fatal to contracts of life insurance, because the companies necessarily rely upon the statements and acts of the insured in making the contracts. See *Equitable Life v. McElroy*, 83 Fed. 631, 28 C. C. A. 365; *Whitney v. West Coast Life Ins. Co.*, 177 Cal. 74, 80, 169 Pac. 997. But it has been held in this state that when the insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely a medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application. *Lyon v. United Moderns*, 148 Cal. 470, 475, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672; *Westphall v. Metropolitan Life*, supra, 27 Cal. App. 739, 151 Pac. 159. Notwithstanding the justice of this rule, it is the statement of only a part of the law of the case, and is subject to the limitation that there must be no complicity on the part of the insured, actual or implied. The element of continued good faith enters into such transactions. The policy of insurance in this case was almost immediately delivered to Layton. It was his duty to read it, and we may assume that he did so. He knew, therefore, that the application and the certificate of the medical examiner, each of which was an integral part of the policy and the consideration therefor, contained two very material and vital statements that were false. His legal and moral duty was then to notify the

company of the fraud that had been perpetrated. By his silence he virtually approved of the act of the medical examiner and became responsible for it. By his conduct he made Dr. Cleland his agent as well as the agent of the company, and the forfeiture of the policy is the result. *Goldstone v. Columbia Life Ins. Co.*, 33 Cal. App. 119, 123, 164 Pac. 416. To the same effect is the decision of our Supreme Court in *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 Pac. 51, and the opinion of Mr. Justice Field in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, which seems to be the leading case on the subject, and which was affirmed in *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, 623, 624, 36 Sup. Ct. 676, 60 L. Ed. 1202. Where one holds a policy, referring in apt terms to the warranties and representations contained in the application annexed, for a reasonable time, he is conclusively presumed to know the contents of the contract, and the untruthful answers plainly written in the application. He is thereby estopped to assert that he had no knowledge on the subject. *Modern Woodmen v. Angle*, 127 Mo. App. 94, 116, 104 S. W. 302, 304. Even though the false answers were written by the examiners of the company without the knowledge of the assured, but the latter has the means at hand to discover the falsehood, and negligently omits to use them, he will be regarded as an instrument in the perpetration of the fraud, and no recovery can be had on the policy. *Forwood v. Prudential Ins. Co.*, 117 Md. 254, 259, 83 Atl. 169, 172; *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 543, 25 S. W. 835, 840.

Because of the inevitable conclusion we have reached, that the plaintiff may not recover in the case, for the reason we have already advanced concerning the invalidity of the policy of insurance on account of the untruthfulness of the answers contained in the application, we deem it unnecessary to consider at length the contention of the appellant that the policy never became effective because the insured was not in good health when it was delivered to him, and when he paid the first premium, as he was required to be by the terms of the policy in order to render the insurance effective. The lower court found that at that time Layton was suffering from a temporary indisposition. There is some evidence in the record on which respondent relies to support this finding, but the fact remains that Layton was receiving sick benefits from two lodges when he accepted the policy and paid the first premium, and was ill and was not working at the time. He had suffered for a year, at least, with the persistent affliction already referred to, and which was described by the doctors as

a "stiff neck," or "a gathering," or "a lump," or "ulcer," in or upon his neck. The immediate cause of his decease, given in the proofs of death furnished the insurance company by the plaintiff, was carcinoma of the mediastinum, or cancer involving the space between the lungs. Dr. Rea, his attending physician at that time, who was familiar with the case, testified that in his opinion there was direct connection between the trouble Layton had on his neck and the cancer which caused his death; that the growth on the neck was a secondary result of the primary trouble in the decedent's chest. In our opinion the history of the case of decedent, and other evidence in the record, would tend to overthrow the conclusion reached by the lower court, were we called upon to pass upon the sufficiency of the evidence to support the finding. But we deem it unnecessary to consider that question any further. The finding of the lower court on the issue of fraud by reason of the false answers in the application is not supported by, but is contrary to, the evidence, for which reason the case must be reversed.

[6] In the proof of death furnished by respondent to the appellant, the immediate cause of death of the insured was specified as carcinoma of the mediastinum. The insurance company, basing its answer upon the information thus furnished to it by the plaintiff, pleaded in its answer that Layton was not in good health at the time of the receipt of the policy, but, on the contrary, was afflicted with the malady "which thereafter caused his death, to wit, carcinoma of the mediastinum, a form of cancer." There was some conflict in the testimony as to the exact nature and name of the malady. At the conclusion of the trial, appellant asked leave to file an amendment to its answer to conform to the proof in this regard. The court denied the application to amend. Notwithstanding the great liberality allowed to trial judges in matters of this kind, we think the amendment should have been allowed.

[7] Because the appellant, upon discovering the facts relating to the illness of the insured, and the alleged fraud in the answers contained in the application, tendered to the plaintiff the sum of \$66.36, the amount of premiums paid on the policy of insurance, and later deposited that sum in court, it would have us remand the case to the lower court, with directions to enter a judgment in favor of plaintiff for that amount. Were we to do so, we would be, in effect, making new findings for the lower court, which is beyond our authority.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

54 Cal. App. 373

STEVENS v. MOON. (Civ. 3743.)

(District Court of Appeal, Second District, Division 1. California. Oct. 31, 1921.)

1. Adjoining landowners ⇨5—Complaint held sufficient to state cause of action.

Under Civ. Code, § 3479, declaring any obstruction of free use of property a nuisance, and Code Civ. Proc. § 731, giving an action to a person whose property is injuriously affected or whose personal enjoyment is lessened thereby, a complaint, stating that defendant maintained trees near plaintiff's land, which was entered by the roofs of the trees, and which was drained of plant food so that plaintiff's trees were stunted in growth, states facts sufficient to constitute a cause of action.

2. Adjoining landowners ⇨5—Trees maintained near boundary so that their roots enter land of another and rob his trees of subsistence constitute a nuisance.

Trees maintained near a boundary so that their roots enter the land of another and rob his trees of subsistence constitute a nuisance which may be abated by the owner of the adjoining land by destroying the roots of the trees or by an action to abate the nuisance.

3. Appeal and error ⇨1170(10)—Appellate court not compelled to affirm judgment denying abatement of nuisance, based on findings not supported by evidence, because plaintiff could abate the nuisance.

In an action to abate a nuisance caused by maintaining trees near a boundary so that their roots entered the land of an adjoining owner, where the findings of the trial court are not supported by sufficient evidence, the appellate court is not compelled to affirm the judgment under Const. art. 6, § 4½, providing that no new trial shall be granted, * * * unless after a careful examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, because plaintiff may abate the nuisance by destroying the roots of the trees.

4. Justices of the peace ⇨130—Judgment in justice court for damages does not constitute a bar to action for abatement of nuisance.

In an action to abate a nuisance and for damages, a judgment obtained by plaintiff in a justice's court, while it would be conclusive on the question of damages up to the date of the judgment, is not a bar to his equitable rights to an injunction to prevent a continuance of the injury.

5. Trial ⇨397(1)—Findings should be made on allegation of judgment in justice's court, pleaded in bar in answer.

In an action for abatement of a nuisance, and for damages, where defendant pleaded in bar a judgment in a justice's court, in favor of defendant, since it was not a judgment of a court of record, and since the allegations of the answer touching the matter are deemed denied, a finding thereon should have been made by the trial court.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Suit by James S. Stevens against Mrs. I. H. Moon. From judgment for defendant, plaintiff appeals. Reversed.

L. B. Stanton, of Los Angeles, for appellant.

Griffith Jones and John J. Craig, both of Los Angeles, for respondent.

SHAW, J. Action for damages and injunctive relief against defendant who, on her own land adjoining that of plaintiff, maintains a row of growing eucalyptus trees, set one foot from the common boundary line. Judgment went for defendant, from which plaintiff appeals.

It appears without controversy that plaintiff and defendant are owners of adjoining tracts of land; that of plaintiff lying immediately west of defendant's tract. Plaintiff has growing upon his land a walnut orchard set out in 1914, the easterly row of trees being 20 feet distant from the boundary line common to the tracts of land; that, set in place at about the same time, and 1 foot east of said boundary line, defendant maintains a row of eucalyptus trees 300 feet in length, which at the time of the trial had attained a height of upwards of 100 feet.

This being the situation, plaintiff, on March 9, 1920, filed his complaint, alleging, among other things, that the roots of the eucalyptus trees had at the time extended into and through the northerly 350 feet of the eastern portion of his land a distance of upwards of 50 feet, by reason of which fact the east row of walnut trees were dwarfed and stunted and the soil for a distance of 50 feet from such boundary line had been deprived of moisture and plant food necessary and required in their growth and production of walnuts, all to his damage in the sum of \$590.80; that by reason of the rapid growth and far-reaching extent of the root system of said trees, unless checked, he will be continuously and further damaged, in that the row of trees next east and distant 60 feet from said boundary line will, due to the increasing root growth, be likewise affected, and the strip of land 60 feet in width adjoining said row of eucalyptus trees rendered valueless for the growing of walnuts or of crops of any kind. The prayer is for damages sustained by reason of injury due to the facts alleged in the complaint and for an injunction requiring defendant to abate the nuisance by checking the growth of the roots of said trees upon and into plaintiff's land.

In her answer defendant denied the material allegations of the complaint, and as separate defenses alleged: First, that any damage sustained by plaintiff and due to the alleged stunted growth of the walnut trees

is directly and proximately the result of neglect on the part of plaintiff to properly irrigate, cultivate, and care for the same; second, that defendant has always carefully pruned the eucalyptus trees and on different occasions plaintiff has pruned such portions of the trees as extended over and upon his land; third, as a plea in bar, defendant alleged that all of the matter upon which plaintiff based his cause of action had been previously adjudicated in an action between the parties in the justice's court, which action was commenced on December 20, 1918, and a trial thereof had on May 6, 1919, which action, as shown by the complaint filed in the justice's court and set forth in defendant's answer, was to recover damages sustained by reason of plaintiff's walnut trees being stunted and the fertility of the land destroyed by the intrusion of the roots of the eucalyptus trees, in which action a judgment was rendered in favor of defendant.

[1] That the complaint states a cause of action we entertain no doubt. Section 3479, Civil Code, declares that anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment thereof is a nuisance, and section 731, Code of Civil Procedure provides:

"An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor."

In *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623, the court, quoting from *Wood on Nuisances*, section 112, says:

"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off or have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow."

[2] The same rule must necessarily apply to a nuisance due to the growth of the roots of such trees which extend into the land of another, thereby withdrawing the moisture and food constituents required in the growing of crops thereon by the owner. While it is true that under such circumstances an owner may himself abate the nuisance by cutting off the overhanging branches, or, by digging into the ground, intercept and destroy the roots, just as he might in a case where a defendant maintained a cesspool on the boundary line the poisonous waters from which percolated through his land, reaching a well of domestic water, abate the nuisance by putting in a drainpipe and convey-

ing the waters from the cesspool, he is not bound to do so, but he has a remedy by an action to abate the nuisance.

In opposition to these views, respondent cites *Corpus Juris*, volume 1, page 1233, section 94, to the effect that:

"One adjoining owner cannot maintain an action against another for the intrusion of roots or branches of a tree which is not poisonous or noxious in its nature; his remedy in such case is to clip or lop off the branches or cut the roots at the line"

—which she claims is supported by *Grandona v. Lovdal*, 78 Cal. 616, 21 Pac. 366, 12 Am. St. Rep. 121. What is said in the excerpt from *Corpus Juris* is restricted to the roots or branches of a tree which is not poisonous or noxious; that is, where no injury results. In the instant case the allegations of the complaint clearly show that the roots of these trees were noxious, in that the fertility of the soil through which the roots permeated was destroyed to an extent that deprived plaintiff of the use of his land. In the *Lovdal* Case the judgment in favor of defendant therein was affirmed, because it appeared from the bill of exceptions that—

"There was a conflict of testimony as to whether either the shade or roots of the trees injured plaintiff's land, and as to whether said roots prevented plaintiff from plowing his lands as near said fence as he otherwise could, and as to whether either the shade or roots of said trees had an injurious effect upon the crops."

In *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30, it is said:

"The rule is general that, where one brings a foreign substance on his land, he must take care of it, and not permit it to injure his neighbor. The law upon the subject is tersely expressed in the maxim, '*Sic utere tuo ut alienum non lædas.*'"

See, also, *Tuebner v. California St. R. R. Co.*, 66 Cal. 171, 4 Pac. 1162, *Gardner v. Stroeve*, 89 Cal. 26, 26 Pac. 618, *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715, *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51, and *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188, upholding the right of action where the roots of a tree on adjoining land invaded plaintiff's well, and wherein the court said:

"It seems to be settled law that overhanging branches are a nuisance, and it must follow that invading roots are. The person intruded on by branches may cut them off; it must be true that one may cut off invading roots; it must be true that he who is injured by encroaching roots from his neighbor's tree can recover the damages sustained from them. The right of action seems clear."

In order to maintain such an action it devolves upon plaintiff to show that he is or will be damaged by the acts complained of,

and upon this issue the court found adversely to plaintiff. It appears from the findings, among other things, that none of the trees were permanently stunted or would have to be removed or replaced; that it is not true that said eucalyptus trees have drained or will exhaust the soil of plaintiff's land of its plant food, or have taken food value from the plaintiff's land in the sum of \$250 or any sum at all; that the roots of said eucalyptus trees have to a certain extent been cut off, and all of them could be cut off without injury to the eucalyptus trees; "that plaintiff can readily abate the nuisance by cutting off the projecting roots"; that walnut trees get all their food value from water (which, we may say is contrary to the experience of horticulturists), and that the alleged stunted walnut trees have not received as much water as the more thrifty trees in the grove; that any damage to the trees is due to the fact that they have not received sufficient water, care, and cultivation. These findings and others of similar import, appellant claims are wholly without support in the evidence, which, since the appeal is under the alternative method, he sets out at great length in a supplement to his printed brief. An examination of this testimony discloses no evidence whatsoever in support of the findings. On the contrary, there is no evidence to support the finding that walnut trees get all of their food value from water, or that the land upon which they were growing was not adequately irrigated, or that there was not proper care given to the trees by plaintiff. It does appear without contradiction that the roots of the eucalyptus trees had intruded into plaintiff's land to a distance of some 50 feet; that in many cases the roots surrounded the trees in the first row next to defendant's land whereon the eucalyptus trees were growing, and that by reason of the extent of such root system and the voracious feeding qualities of eucalyptus trees they had in their growth absorbed from plaintiff's land, where affected, the moisture and food value which but for their presence would have supported the growth and production of the walnut trees, and without which they were stunted and dwarfed and bore little or no fruit.

[3] Respondent directs our attention to no testimony whatever which supports the findings. Her sole contention is that, since plaintiff can abate the nuisance by cutting off the roots, that is his sole remedy, by reason of which fact she argues that, even conceding the findings are not supported by the evidence, nevertheless, under section 4½ of article 6 of the Constitution, it is the duty of this court to affirm the judgment. The contention is without merit.

[4] As to the judgment in the justice's court pleaded in bar, it appears from the record that it was an action for damages

alleged to have been sustained by reason of defendant's acts prior to the filing of the complaint therein on December 20, 1918, in growing said row of eucalyptus trees. Conceding that such judgment might bar a recovery for damages prior to such time, it could not affect plaintiff's right to recover for damages sustained subsequent to said date. In no event could it bar his equitable rights to an injunction to prevent a continuance of the injury. Moreover, it appears the action was dismissed by plaintiff.

[5] Nor is there any finding as to the truth of such matter pleaded in bar. Since it was not a judgment of a court of record, and the allegations of the answer touching the matter are deemed denied, a finding thereon should have been made.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

54 Cal. App. 763

FERRY v. FISK. (Civ. 2321.)

(District Court of Appeal, Third District, California. Oct. 31, 1921. Hearing Denied by Supreme Court Dec. 29, 1921.)

1. Mortgages $\S$ 218—No foreclosure necessary where land has been sold under prior lien.

Where junior mortgagee purchases at sale under trust deed, the mortgage lien ceases to exist, and the mortgagee can bring a personal action against the mortgagor without foreclosure, in the absence of an agreement to the contrary or equitable considerations; Code Civ. Proc. $\S$ 726, and Civ. Code, $\S$ 2904, not applying.

2. Mortgages $\S$ 591(1)—No redemption under trust deed.

There is no right of redemption in case of sale of land under a trust deed, under Civ. Code, $\S$ 2904.

3. Appeal and error $\S$ 1071(5)—Finding as to consideration for note held immaterial.

In an action to recover balance due on note, it was immaterial that the court found that the note was executed in consideration of United States gold coin "loaned by said O. to the defendant at the date thereof," whereas the note was given for a part of the purchase price of a tract of land bought from O.

4. Trial $\S$ 397(2)—Finding on immaterial point unnecessary.

In personal action on note by mortgagee, who purchased the land at a sale under a trust deed, where defendant mortgagor set up an agreement whereby he was to be permitted to sell the land within a year, no specific finding as to the value of the land was required where the court found that the parties did not enter into the agreement set up.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mabel E. Ferry against Kate B. Fisk. Judgment for plaintiff, and defendant appeals. Affirmed.

R. T. McKisick, of Sacramento, for appellant.

Wm. M. Sims, of San Francisco, and Driver & Driver, of Sacramento, for respondent.

BURNETT, J. Appellant does not question the accuracy of the following statement of the facts, which is substantially as made by respondent:

The respondent is the owner and holder of the promissory note in the principal sum of \$11,580, set forth in her complaint, it having been distributed to her on January 24, 1917, in the matter of her father's estate. At the time she became the owner thereof there was likewise distributed to her a mortgage securing said note and covering 77.6 acres of land situated in Yolo county. This mortgage lien was subject to a deed of trust executed by defendant to secure the payment to the Peoples' Savings Bank of Sacramento of a promissory note in the principal sum of \$10,000.

At the time this note and mortgage were distributed to the respondent the bank was demanding payment of its note, and the trustees under said deed of trust had begun the publication of notice of sale of the real property. The trustees continued the sale several times, and on February 26, 1917, sold the property at public sale, and respondent purchased the same for the amount due the bank.

On October 25, 1918, respondent brought this action to recover the amount due upon her said promissory note, less a credit given appellant thereon voluntarily, which credit was supposed to represent the difference between the amount paid by respondent for the land and the price which might be obtained for it from another purchaser within a reasonable time.

[1] Appellant, as her main defense, set up in her answer to respondent's complaint that respondent should have brought an action to foreclose the mortgage securing said note, under section 726 of our Code of Civil Procedure. Another defense was also urged that plaintiff violated a contract entered into between her and defendant in reference to said sale, to which defense reference will be had hereafter.

In support of her first contention appellant cites a long line of decisions from this state, of which *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682, may be taken as an example, in which it was held that a mortgagor cannot be compelled to pay any part of his mortgage debt until a decree is entered for a sale of the premises mortgaged, and he then becomes liable only for such deficiency as shall appear on the sheriff's return. There can be

no doubt that these cases were correctly decided, but the situation here is such that said section of the Code of Civil Procedure has no application. This follows from the fact that the mortgage lien had ceased to exist. The section itself obviously refers to the time when the action is brought. If there is no security then for the obligation, necessarily there is nothing to foreclose, and the action may be brought to enforce the claim as though it had never been secured. The rule in this respect is correctly stated by this court in the case of *J. I. Case T. M. Co. v. Copren Bros.*, 32 Cal. App. 195, 162 Pac. 647, as follows:

"Many conditions may arise after a mortgage has been given rendering what was originally security for the debt valueless. In most cases, perhaps, it might be a correct statement of law to say that the word 'security,' as used in section 726, should be considered as used in the present tense, and that the section refers to a debt that, at the time the suit is brought, is secured by a mortgage. The adoption of the above as a general rule of construction would be subject to exceptions in individual cases. Thus, perhaps, if one having a debt secured by a mortgage should cancel it of record, without the consent of the mortgagor, it might be held he could not bring a personal action. On the other hand, if such mortgage were canceled with the consent or at the request of the mortgagor, without any intention of canceling the indebtedness, or if the property, being personal, were all destroyed by fire, without fault of the mortgagee, in such cases the holder of the indebtedness would not be at all prevented by section 726 from bringing and maintaining a personal action for the amount due. So in this case, the property having been sold by the plaintiff acting under the written authorization of the defendants, and having ceased to be security for any part of the balance due, the notes were not secured by a mortgage at the time the suit was brought, and section 726 has no application to the situation."

There would seem to be no doubt that the mortgage lien was extinguished by the sale under the trust deed; in other words, that, as purchaser, the plaintiff became the owner of the land free from any subsequent incumbrance. That this is ordinarily the effect of such sale is settled by the authorities. In *Metropolis, etc., Sav. Bank v. Barnett*, 165 Cal. 449, 132 Pac. 833, a mechanic's lien was filed subsequent to the execution of a trust deed, and the property was sold under the power conferred by said deed. In regard to the sale the Supreme Court said:

"This latter conveyance vested the absolute title in respondent, and thereby effectually destroyed the lien of the mechanics' lien suit judgment."

Reference may be had also to *City Lumber Co. v. Brown*, 189 Pac. 830, wherein the distinction between a trust deed and a mortgage is discussed and other authorities cited.

[2] If the purchase had been made herein by an outsider for the amount due the bank it would not be disputed that the lien of respondent's mortgage would thereby be destroyed; but it is thought by appellant that the situation is different by reason of the fact that the holder of the inferior security was the purchaser. It is not contended that there is anything illegal or immoral in such purchase, or that any element of fraud, deceit, or overreaching was involved in the sale herein, but it is claimed that, by virtue of section 2904 of the Civil Code, the lien is preserved in favor of the mortgagee. The section is:

"One who has a lien inferior to another, upon the same property, has a right:

"1. To redeem the property in the same manner as its owner might, from the superior lien; and,

"2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby."

We think neither of these subdivisions applies to this case. The first cannot apply, because there is no right of redemption in case of sale under a trust deed. This is settled by the cases which we have cited. Neither does the case fall within the second subdivision, for the reason that, having secured the absolute title to the property under a valid sale, it was not "necessary for the protection of her interest" that she have the lien preserved; and besides, if it might be said that her purchase for the amount of the first claim satisfied the superior lien, there were no benefits left to said lien. The lien was satisfied and discharged by the sale, and it could not be made the basis for any further claim against the property or the former owner. As the superior lienholder could not claim any further benefits or advantage, manifestly there was no legal right to which plaintiff could be subrogated. Of course, plaintiff and defendant could have agreed that the former would purchase the property and hold it as security for the amount of the two debts, or, if it appeared that it was the intention of plaintiff to preserve the lien of her mortgage, it might be that she could not thereafter assume a contrary attitude; but we have no such case. It is true that appellant claims that—

"The evidence establishes beyond question—in fact, it is nowhere questioned by either plaintiff or defendant—that with the money procured from San Francisco Commercial Company plaintiff became purchaser at the trustees' sale solely in order to protect the security of her second mortgage."

Appellant does not point out any such evidence, and a reading of the record does not disclose it. In fact, the supposed agreement between the parties was, in effect, that plaintiff was to become the owner of the property

by purchase at the sale and credit a certain amount on defendant's note, and grant to the latter the exclusive privilege for the term of one year of selling the place and retaining whatever was received above a certain price. The correspondence between the parties is quite voluminous, but there is no intimation therein that, in case of the purchase by respondent at the trustees' sale, the mortgage lien was to be preserved. In this connection we may say that, as far as we can determine from the record, plaintiff treated defendant fairly, and sought no undue advantage. The credit she allowed on the note seems to have been just under the circumstances, and it does not appear to have been her fault that the controversy was not settled out of court.

The cases cited by appellant wherein the mortgage lien was continued, notwithstanding an apparent extinguishment, involved equitable considerations in favor of the mortgagee that in good conscience required the preservation of the security.

In *Carpentier v. Brenham*, 40 Cal. 221, two mortgages existed on the same property. The senior mortgage was foreclosed without making the junior mortgagee a party, and the mortgagee under the first mortgage became the purchaser of the premises. It was claimed by plaintiff that, since the debt secured by the first mortgage was entirely satisfied, partly by the sale and partly by release, the effect of the transaction was—

"wholly to extinguish the lien of the first mortgage and to substitute the purchaser only to the rights of the mortgagor, leaving the junior mortgagee at liberty to assert and enforce the lien of his mortgage in the same manner as if the first mortgage had been absolutely released by the mortgagee, and the purchaser had acquired by a direct conveyance the legal title of the mortgagor."

But, after a learned discussion of the subject, the court properly held that equity would keep the two estates—"or the legal title and the mortgagees' interest—although held by the same person, separate, whenever this is necessary for the full protection of such person's just rights," and that the facts demanded the application of this principle, the court saying:

"The purchaser at such a sale became, as against the plaintiff, the equitable assignee of the claim of the first mortgagee, and held a lien on the premises to that extent."

In *Brooks v. Rice*, 56 Cal. 423, the mortgagee under the first mortgage was ignorant of the existence of a second mortgage, and it was held that a conveyance to him by the mortgagor of the premises to satisfy the mortgage would not operate as a merger, but the lien would be considered as still existing for the protection of the claim of the first mortgagee.

Matzen v. Shaeffer, 65 Cal. 31, 3 Pac. 92, also involved a case wherein the interest of the grantee of the mortgaged premises, which were conveyed to satisfy the mortgage, required that the lien of the mortgage which she paid off should be kept alive to protect her from a judgment against the mortgagor procured and entered after the execution of the mortgage and before the entry of the satisfaction of the mortgage debt.

In *Swain v. Stockton Savings, etc., Soc.*, 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118, it was held that the purchaser of land at an execution sale, before the time of redemption has passed, and before the sheriff's deed has issued, has a lien upon the land, and under section 2904 of the Civil Code, when necessary for the protection of his interest, is entitled to be subrogated to a superior lien held under a prior deed of trust in the nature of a mortgage, which had been executed by the judgment debtor on the same land. In that case the loan society was willing to accept the payment of the money claimed by it as due under the deed of trust and to procure the trustees to reconvey the land to the mortgagors, and the plaintiff tendered said amount and demanded that he "be subrogated to all the benefits of the defendant, of its said lien under said deed of trust." To this the Supreme Court properly held he was entitled to protect his interest against inferior liens.

In *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743, the same principle is involved, and the court held that the effect of a conditional payment of one mortgage by another is to suspend the remedy on the old mortgage until the maturity of the new one, and until such maturity the old mortgage cannot be foreclosed, but, if the debt be not paid at maturity, the old mortgage revives and has priority over an intervening mortgage to a third person.

In *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196, two tenants in common executed a mortgage to secure the purchase price of the land, and one of them, being unable to pay his share, conveyed his interest to his cotenant in consideration that the latter would pay the full amount remaining due on the mortgage. This was paid, and the mortgage satisfied without knowledge on the part of the person making the payment that his grantor had previously made a deed of trust of his half of the land, and it was justly held that the person paying the mortgage debt could maintain an action to revive the mortgage and be subrogated to the rights of the assignee of the mortgage as against the holder of the deed of trust.

In *Randall v. Duff*, 107 Cal. 33, 40 Pac. 20, it was held that the purchaser under an ineffectual foreclosure of mortgages, who, by purchasing, had paid off the mortgages, was

entitled in equity to be subrogated to the rights of the mortgagees, and to receive all that was equitably due on the mortgages but that he would not be permitted to make a speculation out of it a resort to the securities being allowed only so far as necessary to protect the purchaser.

It seems apparent to us that these cases, and others along the same line, are essentially different from the case before us, and we deem it unnecessary to go further with the consideration of this point.

We have already referred to the other defense set up in the answer and cross-complaint. There is evidence in the record to sustain the view of the trial court that the alleged agreement was never consummated by the parties. An offer was made by respondent to appellant for the protection of the interest of both, to enter into an agreement quite similar to that set forth in the answer, but modifications were suggested by the latter, and from the correspondence in relation to the matter, which is set forth in the brief of respondent, it is a rational conclusion that the minds of the parties never met. It cannot be said that the finding as to that issue is unsupported.

[3] Some other criticism is made of the findings, to which brief reference may be had. The court found:

"That said note was executed for and in consideration of the sum of \$11,580 United States gold coin loaned by said O. A. Lovdal to the defendant at the date thereof."

Whereas it is the claim of appellant that the note was given for a part of the purchase price of the tract of 38.8 acres of land which she bought from said Lovdal. But the variance, if it be such, is entirely immaterial. The validity of the note was not questioned, and it makes not a particle of difference whether you call the consideration money loaned or owed for the purchase price of the land.

[4] Appellant claims that there is no specific finding as to the value of said land. The court, however, having found that the parties did not enter into the agreement upon which appellant relies, the value of the property became unimportant. *Keegin v. Joyce*, 9 Cal. App. 207, 98 Pac. 396; *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. 39; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

We have carefully considered the points made by appellant, but we think no sufficient showing has been made to justify an interference with the conclusion of the court below.

The judgment is therefore affirmed.

We concur: PREWETT, Justice pro tem.; FINCH, P. J.

55 Cal. App. 157

SIME et al. v. HUNTER. (Civ. 4020.)

(District Court of Appeal, First District, Division 2, California. Nov. 10, 1921. Hearing Denied by Supreme Court Jan. 9, 1922.)

1. Costs $\S$ 222—Statute allowing expense of stenographer's transcript as costs not impliedly repealed.

Code Civ. Proc. $\S$ 274, requiring fees for transcripts and copies to be paid by the party ordering the same, was not impliedly repealed by section 1027, allowing costs and expenses paid by the prevailing party on appeal, since those two sections are not so inconsistent but that full force and effect can be given to each.

2. Statutes $\S$ 159—Repugnancy implying repeal must be clear, and inconsistency such that effect cannot be given both statutes.

Repeals by implication are not favored, and the repugnancy between the statute claimed to be repealed and the repealing statute must be clear, and the two statutes must be so inconsistent that force and effect cannot be given to both.

3. Costs $\S$ 251—Attorney's traveling expenses on appeal not taxable.

Code Civ. Proc. $\S$ 1027, allowing as costs all amounts actually paid out by the successful party in connection with the appeal, does not authorize taxing the traveling expenses of the attorney in connection with the argument on the appeal any more than section 1033, providing for costs in the court below, and using similar language, authorizes taxing personal expenses of the attorney as costs.

4. Costs $\S$ 3—Must be expressly authorized by statute.

Costs were not recoverable at common law, and he who would claim them must put his finger on the statute which awards them.

5. Appeal and error $\S$ 1171(3)—Item of 45 cents too trifling to be considered.

On appeal from an order taxing costs, an item of 45 cents for expressage on briefs is too trifling to be considered in view of the maxim that the law disregards trifles.

Appeal from Superior Court, Monterey County; Pat R. Parker, Judge.

Action by A. Sime and others, copartners doing business under the firm name and style of the Laton Percheron Horse Association, against Mary A. Hunter, as administratrix of the estate of Byron P. Hunter, deceased. From an order taxing the costs after judgment for plaintiff was affirmed, and disallowing items claimed by plaintiffs, the plaintiffs appeal. Affirmed.

Hugh R. Osburn, of King City, for appellants.

Wallace M. Pence, of San Miguel, for respondent.

STURTEVANT, J. This is an appeal from an order made by the trial court tax-

ing costs. An action was commenced in the same trial court by the same plaintiff against the same defendant, judgment went for the plaintiff and the defendant appealed. The judgment was affirmed. *Sime v. Hunter*, 195 Pac. 935. The statute governing the allowance of costs on appeal is section 1027 of the Code of Civil Procedure. That section, as amended by St. 1919, p. 73, provides as follows:

"The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of one hundred dollars to any one party. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record."

Claiming to act under said section, the plaintiff did, after the remittitur had gone down, prepare, serve and file a memorandum of costs and disbursements for items as follows:

Paid Miss Sena Jensen for copy of transcript on appeal, 189 folios @ 11¢.....	\$ 20 79
Paid Salinas Daily Index for printing brief on appeal, 81 pages @ \$1.80 per page.....	145 80
Paid expressage on briefs.....	45
Paid expenses to San Francisco and return to argue case on appeal.....	20 00
Paid King City Herald for printing reply to petition for hearing in the Supreme Court after decision by District Court of Appeal	23 40
Total	\$210 44

The defendant moved the trial court to re-tax the costs and the trial court made an order taxing the costs as follows, "to wit: Strike out all items set forth in plaintiff's memorandum of costs and disbursements, excepting \$100 for printing brief on appeal," and from that order the plaintiff has appealed.

[1] As to when a transcript of the reporter's notes may be taxed as costs, the matter is covered by section 274, Code Civil Procedure:

"* * * The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same."

[2] If that passage has been repealed, it has been repealed by implication. But repeals by implication are not favored, and the repugnancy between the statute claimed to be repealed and the repealing statute

must be clear, and the two statutes must be so inconsistent that force and effect cannot be given to both. *People ex rel. Wood v. Sands*, 102 Cal. 12, 36 Pac. 404. But sections 274 and 1027 are not so inconsistent but what full force and effect can be given to each.

The trial court allowed the appellant \$100 for printing briefs. That was the full amount to which he was entitled for that item. Code Civ. Proc. § 1027, supra.

[3] The traveling expenses of an attorney are disbursements of his, and not of his client. Such is certainly the rule as to trial work. Appellant has not called to our attention any statute which shows that such a rule obtains as to trial work and which shows that a different rule obtains as to appellate work. As to work on appeal, it is true that the statute refers to "costs" and "all amounts actually paid out." Code Civ. Proc. § 1027. But, as to trial work, the language of the statute is equally broad when it uses the words, "the items of his costs and necessary disbursements." Code Civ. Proc. §§ 1033. However, throughout the 67 years section 1033, Code Civil Procedure (section 510, Prac. Act), has been on the books, the settled practice has been not to include as costs the personal expenses of the attorney of the party prevailing.

[4] It must ever be borne in mind that costs were not recoverable at common law. He who would claim costs must put his finger on a statute which awards the same. The measure of the statute is the measure of the right.

"In England it seems that statutes relating to costs were considered penal in their nature and were to be strictly construed, and, with scarcely an exception, this is the rule generally adopted in this country where the question has been raised and considered by the courts." 15 Corp. Juris, p. 24, § 9.

And, in this case, if it be said that the traveling expenses were "actually paid out by him in connection with said appeal," the answer is that the expenses were paid out by the attorney, and not by "him" (the party to the appeal).

[5] We have thus considered every item which the trial court disallowed except "Expressage on briefs, 45 cents." As to that item affecting this appeal, it may be said, "The law disregards trifles." Civ. Code, § 3533; *Connell v. Harron, Rickard & McCone*, 7 Cal. App. 745, 747, 95 Pac. 916.

The order is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

MEMORANDUM DECISIONS

54 Cal. App. 796

FORDERER CORNICE WORKS v. CHATHAM et al. (Civ. 3958.) (District Court of Appeal, First District, Division 2, California, Oct. 14, 1921.) Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge. Action by the Forderer Cornice Works against William Chatham and another. From a judgment for plaintiff, defendants appeal. Affirmed. A. A. Moore and Stanley Moore, both of San Francisco, and L. R. Weinmann, of Alameda, for appellants. Hartley F. Peart and Olin L. Berry, both of San Francisco, for respondent.

STURTEVANT, J. This is an appeal by the sureties on a contractor's bond from a judgment in favor of a materialman. The case is parallel in all of its facts with the case entitled *W. P. Fuller & Co., a Corporation, Plaintiff and Respondent, v. William Chatham & F. E. Knowles, Defendants and Appellants*, 200 Pac. 293, Civil No. 3812, First Appellate District, Division 2, filed July 20, 1921. A petition to have that case heard and determined by the Supreme Court was by that court denied September 17, 1921. Since this case was filed, the Fuller Case was heard and determined on appeal. Counsel for appellants have courteously called to our attention the above facts. On the authority of the Fuller Case the judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

